1

Defining Terrorism in International Law

1.1 INTRODUCTION

No unitary definition of terrorism exists in international law and it is unlikely that States will agree upon one in the future.[1] The salient definition (or definitions) that pertains to any set of facts is to be determined by reference to the prevailing context as well as to the nature of the criminal conduct itself. Hence, when considering how contemporary international law defines terrorism, it is first necessary to interrogate the specific scenario at issue. If a terrorist act is committed in peacetime, is it an act of international terrorism or of domestic terrorism? If instead terrorism in a situation of armed conflict is at issue, does this involve the perpetration of acts against persons detained by the enemy or against civilians by use of force in the conduct of hostilities? Each of these scenarios evinces particularities in the contours of terrorism under international law.

Fifty years ago, an unnamed State representative observed in relation to the definition of international terrorism that *omnis definitio in lege periculosa*[2] – 'every legal definition is perilous' in the vernacular. Yet the absence of a clear definition is indeed 'a normative black hole', and one that is not without consequence. For how, Saul asks, can the United Nations (UN) Security Council, 'credibly, and with a straight face', designate all terrorism as a threat to international peace and security and require legal measures to be taken against it, without explaining what it is?[3] The myriad obligations imposed upon States by Security Council Resolution 1373 pertain to 'terrorism' and 'terrorists' and thus the terms have 'operative legal significance'.[4]

Moreover, when – or rather *if* – the Comprehensive Convention against International Terrorism[5] is finally concluded by States,[6] it will not be all-encompassing, its claimed

[1] K. Ambos, 'Amicus Curiae brief on the question of the applicable terrorism offence in the proceedings before the Special Tribunal for Lebanon, with a particular focus on a "special" special intent and/or a special motive as additional subjective requirements', Special Tribunal for Lebanon (Re. Case No. STL-11–0111), Scheduling Order of the President, 21 January 2011, at: https://bit.ly/3sz5ipq, p. 6, para. 7.

[2] Report of the Ad Hoc Committee on International Terrorism, UN doc. A/9028, UN General Assembly, New York, 1973, at: https://bit.ly/3HLz54T, para. 35.

[3] B. Saul, *The Legal Black Hole in United Nations Counterterrorism*, IPI Observatory, New York, 2 June 2021, at: https://bit.ly/3GTe8nn.

[4] B. Saul, 'Definition of "Terrorism" in the UN Security Council', *Chinese Journal of International Law*, Vol. 4, No. 1 (2005), 141–66, *esp.* at pp. 159–60.

[5] Draft comprehensive convention against international terrorism, Coordinator's draft text, Appendix II to UN doc. A/59/894, 12 August 2005, at: http://bit.ly/2sVRhYm (hereafter, 2005 Draft Comprehensive Convention against International Terrorism).

[6] Writing back in 2006, for instance, Nuotio had claimed overoptimistically that the Ad Hoc Committee was 'relatively close to reaching an agreement' on the definition of international terrorism for the purpose of the Comprehensive

https://doi.org/10.1017/9781009309103.002 Published online by Cambridge University Press

'comprehensive' scope notwithstanding. For a provision in the draft text excludes from the treaty's scope the activities of State and non-State armed forces during an armed conflict insofar as their conduct is governed by international humanitarian law (IHL). A further provision excludes application to the activities of a State's 'military force' in peacetime, insofar as the conduct is governed by other rules of international law.[7] Reflecting its proposed title – and as has typically been the case with the 'sectoral' counterterrorism conventions – what purely domestic terrorism also falls outside the purview of the Draft Comprehensive Convention against International Terrorism?[8]

In 2003, as the Introduction to this book recalled, the International Criminal Tribunal for the former Yugoslavia (ICTY) reflected that the offence of international terrorism has 'never been singly defined under international law'.[9] In its judgment in the *Galić* case, the ICTY was interested in terrorism during armed conflict (the material jurisdiction imposed by its founding Statute), an issue covered later in this chapter. Moreover, that an act of terrorism does not have a transnational element does not per se exclude the application of IHL.

This chapter thus considers the primary contexts for terrorism in turn. International terrorism perpetrated in peacetime is addressed first. The distinction with domestic terrorism is then clarified. Consideration next moves to terrorism committed amid a situation of armed conflict. It is already important to bear in mind, though, that under the relevant UN sectoral counterterrorism treaties, the demarcation between terrorism in peacetime and terrorism during and in connection with an armed conflict is neither strict nor especially crisp.

1.2 DEFINING INTERNATIONAL TERRORISM IN PEACETIME

1.2.1 *The Historical Background*

Early efforts to construct an overarching definition of terrorism were made prior to the Second World War under the League of Nations. The 1937 Convention for the Prevention and Punishment of Terrorism had defined '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'.[10] The scope of the definition was not only limited to acts of violence against persons but also encompassed damage to (public) property.[11] The Convention's breadth of scope and the focus on terrorism directed at another State tracked the primary motivation for its elaboration – the slaying in France of the leader of another European nation three years earlier. There was no orientation with respect to the Convention's application during a state of war, but no formal exclusion either.

Four decades later, following the murder of the Israeli Olympic athletes at Munich in September 1972, the United States proposed a draft Convention for the Prevention and

Convention. K. Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law', *Journal of International Criminal Justice*, Vol. 4 (2006), 998–1016, at p. 1005.

7 Art. 20(2) and (3), 2005 Draft Comprehensive Convention against International Terrorism.

8 'The present Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, [and] the alleged offender is found in the territory of that State.' Art. 4, 2005 Draft Comprehensive Convention against International Terrorism.

9 ICTY, *Prosecutor* v. *Galić*, Judgment (Trial Chamber) (Case No. IT-98–29-T), 5 December 2003, para. 87, note 150.

10 Art. 1(2), Convention for the Prevention and Punishment of Terrorism; signed at Geneva, 16 November 1937; never entered into force.

11 Art. 2(2), 1937 Convention for the Prevention and Punishment of Terrorism.

https://doi.org/10.1017/9781009309103.002 Published online by Cambridge University Press

Punishment of Certain Acts of International Terrorism.[12] The heart of the 1972 US draft text was its Article 1(1), wherein it was stipulated that '[a]ny person who unlawfully kills, causes serious bodily harm or kidnaps another person ... commits an offence of international significance'. This applied where the act

- had an international element;
- was committed 'neither by or against a member of the armed forces of a State in the course of military hostilities'; and
- was 'intended to damage the interests or obtain concessions from a State or an international organization'.[13]

This is an intriguing text in a number of respects. It does not extend the notion of terrorism to damage to property or economic harm, as does the current draft of the ComprehensiveConvention against International Terrorism, but rather hones in on the infliction of bodily harm. The US draft also excluded from its scope certain conduct in hostilities in all armed conflicts (not only those which involved two States pitted against one another and thus were international in character). As a consequence, salient acts of an armed group engaged in armed struggle in furtherance of the right of a people to self-determination would have been exempted from treatment as international terrorism as long as the group was party to an armed conflict and that it targeted the armed forces of a State. Seemingly, the draft provision put forward by the United States would even have excluded from the treaty's ambit a civilian not belonging to an armed group who similarly attacked a soldier in a State armed forces. This would have been so, as long as the action occurred with sufficient nexus to the conduct of hostilities in an armed conflict.[14] The proposed provision also excluded domestic terrorism from its purview.[15]

Despite the proposed exclusions in the US draft, the formulation of international terrorism in the proposed text was generally opposed by Arab and African States as well as by China, all of whom perceived the initiative as a renewed attempt to criminalize national liberation movements.[16] A national liberation movement that was not party to an armed conflict under IHL – either for want of the requisite level of 'organization' of the armed group or owing to a lack of intensity of the violence – would still be captured by the definition of international terrorism.[17]

[12] 'US Draft Convention for Prevention and Punishment of Terrorism Acts', UN doc. A/C.6/L.850, reprinted in *International Legal Materials*, Vol. 11, No. 6 (November 1972), 1382–87 (hereafter, 1972 US Draft Convention for Prevention and Punishment of Terrorism Acts).

[13] Surprisingly, Friedrichs did not consider this to amount to any legal definition of international terrorism. J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism', *Leiden Journal of International Law*, Vol. 19 (2006), 69–91, at p. 72.

[14] This approach is not, though, the way in which the law has developed in the sectoral treaties.

[15] Art. 1(1)(a) and (b), 1972 US Draft Convention for Prevention and Punishment of Terrorism Acts. The relevant text specifies that in order to constitute international terrorism, the salient act of violence must be committed in a State of which the offender is not a national *and* is committed against a State but outside its territory or against a person who the offender knows is not a national of the State where the attack occurs.

[16] B. Saul, 'United Nations Measures to Address the "Root Causes" and "Conditions Conducive" to Terrorism and to Prevent Violent Extremism (PVE)', Chap. 37 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., Edward Elgar, Cheltenham, 2021, p. 531.

[17] Of course, these *'Tadić'* judgment requirements for a non-international armed conflict are being transplanted even though they were only set out in the ICTY's Appeals Chamber twenty-three years later, in 1995. ICTY, *Prosecutor* v. *Tadić (aka 'Dule')*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (Case No. IT-94–1), 2 October 1995, at: https://bit.ly/2YR8mzd, para. 70. Also not yet adopted was the provision in Article 1(4) of the 1977 Additional Protocol I deeming as international in character 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination'. Art. 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

The Non-Aligned Movement was seeking to have international law condemn Israel instead for its occupation of Palestine as well as South Africa for its policy and practice of *apartheid*.[18] The schism in the international community that persists to this day was manifest, despite occasional claims in literature that it has been largely overcome.

Seeking a compromise way forward, the UN Secretary-General at the time, Kurt Waldheim, proposed an agenda item in the General Assembly on measures to prevent terrorism.[19] UN General Resolution 3034 (XXVII) established an Ad Hoc Committee on International Terrorism,[20] one of whose tasks was to elaborate a general treaty on international terrorism. It would not be successful in this endeavour. Instead, the United Nations turned to the negotiation of more limited, sectoral treaties in order to bypass the ideological divide.

1.2.2 *The Definition(s) of Terrorism in the UN Sectoral Terrorism Treaties*

1.2.2.1 The Definition in the 1973 Internationally Protected Persons Convention

The 1973 Convention on Crimes against Internationally Protected Persons[21] is considered the first of the UN sectoral treaties repressing specific forms of terrorism, even though the word terrorism or terrorist appears nowhere within it.[22] The treaty text is based on the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related

(Protocol I); adopted at Geneva, 8 June 1977, entered into force, 7 December 1978 (hereafter, 1977 Additional Protocol I). The threshold of violence necessary to meet this criterion is uncertain but the limited State practice that exists, with respect to the struggle between the Polisario Front and Morocco over Western Sahara, suggests that it is very low, potentially equating to the minimal threshold required for an international armed conflict between two existing States. The United States has strongly opposed the extension of scope of the Protocol to national liberation movements.

18 In the words of Adam Roberts, the labelling of the African National Congress as 'terrorist' was a 'shallow and silly attribution even at the time'. Roberts, 'Countering Terrorism', p. 6. Whereas, as Saul notes, *apartheid* South Africa was justly accused of ruling by terror. Saul, 'United Nations Measures to Address the "Root Causes" and "Conditions Conducive" to Terrorism and to Prevent Violent Extremism (PVE)', p. 333. The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid terms *apartheid* a crime against humanity but also does not use the word terrorism in its provisions. International Convention on the Suppression and Punishment of the Crime of Apartheid; adopted at New York, 30 November 1973; entered into force, 18 July 1976. As of 1 January 2024, 109 States were party to the Convention. Kenya is the sole signatory that has never ratified the Convention. Of the five permanent members of the UN Security Council, States not party are France, the United Kingdom, and the United States.

19 Saul, 'United Nations Measures to Address the "Root Causes" and "Conditions Conducive" to Terrorism and to Prevent Violent Extremism (PVE)', p. 531.

20 UN General Assembly Resolution 3034 (XXVII), adopted on 18 December 1972 by 76 votes to 35 with 17 abstentions, operative para. 9.

21 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; adopted at New York, 14 December 1973; entered into force, 20 February 1977. As of 1 January 2024, 180 of 197 States were party to the Convention. In addition, the Cook Islands and Niue are bound through New Zealand's ratification, meaning that 182 States in total are bound by its provisions. See the relevant UN Treaty Collection entry at: https://bit.ly/3BaEfVk.

22 As noted in the Introduction to this book, the 1970 Hague Convention and the 1971 Montreal Convention, on air hijacking and the bombing of aircraft, respectively, were adopted within the International Civil Aviation Organization (ICAO), which is a specialized agency of the United Nations albeit with a significant degree of autonomy from it. Convention on the Suppression of Unlawful Seizure of Aircraft; adopted at The Hague, 16 December 1970; entered into force, 14 October 1971; and Convention the Suppression of Unlawful Acts against the Safety of Aviation, adopted at Montreal, 23 September 1971; entered into force, 26 January 1973. In both cases, the depositaries of the Convention are the Russian Federation (as successor State to the Soviet Union), the United Kingdom, and the United States and not the UN Secretary-General. The two treaties are discussed later in the present chapter.

https://doi.org/10.1017/9781009309103.002 Published online by Cambridge University Press

Extortion that Are of International Significance,[23] which had been promulgated by the Member States of the Organization of American States (OAS) in 1971.[24]

An internationally protected person under the 1973 UN Convention covers, in particular, a head of State, the head of government, and the minister for foreign affairs, as well as their family members, when travelling abroad.[25] Similarly, falling within the ambit of the Convention are other State and government officials housed abroad who are entitled to special protection under international law (for instance, Embassy and consular diplomats), along with family members in their households.[26] There is no exemption for a prohibited act that is committed by an agent of a State.

Already, however, the problems that continue to bedevil the negotiation of the Comprehensive Convention against International Terrorism were laid bare following the conclusion of the 1973 Internationally Protected Persons Convention. To address the issue of national liberation movements, it was agreed that the 1973 Convention would be annexed to a UN General Assembly resolution that recognized that the provisions of the Convention

> could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid.[27]

When depositing its instrument of ratification, Burundi formally declared that it would decline to criminalize such acts 'where the alleged offenders belong to a national liberation movement recognized by Burundi'. Italy responded with a declaration 'that the reservation expressed by the Government of Burundi is incompatible with the aim and purpose of the Convention', and that 'the Italian Government can not consider Burundi's accession to the Convention as valid as long as it does not withdraw that reservation'.[28] Iraq went a step further than Burundi, asserting that the protection of Article 1(1)(b) of the Convention (namely, government diplomats) 'shall cover the representatives of the national liberation movements recognized by the League of Arab States or the Organization of African Unity'. Israel, Italy, and the United Kingdom all objected to what it termed a reservation, while Germany declared that Iraq's statement 'does not have any legal effects for the Federal Republic of Germany'.[29]

[23] Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance; adopted at Washington DC, 2 February 1971; entered into force, 16 October 1973. As of 1 January 2024, eighteen States were party to the Convention leaving sixteen States not party of which three (Chile, Jamaica, and Trinidad and Tobago) were signatories. The status of adherence is available at: https://bit.ly/3YS2XFW. Cuba, the other member State, is not currently in a position to adhere to the Convention given its stand-off with the Organization, although it had ratified the OAS Charter in 1952. The 1971 OAS Convention has effectively been superseded by the 2002 Inter-American Convention against Terrorism, which explicitly considers the 1973 Internationally Protected Persons Convention as the basis for a terrorist offence.

[24] M. Sossai, 'The Legal Response of the Organization of American States in Combatting Terrorism', chap. 43 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 626.

[25] Art. 1(1)(a), 1973 Internationally Protected Persons Convention.

[26] Art. 1(1)(b), 1973 Internationally Protected Persons Convention.

[27] UN General Assembly Resolution 3166 (XXVIII), adopted without a vote on 14 December 1973, operative para. 4.

[28] Declarations available at: https://bit.ly/3rBRmvD.

[29] At ibid. In contrast to Burundi's declaration, it is something of a stretch to see Iraq's declaration as a reservation as it does not purport to 'exclude or to modify the legal effect of provisions of the treaty' but rather only to broaden the

The 1973 Convention does not exempt its application in a situation of armed conflict. Nevertheless, in accordance with IHL, certain senior State officials and diplomats may be lawful military objectives in the conduct of hostilities. Targeting them where this is the case would not amount to terrorism under this branch of international law. If they are combatant members of the armed forces or they meet the IHL criteria for direct participation in hostilities, neither their international protection under the 1973 Convention nor their presence on the territory of another State will render them personally immune from attack under the law of armed conflict. This is so, at the least in an international armed conflict, whose jurisdictional reach *ratione loci* is not geographically circumscribed.[30]

That said, in 2005, the Eritrea-Ethiopia Claims Commission held that the Eritrean Embassy residence was, in the midst of the international armed conflict between the two States, 'absolutely inviolable under Article 22 of the Vienna Convention on Diplomatic Relations',[31] even where it might have been used 'criminally' to stockpile weapons for the war effort.[32] Moreover, the 'person of a diplomatic agent shall be inviolable'.[33] The Commission's holding is very much open to question. For if it were correct, the 1973 Convention 'potentially raises a direct and irreconcilable conflict with IHL'.[34] It was certainly open to the Ethiopian authorities to have closed the Embassy, as the Claims Commission observed.[35] But the actions of Ethiopia at issue in the adjudication were to search and ransack the Embassy in search of weapons.

That said, should their forces have come under attack from within the Eritrean Embassy, they would have been entitled to respond forcibly. After all, a duty is imposed upon all persons enjoying the privileges and immunities of the 1961 Vienna Convention on Diplomatic Relations to 'respect the laws and regulations of the receiving State' and 'not to interfere in the internal affairs of that State'.[36] Moreover, 'the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law'.[37]

1.2.2.2 The Definition in the 1979 Hostage-Taking Convention

In contrast to the UN Internationally Protected Persons Convention, the 1979 International Convention against the Taking of Hostages did refer to unlawful action within its scope as

protection afforded by the Convention to other categories of person. A reservation is defined in Art. 2(1)(d), Vienna Convention on the Law of Treaties; adopted at Vienna, 23 May 1969; entered into force, 27 January 1980.

30 See on this issue S. Casey-Maslen, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict*, Hart, Oxford, 2018, pp. 49–50.

31 Vienna Convention on Diplomatic Relations; adopted at Vienna, 18 April 1961; entered into force, 24 April 1964. Article 22(1) of the Convention stipulates that '[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission'. Both Eritrea and Ethiopia were States Parties. As of 1 January 2024, 193 States were party to the 1961 Vienna Convention on Diplomatic Relations. The Cook Islands, Niue, Palau, and South Sudan are the four States that are not party. Status of adherence at: https://bit.ly/3QZvBD4.

32 Eritrea-Ethiopia Claims Commission (EECC), *Partial Award: Diplomatic Claim – Eritrea's Claim 20*, *Reports of International Arbitral Awards*, Vol. XXVI (19 December 2005), 381–406, at: https://bit.ly/36Zc4hg, paras. 45–46; see B. Saul, 'From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law', *International Review of the Red Cross*, Vol. 103, Nos. 916–917 (February 2022), 157–202, at p. 176.

33 Art. 29, 1961 Vienna Convention on Diplomatic Relations.

34 Saul, 'From Conflict to Complementarity', p. 174.

35 EECC, *Partial Award: Diplomatic Claim – Eritrea's Claim 20*, para. 47.

36 Art. 41(1), 1961 Vienna Convention on Diplomatic Relations.

37 Art. 41(3), 1961 Vienna Convention on Diplomatic Relations.

a 'manifestation' of international terrorism, albeit only in a preambular paragraph.[38] The core of proscribed conduct is as follows:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention.[39]

The Convention thus applies to hostage-taking for private purposes (such as extortion) as well as for the purpose of terrorizing the public or coercing State conduct.[40]

The material scope of the Convention is not strictly limited to peacetime, even though proposals were made during the drafting for such a clear demarcation to be incorporated.[41] The text does explicitly exclude its application to certain acts of hostage-taking in armed conflict, but only where States Parties to the salient treaties of IHL are obligated to either prosecute or hand over for prosecution a hostage-taker.[42] This would pertain to international armed conflict, including, explicitly, situations where people were fighting in the exercise of their right of self-determination.[43] Taking as hostage a civilian in occupied territory or on the territory of the parties to armed conflict, where that civilian is a protected person,[44] is a grave breach of the 1949 Geneva Convention IV,[45] a treaty that binds all 197 States today.[46]

[38] International Convention against the Taking of Hostages; adopted at New York, 17 December 1979; entered into force, 3 June 1983 (1979 Hostage-Taking Convention), fifth preambular para. As of 1 January 2024, 176 States were party to the Convention. In addition, the Cook Islands and Niue are bound through New Zealand's ratification, meaning that 178 of 197 States able to adhere to the Hostage-Taking Convention are bound by its provisions. See the relevant UN Treaty Collection entry at: https://bit.ly/3KyjBmt.

[39] Art. 1(1), 1979 Hostage-Taking Convention.

[40] This implies that if I take my neighbour hostage and demand a ransom for his safe return, I am an ordinary criminal if we share the same nationality and where that nationality is of the territorial State but that if he is a foreign national, I am an international terrorist.

[41] W. Verwey, 'The International Hostages Convention and National Liberation Movements', *American Journal of International Law*, Vol. 75, No. 1 (1981), 69–92, at pp. 84–86; see also Saul, 'From Conflict to Complementarity', p. 177.

[42] Thus, Article 12 of the 1979 Hostage-Taking Convention stipulates: 'In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

[43] Thus, if a relevant State is party to the 1977 Additional Protocol I to the four Geneva Conventions and has not made a reservation with respect to Articles 1(4) and 96(3) of the Protocol, the exclusion would apply. At the time of writing, this concerned only Morocco, which was deemed to be engaged in an international armed conflict with the Polisario Front, a national liberation movement representing the Sahrawi people in Western Sahara.

[44] Persons protected by the 1949 Geneva Convention IV are 'those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals. . . . Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are'. Art. 4, Convention (IV) relative to the Protection of Civilian Persons in Time of War; adopted at Geneva, 12 August 1949; entered into force, 21 October 1950 (hereafter, 1949 Geneva Convention IV).

[45] Arts. 34, 146, and 147, 1949 Geneva Convention IV. For further details of the prohibition of hostage-taking in a situation of armed conflict under IHL, see *infra* the discussion of the Geneva Law definition of terrorism.

[46] As of 1 January 2024, 196 States were party to the 1949 Geneva Convention IV (and the other three Geneva Conventions) while the 197th (Niue) remains bound by New Zealand's ratification of the 1949 Geneva Conventions, 'until such time as Niue accedes to the Conventions in its own right'. International Committee of

Thus, the exclusionary clause in the Hostage-Taking Convention would not apply in non-international armed conflict and incidents of hostage-taking in such conflicts would therefore fall within the Convention's scope.[47] That includes the taking as hostage of members of State armed forces or non-State armed groups in such a conflict.[48] That said, 'where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State', a broader exclusion under the Convention applies. This is a generalized exclusion for acts of 'domestic' terrorism.[49]

There is no exemption from the Hostage-Taking Convention for acts by an agent of a State. In adhering to the Convention in 2006, Iran made an interpretative declaration whereby it categorically condemned 'each and every act of terrorism, including taking innocent civilians as hostages'. At the same time, Iran expressed its belief that 'fighting terrorism should not affect the legitimate struggle of peoples under colonial domination and foreign occupation in the exercise of their right of self-determination'. Austria, Canada, France, Germany, Italy, Japan, the Netherlands, Portugal, Spain, the United Kingdom, and the United States all objected to this declaration, with several of these States deeming it an unlawful 'reservation' to the provisions.[50]

1.2.2.3 The Definition in the 1997 Terrorist Bombings Convention

The first UN treaty to contain the word 'terrorist' in its title was the 1997 International Convention for the Suppression of Terrorist Bombings.[51] The Convention, which was negotiated at the instigation of the United States following a bombing of its air force personnel at the Khobar Towers in Dhahran, Saudi Arabia, in 1996,[52] requires the criminalization in domestic law of the act of intentionally delivering, placing, discharging, or detonating

> an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury or to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.[53]

In addition to the explosive and incendiary devices its title indicates, the Convention also applies to weapons or devices that can cause serious physical harm or material damage through 'the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material'.[54]

Witten has suggested: 'Like its predecessors, the Convention does not attempt to define "terrorism" but instead defines particular conduct that, regardless of its motivation, is condemned internationally and therefore is an appropriate subject of international law enforcement

the Red Cross (ICRC), States Parties to International Humanitarian Law and Other Related Treaties, available at: https://bit.ly/2OSD7Sg, p. 6.

47 Dinstein, *Non-International Armed Conflicts in International Law*, 2nd ed., p. 224, para. 632.

48 K. N. Trapp, *State Responsibility for International Terrorism*, Oxford University Press, Oxford, 2011, p. 111 note 149.

49 Art. 13, 1979 Hostage-Taking Convention.

50 Texts available at: https://bit.ly/3J9Pn7Q.

51 International Convention for the Suppression of Terrorist Bombings; adopted at New York, 15 December 1997; entered into force, 23 May 2001. As of 1 January 2024, 170 States were party to the 1997 Terrorist Bombings Convention, while Burundi and Nepal were signatories. Status at: https://bit.ly/44tEGHw.

52 Ibid., pp. 110–11. For details of the bombing which killed 19 US airmen and wounded almost 500, see, e.g., B. Riedel, 'Remembering the Khobar Towers bombing', The Brookings Institution, 21 June 2021, at: http://bit.ly/3IyX4a2.

53 Art. 2(1), 1997 Terrorist Bombings Convention.

54 Art. 1(3)(b), 1997 Terrorist Bombings Convention.

cooperation.'[55] His claim is clearly open to question given the treaty nomenclature. Yet, it is true that the Convention does not demand any specific intent behind the delivery, placing, discharge, or detonation of the explosive or other lethal device. This must occur 'unlawfully and intentionally', but all offences within the Convention's scope must be criminalized, 'in particular' – but not only – 'where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular person'.[56] One argument is that any use of an explosive device to kill, injure, or cause extensive property damage is inherently terrorizing and thus no mental element is needed.[57] Ben Saul's argument that a political or religious other ideological purpose behind a serious criminal offence is the crux of terrorism is, however, more persuasive.[58]

A number of exemptions and exclusions are set out in the Convention. Activities undertaken by the 'military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law', are not governed by the Convention.[59] Thus, it is questionable whether the French secret service agents who blew up the Greenpeace boat, the *Rainbow Warrior*, in Auckland in 1985 would have been excluded from the scope of the Convention – had it existed at that time – as it appears they were not formally part of the French armed forces.[60] The General Directorate for External Security (la DGSE) is, however, answerable to the Minister of the Army[61] and the term 'military forces of a State' is explicitly defined 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'.[62] In fact, while supporting the armed forces in certain respects, the DGSE also intervenes where the armed forces cannot.[63]

There is a broader exemption for acts *in bello*. Since targeting military objectives is not just permissible to parties to armed conflict but is also effectively *obligated* by the IHL principle of distinction,[64] an exclusion for the conduct of hostilities and for the actions of the parties in relations to persons protected under IHL is also set forth in the Convention.[65] Thus, it is stipulated that '[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.[66] O'Donnell suggests that this exclusionary clause in the Convention might not apply to 'other situations' in which IHL applies, 'such as occupation'.

[55] S. Witten, 'The International Convention for the Suppression of Terrorist Bombings', chap. 8 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 111.

[56] Arts. 2(1) and 5, 1997 Terrorist Bombings Convention.

[57] See, e.g., Trapp, *State Responsibility for International Terrorism*, p. 20.

[58] B. Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, p. 39.

[59] Art. 19(2), 1997 Terrorist Bombings Convention.

[60] But see *contra* the claim by O'Donnell that they were. D. O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', *International Review of the Red Cross*, Vol. 88, No. 864 (December 2006), 853–80, at p. 870.

[61] See, e.g., 'Compte rendu de réunion n° 60 – Commission de la défense nationale et des forces armées', l'Assemblée Nationale (French Parliament), 12 April 2023, at: https://bit.ly/3qPFJni.

[62] Art. 1(4), 1997 Terrorist Bombings Convention.

[63] See, e.g., DGSE, 'La DGSE au cœur des cinq fonctions stratégiques : enjeux et perspectives', *Revue Défense Nationale*, Vol. 813, No. 8 (2018), pp. 14–19, at: https://bit.ly/3KZfe5J.

[64] Thus, 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly *shall direct their operations only against military objectives*'. Art. 48, 1977 Additional Protocol I [added emphasis].

[65] As Pierre Klein has observed: 'Compared with the majority of previous "sectoral" conventions, the 1997 Convention breaks new ground' through this exclusion. Klein, 'International Convention for the Suppression of the Financing of Terrorism', UN Audiovisual Library of International Law, p. 3.

[66] Art. 19(2), 1997 Terrorist Bombings Convention.

But this is incorrect. A situation of international armed conflict includes a situation of belligerent occupation, as the Elements of Crime for the Rome Statute of the International Criminal Court make clear.[67] In contrast, O'Donnell correctly affirms that the exclusion in the Terrorist Bombings Convention would not specifically apply where resistance to occupation by a non-State armed group does not rise to the level of an armed conflict.[68]

The notion of 'armed forces' in the 1997 Convention encompasses both State armed forces and organized non-State armed groups, where they are party to an armed conflict (whether international or non-international in character).[69] Despite opposition from a small number of commentators to the notion that the term 'armed forces' excludes also non-State armed groups,[70] this appears clear from the text, which refers first to 'armed forces' and then to the 'military forces of a State' in the same provision.[71] It is also the position of the International Committee of the Red Cross (ICRC), which affirms that the reference in Article 3 common to the four 1949 Geneva Conventions to '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms',[72] encompasses non-State armed groups as well as the State armed forces.[73]

A civilian, however, who decides to engage in prohibited conduct *in bello* but who is not a member of any armed forces would fall outside the exclusion for armed conflict.[74] This would mean, for instance, that Ukrainian civilians who threw Molotov cocktails[75] at Russian forces in

[67] Elements of Crimes under the Rome Statute of the International Criminal Court, reproduced from Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002, note 34.

[68] O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', p. 868. O'Donnell subsequently appears to equate a non-international armed conflict with the criteria related to territorial control laid down in Article 1(2) of the 1977 Additional Protocol II. Ibid., p. 869. This is wrong. No territorial control by a non-State armed group is necessary for a non-international armed conflict where the relevant hostilities are governed by customary IHL.

[69] Witten, 'The International Convention for the Suppression of Terrorist Bombings', p. 117. See also A. R. Perera, 'The draft United Nations Comprehensive Convention on International Terrorism' chap. 9 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 127; and Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', p. 180.

[70] Saul cites two such outliers: M. Zwanenburg, 'Foreign Terrorist Fighters in Syria: Challenges of the Sending State', *International Legal Studies*, Vol. 92, No. 1 (2016), 204–34, at: https://bit.ly/3vBEat9, at pp. 216–17; and M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention', *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), at p. 1036. Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', p. 179. See also the references in T. Van Poecke, F. Verbruggen and W. Yperman, 'Terrorist offences and international humanitarian law: The armed conflict exclusion clause', *International Review of the Red Cross*, Vol. 103, Nos. 916–917 (2021), 295–324, at p. 303, note 49. Zwanenburg argues that the determinant issue is whether members of the force enjoy combatant's privilege. In fact, terrorism under IHL is defined in more restrictive terms than is terrorism outside the realm of armed conflict; according to the sectoral treaties, acts of terrorism can be perpetrated against military objects or personnel and must be punished as such. These would be lawful military objectives under IHL within the confines of armed conflict.

[71] D. Kretzmer, 'Terrorism and the International Law of Occupation', chap. 15 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 216. The argument by Van Poecke, Verbruggen, and Yperman that the two terms 'operate in different legal spheres, and it seems that they should not be read in relation to one another' is unpersuasive. Van Poecke, Verbruggen, and Yperman, 'Terrorist offences and international humanitarian law: The armed conflict exclusion clause', p. 304. Acts of terrorism by a State in the context of a military occupation are expressly prohibited by Article 33 of the 1949 Geneva Convention IV, as discussed in Section 1.4.4.1.

[72] See, e.g., Art. 3(1), 1949 Geneva Convention IV.

[73] N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 28–30.

[74] Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', p. 186; and see similarly O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', p. 869.

[75] On the issue of Molotov cocktails as lawful weapons under IHL, see S. Watts, 'Are Molotov Cocktails Lawful Weapons?' Blog Post, Lieber Institute for Law & Warfare at West Point, United States, 2 March 2022, at: https://bit.ly/3vBpbze.

March 2022 and beyond were engaging in international terrorism as defined in the 1997 Convention (and furthermore must be prosecuted by the authorities in accordance with that treaty's dictates).[76] The position of a member of a *levée en masse* – inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces – is not settled.[77] As Saul notes, while they are not strictly 'armed forces', a 'purposive interpretation' would argue in favour of their exclusion from the scope of the 1997 Convention.[78] Participants in a *levée en masse* are entitled to prisoner-of-war status and thus enjoy combatant's privilege from prosecution for lawful acts of war.[79]

Following the conclusion of the 1997 Convention, a distinction between criminal actions and legitimate struggle for self-determination outside the conduct of hostilities was again drawn by a contracting State. Pakistan made a declaration at the time of its adherence whereby 'nothing' in the Convention 'shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law'. Many States objected to this position.[80] Finland, for instance, was 'of the view that the declaration amounts to a reservation as its purpose is to unilaterally limit the scope of the Convention'. Finland further considered the declaration 'to be in contradiction with the object and purpose of the Convention, namely the suppression of terrorist bombings wherever and by whomever carried out'.[81] For its part Russia stated that 'the realization of the right of peoples to self-determination must not conflict with other fundamental principles of international law, such as the principle of the settlement of international disputes by peaceful means, the principle of the territorial integrity of States, and the principle of respect for human rights and fundamental freedoms'.[82]

1.2.2.4 The Definition in the 1999 Terrorism Financing Convention

The 1999 Terrorism Financing Convention[83] has particular resonance given that it is the most widely ratified sectoral treaty on the repression of terrorism, with 190 States Parties to it from the

[76] Art. 7(1) and (2), 1997 Terrorist Bombings Convention. In 2015, Ukraine informed the depositary of the Convention that 'from 20 February 2014 and for the period of temporary occupation by the Russian Federation of a part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – as a result of the armed aggression of the Russian Federation committed against Ukraine and until the complete restoration of the constitutional law and order and effective control by Ukraine over such occupied territory, as well as over certain districts of the Donetsk and Luhansk oblasts of Ukraine, which are temporarily not under control of Ukraine as a result of the aggression of the Russian Federation, the application and implementation by Ukraine of the obligations under the above [Convention], as applied to the aforementioned occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed'. Communication of Ukraine to the UN Secretary-General in his capacity as treaty depositary, UN Ref. C.N.610.2015.TREATIES-XVIII.9 (Depositary Notification), Communication was received on 20 October 2015.

[77] For details on the legal status of a *levée en masse*, see, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., Cambridge University Press, Cambridge, 2022, pp. 68–69, paras. 189–92.

[78] Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', p. 179.

[79] United Kingdom Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict* (as amended in 2010), London, para. 4.2.2.

[80] Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Ireland, Israel, Italy, Japan, Moldova, the Netherlands, New Zealand, Norway, Poland, Russia, Spain, Sweden, United Kingdom, and the United States.

[81] Declaration of Finland, 17 June 2003, at: http://bit.ly/2YbSI1g.

[82] Declaration of the Russian Federation, 22 September 2003, in Endnote 10 on the UN Treaty Series website entry for the 1997 Convention, available at: http://bit.ly/2YbSI1g.

[83] International Convention for the Suppression of the Financing of Terrorism; adopted at New York, 9 December 1999; entered into force, 10 April 2002.

197 that could adhere at the time of writing.[84] The core definition of international terrorism is set forth in its Article 2(1). Subparagraph (a) referred States Parties to the list of nine multilateral treaties on terrorism adopted at the time the Convention was concluded[85] and the offences provided for under those treaties as being applicable.[86] An opportunity was given to 'opt out of' definitions in treaties by any given State Party to the 1999 Convention.[87] Predictably, many States declared that those treaties to which they were not party upon adherence to the 1999 Terrorism Financing Convention would not be relevant to the scope of their obligations.

Subparagraph (b) of Article 2(1) contains what might conceivably be adopted as a general definition of a terrorist offence under international counterterrorism law. It is thus stipulated that it is also an offence 'within the meaning' of the 1999 Convention if funding is knowingly provided for:

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[88]

A number of leading commentators expressly approve of the definition in the Terrorism Financing Convention. Yoram Dinstein, for instance, has termed it a most 'useful and relevant definition' and 'certainly the clearest'.[89] The focus is on harm to civilians or those *hors de combat* and not to property or to the environment per se. What is more, there is a purposive terrorism element: either to 'intimidate' the general public or to compel government conduct (or that of an international organization, such as the United Nations). While it expressly applies to a situation of armed conflict, the definition is not entirely consistent with the definitions of terrorism under international humanitarian law, being substantively broader than the IHL understanding of the term. This is so, given the requirement that mere intimidation – and not the spreading of 'terror' – suffices, along with, in the alternative, compelling government conduct.[90] This latter motivation is not relevant to IHL.

Di Filippo criticizes the Terrorism Financing Convention for adopting the 'lowest common denominator' approach.[91] Nevertheless, even this narrow scope did not attract universal support

[84] At the time of writing, only Burundi (a signatory), Chad, Eritrea, Iran, Somalia (also a signatory), the State of Palestine, and Tuvalu were States not party.

[85] The 1970 Hague Convention; the 1971 Montreal Convention; the 1973 Internationally Protected Persons Convention; the 1979 Hostage-Taking Convention; the 1979 Convention on the Physical Protection of Nuclear Material, adopted at Vienna, 28 October 1979; entered into force, 8 February 1987; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted at Montreal, 24 February 1988; entered into force, 6 August 1989; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted at Rome, 10 March 1988; entered into force, 1 March 1992; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted at Rome, 10 March 1988; entered into force, 1 March 1992; and the 1997 Terrorist Bombings Convention.

[86] As Saul observes, the exceptions applicable in those treaties remain applicable in the context of the 1999 Terrorism Financing Convention. Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', p. 178.

[87] Art. 2(2)(a), 1999 Terrorism Financing Convention. The provision stipulates, however, that any declaration 'shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact'.

[88] Art. 2(1)(b), 1999 Terrorism Financing Convention.

[89] Y. Dinstein, *Non-International Armed Conflicts in International Law*, 2nd ed., Cambridge University Press, Cambridge, 2021, p. 226, para. 637.

[90] This would cover almost funding linked to almost every direct attack on a civilian by a non-State armed group.

[91] M. Di Filippo, 'The definition(s) of terrorism in international law', chap. 1 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 6.

from States as the issue of national self-determination remained the sticking point. Thus, upon ratification of the 1999 Convention, Egypt entered an 'explanatory declaration', stating that '[w]ithout prejudice to the principles and norms of general international law and the relevant United Nations resolutions', Egypt 'does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning' of Article 2(1)(b) of the Convention. Jordan similarly declared that it 'does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts' within the context of that provision. Syria made a 'reservation' inasmuch as it 'considers that acts of resistance to foreign occupation are not included under acts of terrorism'.[92] A considerable number of States objected to one or more of these declarations or reservations.[93]

Other States made more general observations on the ambit of the term *terrorism*. Namibia entered what it termed a reservation to its application of the Convention whereby 'a struggle waged by people in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces, shall not be considered as terrorist acts'. When submitting its proposal for accession to the Convention in its Parliament, the Government of Nepal clarified that the meaning of the word 'terrorism' in the Convention does not encompass 'any acts which are related to political activities'.[94] Pakistan, however, which had entered a reservation to its adherence to the 1997 Terrorist Bombings Convention on the basis of the right of peoples to self-determination, did not do likewise when adhering to the 1999 Convention.

1.2.2.5 The Definition in the 2005 Nuclear Terrorism Convention

The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[95] took seven years to negotiate in the Ad Hoc Committee on Measures to Eliminate International Terrorism established under the UN General Assembly.[96] The last four years of these negotiations were dedicated to resolving disputes about the definition of terrorism. The solution was effectively to omit such a definition, at least overtly.[97]

Largely mirroring the approach in the 1997 Terrorist Bombings Convention, the 2005 Nuclear Terrorism Convention covers the unlawful and intentional possession of radioactive material and the making or possession of a device with the intent either to cause death, serious bodily injury, or substantial damage to property or to the environment.[98] It also applies to the 'unlawful and intentional' use of radioactive material or a device or damage to a nuclear facility in a manner that releases (or risks the release of) radioactive material. This is the case where the intent exists to cause death or serious bodily injury; or to inflict substantial damage on property or

[92] The text of the various declarations is available on the UN Treaty Section webpage for the status of adherence to the Convention, at: https://bit.ly/3LiTzUJ.

[93] Austria, Belgium, Canada, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, the United Kingdom, and the United States.

[94] At: https://bit.ly/3LiTzUJ.

[95] International Convention for the Suppression of Acts of Nuclear Terrorism; adopted at New York, 13 April 2005; entered into force, 7 July 2007. As of 1 January 2024, 123 States were party to the 2005 Nuclear Terrorism Convention and a further 30 States were signatories.

[96] The Ad Hoc Committee, which was established by General Assembly Resolution 51/210, adopted without a vote on 17 December 1996, concentrated first on the elaboration of the Terrorist Bombings Convention.

[97] D. Joyner, 'Countering Nuclear Terrorism: A Conventional Response', *European Journal of International Law*, Vol. 18 (2007), 225–51, at p. 232.

[98] Art. 2(1)(a), 2005 Nuclear Terrorism Convention.

to the environment; *or* to compel conduct by a natural or legal person, an international organization, or a State.[99] Hence, the aim of compelling conduct is only an alternative requirement (to two others) for an offence involving the use of radioactive material or a device (or damage to a nuclear facility). It is not even potentially part of the offence where the *possession* of such material or device is concerned. As with the Terrorist Bombings Convention, the actus reus of the offence in the 2005 Convention is implicitly considered to be inherently terrorizing.

There is a general exclusion for warfare directed against nuclear facilities in a situation of armed conflict under the 2005 Nuclear Terrorism Convention in almost identical terms to those set forth in the Terrorist Bombing Convention:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law[,] are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.[100]

In addition, unauthorized non-State actors are, indirectly, precluded from ever having access to a radiological device under UN Security Council Resolution 1540 (2004).[101] Under the Resolution, which pertains in both peacetime and armed conflict, the Security Council decided that *all* States *shall refrain* from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical, or biological weapons and their means of delivery, in particular for terrorist purposes.[102]

1.2.2.6 The Proposed Definition in the Draft Comprehensive Convention against International Terrorism

Although the UN Comprehensive Convention against International Terrorism had not been adopted at the time of writing, it is important to review the definition in the current draft. This is set forth in draft Article 2(1), which provides that:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[103]

[99] Art. 2(1)(b), 2005 Nuclear Terrorism Convention.
[100] Art. 4(2), 2005 Nuclear Terrorism Convention.
[101] The resolution defines non-State actors in a footnote in the following terms: 'Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.' UN Security Council Resolution 1540, adopted on 28 April 2004 by unanimous vote in favour.
[102] UN Security Council Resolution 1540, operative para. 1.
[103] Art. 2(1), Draft comprehensive convention against international terrorism (Consolidated text prepared by the coordinator for discussion), Appendix II to Letter dated 3 August 2005 from the Chairman of the Sixth

The definition thus covers all means of inflicting physical harm or causing material damage but only when the requisite intent – coercing conduct by a government or international organization or intimidating a population – is present in relation to the actus reus. Trapp gives examples of polluting food or water or destroying railways without recourse to explosives as additional offences instituted by the Comprehensive Convention against International Terrorism.[104] Where explosives were used, however, the 1997 Terrorist Bombings Convention would be determinant. Thus, in the current draft text, it is stipulated that where the Convention and a sectoral treaty 'dealing with a specific category of terrorist offence' would apply to the same act as between States that are parties to both the Comprehensive Convention and the sectoral treaty, 'the provisions of the latter shall prevail'.[105]

The Comprehensive Convention is nevertheless also broad in scope insofar as it would extend not only to what one might naturally consider terrorist actions but also potentially to protests against a regime in power that involved violence. This would be so, at the least when the relevant protest involved foreign nationals (either as victims or as perpetrators),[106] and when the protests saw violence directed not only at law enforcement officials or the authorities but also against private property. Indeed, as O'Donnell has remarked: 'Expanding the material element to include serious damage to private property of any kind is a significant departure from existing definitions, since the main thrust of existing international standards against terrorism is to safeguard the public interest.'[107] He also suggests that the 'recognition of serious damage to the environment as a material element of the definition may be the most significant innovation contained in the present draft'.[108]

Certain exclusions are, however, incorporated to the definition of international terrorism, broadly similar to those under the Terrorist Bombings and Nuclear Terrorism Conventions. Draft Article 20(2) provides that '[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention'. The notion of 'armed forces' in the Draft Comprehensive Convention likewise encompasses not only State armed forces but also organized non-State armed groups, where they are party to an armed conflict. Seemingly, however, a civilian who decides to engage in prohibited conduct but who is not a member of any armed force that is party to the armed conflict would again fall outside that exclusion.

Article 20(3) of the Draft Comprehensive Convention further provides that '[t]he activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the present Convention'. This would exclude acts of 'law enforcement' by a State's armed forces, including counterterrorism operations, which do not amount to the conduct of hostilities, at the least where these acts fell to be regulated by the law on inter-State use of force or international human

Committee addressed to the President of the General Assembly, UN doc. A/59/894, 12 August 2005 (hereafter, 2005 Draft Comprehensive Convention against International Terrorism).

[104] Trapp, *State Responsibility for International Terrorism*, p. 22.

[105] Art. 3, 2005 Draft Comprehensive Convention against International Terrorism.

[106] Draft Article 4 stipulates in part that '[t]he present Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 7, paragraph 1 or 2, of the present Convention to exercise jurisdiction'. Article 7 concerns inter alia an offence committed on national territory but within the embassy of a foreign State.

[107] O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', p. 873.

[108] Ibid.

rights law.[109] This is one of the sticking points precluding the finalization of the Convention. Acts such as the bombing of the Greenpeace vessel, *Rainbow Warrior*, in 1985 by French security service agents operating covertly (discussed in Chapter 7) would not be excluded from coverage of the Comprehensive Convention as, seemingly, the agents were not members of the French military forces.[110]

The main issue remains, however, the situation of peoples involved in armed struggle for their right of self-determination. Western nations oppose an exclusion on this basis. Members of the Non-Aligned Movement, and especially those who also belong to the Organisation of Islamic Cooperation (OIC),[111] insist that peoples seeking to achieve statehood and using force to do so shall not be treated as terrorists.[112] The current draft text of the Convention would exclude from its purview the actions of an armed group fighting on behalf of people struggling for self-determination when the group was a party to an armed conflict, but not other members of such people. Outside a situation of armed conflict, all would be considered terrorists if they engaged in armed struggle against the State. This is clearly problematic given the status as a peremptory (*jus cogens*) norm of international law of the right of self-determination,[113] even though the right to use force with a view to achieving self-determination does not enjoy customary law recognition.[114]

The OIC has proposed language to amend the draft text of the Comprehensive Convention. Thus:

2. The activities of the parties during an armed conflict, *including in situations of foreign occupation*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
3. The activities undertaken by the military forces of a State in the exercise of their official duties, *inasmuch as they are in conformity with international law*, are not governed by this Convention.[115]

This is not acceptable to many Western nations. In 2005, the Coordinator of the negotiations proposed to add a preambular paragraph to the Draft Comprehensive Convention.

[109] The United States, for example, rejects the extraterritorial application of the 1966 International Covenant on Civil and Political Rights. Fifth Periodic Report of the United States under the ICCPR, UN doc. CPR/C/USA/5, 19 January 2021, para. 14.

[110] See on the broader issue of State responsibility K. Trapp, 'Terrorism and the international law of State responsibility', in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., pp. 37–8; and infra Chapter 7.

[111] English language homepage of the OIC at: https://bit.ly/3JbGafg.

[112] The OIC Convention on Combatting International Terrorism exempts from the crime of terrorism 'Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law'. Art. 2, Convention of the Organisation of the Islamic Conference on Combating International Terrorism; Annex to Resolution 59/26-P, adopted at Ouagadougou, 1 July 1999. A similar exemption was incorporated in the corresponding 1999 Organization of African Unity (OAU) Convention on Terrorism. Art. 3, OAU Convention on the Prevention and Combating of Terrorism; adopted at Algiers, 1 July 1999; entered into force, 6 December 2002. As of 1 January 2024, forty-three States were party to the OAU Convention and a further ten were signatories. Only Morocco and Zimbabwe are non-signatory States.

[113] International Law Commission (ILC), Annex to the text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the ILC on first reading, in UN doc. A/74/10, 2019, point (h).

[114] See, e.g., S. Casey-Maslen, *Jus ad Bellum: The Law on Inter-State Use of Force*, Hart, Oxford, 2020, pp. 30–33, 51.

[115] UN doc. A/58/37, 11 February 2002, Annex IV, incorporated in Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN doc. A/68/37, New York, 2013, at: https://bit.ly/3Jodm39, p. 18 [added emphasis]. Saul argues that the reference to 'parties' could 'conceivably' extend to disorganized armed groups, civilians directly participating in hostilities, and civilians participating indirectly in hostilities, although he also believes that the drafting of the OIC would fail to achieve these aims. Saul, 'From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law', pp. 186–87.

This was based on operative paragraph 15 of General Assembly Resolution 46/51 of 9 December 1991, whereby:

> *Reaffirming* that nothing in this Convention shall in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right or the right of these peoples to struggle to this end in conformity with international law.[116]

This did not suffice to break the impasse. In informal negotiations chaired by the Coordinator in July 2005, Jordan made a further proposal to amend the operative text of the Convention, whereby '[e]xcept for an offence under article 2, paragraph 1 (a), of this Convention committed against a protected civilian to which this Convention shall be applicable, the activities during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.[117] This likewise did not overcome the negotiating blockage. So there we stand. Two decades later, the draft Convention remains just that, an unadopted proposal for a new treaty.

For the OIC has shown no signs of backing down on its demands for legislative change to the salient article on exclusions from the text. As Samuel explains, the Organisation does not seek to amend international law governing violations of IHL by those engaged in the struggle for self-determination, but rather to exclude from the ambit of international terrorism other acts of resistance movements that use force.[118] This would seem to counterbalance the exclusion of acts in such situations by State armed forces. In relation to the corresponding provision in the Terrorist Bombings Convention, O'Donnell declared that 'the exemption for acts of terrorism committed by the armed forces of states even when international humanitarian law is inapplicable is an affront to the rule of law'.[119]

1.2.2.7 Maritime Terrorism

Acts of terrorism may also be perpetrated on the high seas. This is significant as around 90 per cent of the world's goods are transported by sea.[120] But just as there is no generally accepted definition of terrorism on land, so too an accepted definition of maritime terrorism remains elusive.[121] In addition, the interrelationship between terrorism and piracy is not straightforward, and the international legal framework is further complicated by drug and human trafficking, which may sometimes be carried out by terrorist groups in order to fund their military activities.[122]

[116] Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism, held from 25 to 29 July 2005, Appendix I to Letter dated 3 August 2005 from the Chairman of the Sixth Committee, pp. 3–4.

[117] Ibid., p. 5.

[118] K. Samuel, 'The legal response to terrorism of the Organization of Islamic Cooperation', chap. 44 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 648.

[119] O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', p. 879.

[120] Organisation for Economic Co-operation and Development (OECD), 'Ocean shipping and shipbuilding', accessed 1 February 2022 at: https://bit.ly/3HKKDFi.

[121] E. Papastravridis, 'Maritime terrorism in international law', chap 5 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 62.

[122] The procurement of explosives used for the 2004 Madrid train bombing, for instance, was in part funded by the provision of drugs. B. Saul, 'The legal nexus between terrorism and transnational crime', chap. 10 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 143. In December 2008, a Moroccan court convicted a drug trafficker, Hicham Ahmidan, of links to the bombing, which killed 191 people. He was sentenced to

No right is laid down in the UN Convention on the Law of the Sea[123] (UNCLOS) – or indeed customary international law – according to which warships may interfere with vessels on the basis that they have on board individuals who are reasonably suspected of having committed a terrorist offence on the high seas.[124] Two potential grounds from among those set forth in UNCLOS[125] may, though, be relevant: piracy and where a vessel is not flagged.

Under general international law, as codified in Article 101 of UNCLOS, piracy is defined as

> any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.[126]

Given that the material elements of the offence of piracy – 'illegal acts of violence or detention' or any act of 'depredation' (i.e., robbery) – will typically exist in an act of maritime terrorism, the interplay between piracy and terrorism turns primarily on the interpretation of the notion of 'private ends'; that is to say, the motivation for the unlawful acts. Historically, a distinction was made in law between 'privateering' and 'piracy'. The former involved private individuals duly authorized by the State to capture merchant vessels belonging to another State.[127] The latter involved a private individual engaging in the same conduct but without possessing such lawful authority, meaning that the captain of the marauding ship did not possess a requisite 'letter of marque' from a government.[128]

Privateering was formally abolished in international law by the 1856 Paris Declaration Respecting Maritime Law.[129] The 1856 Declaration, which by the end of the nineteenth century was also codifying customary law, stated simply that '[p]rivateering is, and remains, abolished'.[130] This is a customary rule. The wording of 'private ends' appeared in the 1927 Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law. This document stated: 'According to international law, piracy consists in sailing the seas *for private ends without authorisation from the Government of any State* with the object of committing depredations upon property or acts of violence against persons.'[131]

Some commentators argue that private ends refer to the aim of lucrative gain as opposed to a political motive.[132] The better view is that, reflecting the evolution of piracy under the law of

ten years' imprisonment. France24, 'Moroccan jailed for 20 years for Madrid bombings', 18 December 2008, at: https://bit.ly/34GCljo.

123 United Nations Convention on the Law of the Sea; adopted at Montego Bay, 10 December 1982; entered into force, 16 November 1994. As of 1 January 2024, 169 States were party to UNCLOS and a further 13 were signatories. Among the permanent members of the UN Security Council, only the United States is a State not party. It did not sign the treaty when it was possible to do so. Art. 305, UNCLOS. See further W. Gallo, 'Why Hasn't the US Signed the Law of the Sea Treaty?' *VOA News*, 6 June 2016, at: https://bit.ly/3Lsztr2.

124 Papastravridis, 'Maritime terrorism in international law', p. 64.

125 Art. 110, UNCLOS.

126 Art. 101(a), UNCLOS.

127 See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., Cambridge University Press, Cambridge, 2022, pp. 48–49, para. 132.

128 See, e.g., Royal Museums Greenwich, 'Letters of marque', accessed 1 February 2022, at: https://bit.ly/3BhJl24.

129 Declaration Respecting Maritime Law; adopted at Paris, 16 April 1856; entered into force the same day.

130 Text available at: https://bit.ly/3Be79nG.

131 League of Nations Document C.196.M.70 (1927) V, pp. 116–17 [added emphasis].

132 For example, this is the understanding of the International Maritime Organization (IMO). See 'Introduction: Southeast Asian Piracy: Research and Developments', in G. G. Ong-Webb (ed.), *Piracy, Maritime Terrorism and*

https://doi.org/10.1017/9781009309103.002 Published online by Cambridge University Press

nations, the requirement serves to distinguish the acts of private individuals from the acts of a State or its duly authorized agents.[133] Hostage-taking can be both piracy and terrorism. Hence, piratical acts by non-State actors may also amount to acts of terrorism where the requisite terrorist motive is satisfied. What is more, since the right of search pertaining to suspected piracy may allow a warship to board a piratical vessel and arrest individuals who are reasonably suspected of being pirates,[134] once in custody, the detainees may later be charged also with an act of terrorism in certain circumstances.

In an armed conflict, a military vessel of an adversary may lawfully be targeted under IHL as may a merchant vessel of an adversary that is transporting armaments on its behalf.[135] As discussed in Section 1.4.2, IHL provides that terrorism in the conduct of hostilities in armed conflict occurs where acts (or threats) of violence have as their primary purpose to spread terror among the civilian population.[136] This would include terror attacks against civilians on board ships.[137] Saul wisely suggests that terrorism treaties 'be harmoniously interpreted with IHL by applying the IHL rules to define whether an act is "unlawful"' under the salient terrorism treaty'. If this is not the case, no terrorism offence is committed.[138]

Piracy, however, only exists under international law where the crew of one vessel attacks another on the high seas.[139] The *Achille Lauro* hijacking in 1985 concerned four armed Palestinians who had boarded the Italian cruise ship, but not from another ship. The men, who belonged to the Popular Front for the Palestine Liberation Front (PLF), took control of the vessel and demanded that Israel release imprisoned PLF members. They sought the ship's entry to a Syrian port but when Syria denied the request, the hijackers killed a sixty-nine-year-old wheelchair-bound American Jew, Leon Klinghoffer, in cold blood. After being shot in the head, Mr Klinghoffer was thrown overboard.[140]

The United States prompted the International Maritime Organization[141] (IMO) to take action. In March 1988, a diplomatic conference in Rome adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[142] (SUA Convention). The Convention

Securing the Malacca Straits, Institute of Southeast Asian Studies, Singapore, 2006, p. xiii. See also Papastravridis, 'Maritime terrorism in international law', p. 65.

133 A. Priddy and S. Casey-Maslen, *Counterpiracy under International Law*, Academy Briefing No. 1, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, August 2012, p. 12, and related citations.

134 See similarly Papastravridis, 'Maritime terrorism in international law', p. 66.

135 See, e.g., S. Haines, 'Naval Warfare', chap. 11 in Casey-Maslen, Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict, 274–312; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., Cambridge University Press, Cambridge, 2022, pp. 151–52, para. 434.

136 Art. 51(2), 1977 Additional Protocol I. See also ICRC, Customary IHL Rule 2: 'Violence Aimed at Spreading Terror among the Civilian Population', at: https://bit.ly/33ip53U.

137 Art. 49(3), 1977 Additional Protocol I.

138 Saul, 'From conflict to complementarity', p. 174.

139 Art. 101(a), UNCLOS.

140 '1985, October 7: Palestinian terrorists hijack an Italian cruise ship', *History*, last updated 6 October 2020, at: https://bit.ly/3BfN93S.

141 The International Maritime Organization is the UN's specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships. IMO, 'Introduction to IMO', 2019, at: https://bit.ly/3YSJzsh. In 1948, an international conference in Geneva adopted a convention formally establishing the Inter-Governmental Maritime Consultative Organization (IMCO), but the name was changed in 1982 to IMO. The Convention entered into force in 1958 and the new organization met for the first time the following year. Its mission is 'to promote safe, secure, environmentally sound, efficient and sustainable shipping' by 'adopting the highest practicable standards of maritime safety and security . . . as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application'. IMO, 'Brief History of IMO', 2019, at: https://bit.ly/45pvRQ5.

142 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; adopted at Rome, 10 March 1988; entered into force, 1 March 1992. As of 1 January 2024, 166 States were party to the Convention.

prohibits the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it, obligating States Parties to either extradite or 'establish their jurisdiction over' these offences when the alleged perpetrators are found on their territory. Moreover, unlike the crime of piracy, which is limited to acts on the high seas (and in a State's exclusive economic zone),[143] the SUA Convention also applies in a State's territorial waters.[144]

In 2005, a Protocol to the SUA Convention was adopted to amend the Convention by its States Parties.[145] The Protocol adds a new Article 3*bis*, which provides that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally uses against or on a ship or discharges from a ship any explosive, radioactive material, or biological, chemical, nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage (or uses a ship in a manner that causes death or serious injury or damage).[146] The offence is committed 'when the purpose of the 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 any act'.

That the States Parties were concluding treaties on the repression of terrorism is clear from the text of the Convention and its Protocol. In the preamble to the 1998 SUA Convention, they expressed their 'deep concern about the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings'.[147] In the second preambular paragraph to the 2005 SUA Protocol, the States Parties explicitly 'acknowledg[e] that terrorist acts threaten international peace and security'. They further express their belief that 'it is necessary to adopt provisions supplementary to those of the Convention, to suppress additional terrorist acts of violence against the safety and security of international maritime navigation and to improve its effectiveness'.[148]

A provision in the 2005 Protocol covers the procedures to be followed if a State Party seeks to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention.[149] In other respects, neither the SUA Convention nor its 2005 Protocol amends the contours of the freedom of the high seas, which has been a customary rule of international law for centuries.

1.2.2.8 Terrorism and Transnational Organized Crime

With respect to transnational organized crime, such as drug smuggling or human trafficking, the key to understanding the overlap with, or differentiation from, terrorism is the intent requirement of a financial or material benefit.[150] That is not to say that terrorist groups are not interested in fundraising through illicit activities – in its Resolution 2195 (2014), the UN Security Council expressed its 'concern that terrorists benefit from transnational organized crime in some

[143] Art. 58(2), UNCLOS.
[144] Priddy and Casey-Maslen, *Counterpiracy under International Law*, p. 14.
[145] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; adopted at London, 14 October 2005; entered into force, 28 July 2010. As of 1 January 2024, fifty-three States were party to the 2005 SUA Protocol.
[146] Art. 4(5), 2005 SUA Protocol.
[147] 1988 SUA Convention, third preambular para.
[148] 2005 SUA Protocol, twelfth preambular paragraph.
[149] Art. 8 *bis* (5), 2005 SUA Protocol.
[150] Saul, 'The legal nexus between terrorism and transnational crime', p. 132.

regions'[151] – but their 'further, ulterior aim' is 'to use the proceeds of such crimes to fund terrorist acts'.[152] As Chapter 3 describes, a number of States have adopted dedicated national legislation that governs both terrorism and organized crime.

The UN Convention against Transnational Organized Crime[153] (also known as the Palermo Convention) defines a transnational organized group as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.[154] This clearly encompasses certain terrorist groups. Indeed, in the UN General Assembly, in the resolution that adopted the Palermo Convention, noted 'with deep concern the growing links between transnational organized crime and terrorist crimes'.[155] As Saul remarks, the distinction between terrorism and transnational organized crime is 'slippery' because of the lack of an internationally accepted definition of what does and does not constitute terrorism and the 'diversity of terrorist-type offences' in treaties and national law.[156]

1.2.3 *Towards an Agreed Definition of Terrorism in Peacetime?*

Despite the impasse in the negotiation of the UN Comprehensive Convention on International Terrorism, in a 2011 decision the Appeals Chamber of the Special Tribunal for Lebanon, led by Judge Antonio Cassese, held that a definition existed in customary law of international terrorism in peacetime. This holding was surprising for a number of reasons.[157] First and foremost, of course, given the disagreement among States as to the definition of international terrorism, how could one credibly argue that the threshold of general agreement, including among 'specially affected States', had been reached? Second, the determination of any customary rules was materially irrelevant to the case at hand and was thus *obiter dicta*. The Special Tribunal for Lebanon was an ad hoc mechanism created in relation to the bombing that killed former Lebanese prime minister Rafik Hariri on 14 February 2005. Its mandate, which was issued by the UN Security Council, made it explicit that Lebanese law and not international law was the legal basis for the offences to be tried by the Tribunal.[158] Third, the Prosecution and the Defence before the Tribunal decision had been in agreement that no definition of terrorism existed in customary international law.[159]

[151] UN Security Council Resolution 2195, adopted without a vote on 19 December 2014, seventh preambular para. The Security Council identified as examples of activities of such transnational organized crime 'the trafficking of arms, persons, drugs, and artefacts' and 'the illicit trade in natural resources including gold and other precious metals and stones, minerals, wildlife, charcoal and oil', as well as 'kidnapping for ransom and other crimes including extortion and bank robbery'.

[152] Saul, 'The legal nexus between terrorism and transnational crime', p. 132.

[153] United Nations Convention against Transnational Organized Crime; adopted at New York, 15 November 2000; entered into force, 29 September 2003 (2000 Palermo Convention). As of 1 January 2024, 191 States were party to the Convention. A further two States (the Republic of Congo and Iran) were signatories. The other four States not party are Papua New Guinea, the Solomon Islands, Somalia, and Tuvalu. The European Union is also a party to the Convention having adhered in 2004.

[154] Art. 2(a), 2000 Palermo Convention.

[155] UN General Assembly Resolution 55/25, adopted without a vote on 15 November 2000, eighth preambular para.

[156] Saul, 'The legal nexus between terrorism and transnational crime', p. 133.

[157] That a Court led by Antonio Cassese should make such a determination is not the surprise. Cassese had already written an article in 2006 in which he affirmed that a customary rule detailing the elements of the [international] crime of international terrorism in time of peace had already crystallized. A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice*, Vol. 4 (2006), 933–58, at p. 935.

[158] Art. 2, Statute of the Special Tribunal for Lebanon, annexed to UN Security Council Resolution 1757, adopted on 30 May 2007 by ten votes to nil, with five abstentions (China, Indonesia, Qatar, Russia, and South Africa).

[159] Ibid., p. 590.

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

(a) The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, or arson);
(b) The intent to spread fear among the population or to coerce a national or international authority to take some action or to refrain from taking it; and
(c) The act involves a transnational element.[160]

The Tribunal's *Interlocutory Decision on the Applicable Law* received scant support from States and leading jurists. Mettraux described it as an 'extraordinary judicial pronouncement', noting the mixture of 'scepticism and disapproval' that greeted it.[161] Among that chorus was Saul, who authored an article unambiguously entitled 'The United Nations Special Tribunal for Lebanon *invents* an international crime of transnational terrorism'.[162] He pointed out that all the sources of custom relied upon by the Appeals Chamber – national legislation, judicial decisions, regional and international treaties, and UN resolutions – were 'misinterpreted, exaggerated, or erroneously applied'.[163] Kirsch and Oehmichen similarly termed the purported customary law crime a 'fabrication'.[164] Mettraux himself concludes that the Special Tribunal's 'discovery' of an international crime of international terrorism 'fails to convince', declaring that in its reasoning the Tribunal 'seems to have over-reached' using a 'recipe' of '*peel off, cherry-pick and bend*'.[165]

Cassese's attempt to rewrite both history and international law failed even to persuade fellow judges on the Special Tribunal itself. Thus, in its trial judgment of four accused, issued nine years later, the Tribunal not only recalled that the Appeals Chamber's consideration of the 'apparent existence of a customary international law definition of terrorism' was *obiter dicta* but also declared that it was 'not convinced that one exists'.[166] In her separate opinion, Judge Janet Nosworthy did argue that the definition was *de lege ferenda* as custom as of 2005,[167] but insufficient evidence was adduced to sustain even this more tentative assertion.

In rejecting the *customary law* nature of the Appeals Chamber's proposed definition, Ambos and Timmermann nonetheless aver that a 'current consensus' exists that terrorism 'requires the commission of any criminal act, which causes death or bodily injury to any person, or severe damage to public or private property' where an associated special intent exists to spread fear,

[160] Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber) (Case No. STL-11–01/I), 16 February 2011, para. 85.

[161] G. Mettraux, 'The UN Special Tribunal for Lebanon: defining international terrorism', chap. 40 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 589.

[162] B. Saul, 'Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism', *Leiden Journal of International Law*, Vol. 24, No. 3 (2011), 677–700, available on SSRN at: https://bit.ly/3rHyRGb [added emphasis]. In 2005, Saul had concluded that arguments that terrorism is a customary international crime 'are premature'. B. Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, p. 270.

[163] Saul, 'Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism', p. 679.

[164] S. Kirsch and A. Oehmichen, 'Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon', *Durham Law Review Online*, Vol. 1 (2011), 1–20 [added emphasis].

[165] Mettraux, 'The UN Special Tribunal for Lebanon: defining international terrorism', pp. 598, 589, and 592 [original emphasis].

[166] Special Tribunal for Lebanon, *Prosecutor* v. *Salim Jamil Ayyash and others*, Judgment (Trial Chamber) (Case No. STL-11–01/T/TC), 18 August 2020, para. 6192.

[167] Ibid., Separate Opinion of Judge Janet Nosworthy, paras. 124–25.

intimidate a population, or coerce an entity to do or abstain from doing any act.[168] Claiming that such a consensus exists is significantly overreaching. It flies in the face of State practice, including as set out in the sectoral treaties.

It is true, as Kent Roach observes,[169] that 'guidance' on the definition of international terrorism was provided by the United Nations Security Council Resolution 1566 (2004). It even 'came close' to a comprehensive definition of terrorism in an operative paragraph.[170] But the relevant paragraph was carefully drafted to allow those States that did not consider national liberation movements as terrorists to lay claim to a continued carve-out on that basis. Thus, the Resolution

> [r]*ecalls* 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 nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature[.][171]

What is also notable in the operative provision is the omission of reference to property or economic damage as being constitutive of an offence.[172] In any event, the terms of Resolution 1566 have had little influence on State practice.[173]

A broadly similar approach was taken by Fionnuala Ní Aoláin, the then UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in her 2018 letter to Mark Zuckerberg, the Chief Executive Officer of Facebook. Therein, the Special Rapporteur offered the following 'model' definition of terrorism:

Terrorism means an action or attempted action where:

1. The action:
   (a) Constituted the intentional taking of hostages; or
   (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
   (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is done or attempted with the intention of:
   (a) Provoking a state of terror in the general public or a segment of it; or
   (b) Compelling a Government or international organization to do or abstain from doing something; and

[168] K. Ambos and A. Timmermann, 'Terrorism and customary international law', chap. 2 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., pp. 27–8.
[169] K. Roach, 'Comparative Counter-Terrorism Law Comes of Age', in K. Roach (ed.), *Comparative Counter-Terrorism Law*, Cambridge University Press, Cambridge, 2015, p. 14.
[170] Roberts, 'Countering Terrorism: A Historical Perspective', p. 7.
[171] UN Security Council Resolution 1566, adopted on 8 October 2004 by unanimous vote in favour, operative para. 3.
[172] B. Saul, *'The Legal Black Hole in United Nations Counterterrorism'*, IPI Observatory, New York, 2 June 2021, at: https://bit.ly/3GTe8nn.
[173] Saul, 'From conflict to complementarity', p. 188.

(3) The action corresponds to:

(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
(b) All elements of a serious crime defined by national law.[174]

While not a perfect definition of terrorism in peacetime, the model definition proposed by the Special Rapporteur is certainly valuable.[175] It effectively excludes property damage and peaceful protest against the regime from the ambit of terrorism.[176] Thus, foreign nationals among the *gilets jaunes* ('yellow vest') protesters against President Emmanuel Macron's government in France in 2018–19[177] could not be deemed international terrorists under the definition, even had they defaced or damaged monuments in the capital.[178]

A further tweak to the language could usefully draw on the European Union's 2002 Framework Decision on Terrorism. Therein, one of the requisite intents for terrorist action includes reference to 'unduly compelling' the conduct of a government or international organization.[179] More problematic, however, is the delimiting reference in the Special Rapporteur's text to 'the general population or segments of it', which would appear to also exclude from the ambit of terrorism acts of violence against law enforcement officials. This is hard to square with the dictates of the 1997 Terrorist Bombings Convention, which certainly encompasses bombings directed against the police outside the conduct of hostilities in an armed conflict.[180]

1.3 DEFINING 'DOMESTIC' TERRORISM

As has been seen, a number of UN anti-terrorism treaties exclude from their scope what may be considered acts of purely domestic terrorism. The relevant provision in the 1979 Hostages Convention, for example, excludes consideration of a situation where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State, and the alleged offender is found in the territory of that State.[181] Similar provisions are found in the 1997

[174] Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Letter to Mr Mark Zuckerberg, UN doc. OL OTH 46/2018, 24 July 2018, at: https://bit.ly/34qJpkf, pp. 4–5. Small grammatical and typographical corrections have been made to the text for the sake of consistency, none of which is substantive.

[175] Compare the proposed definition with the one put forward by Ben Saul in 2006. *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, pp. 65–6.

[176] Saul would include acts against property where they resulted in physical harm, and would include a specific exemption for the exercise of certain fundamental human rights. Ibid.

[177] See, e.g., J. Lichfield, 'Just who are the gilets jaunes?' Observer Special Report, *The Guardian*, 9 February 2019, at: https://bit.ly/3JspQaf.

[178] That does not make such acts lawful, of course, nor does it seek to preclude a State from prosecuting offenders for a crime in national law, just not one that falls under the rubric of terrorism and under cover of international counterterrorism law.

[179] Art. 1(1), EU Council Framework Decision of 13 June 2002 on combating terrorism, at: https://bit.ly/30LeoA1.

[180] The Convention stipulates that '[a]ny person commits an offence within the meaning of this Convention 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'. Art. 2(1), 1997 Terrorist Bombings Convention. In turn, a 'State or government facility' is defined broadly as 'any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity'. Art. 1(1), 1997 Terrorist Bombings Convention.

[181] Art. 13, 1979 Hostage-Taking Convention.

Terrorist Bombings Convention,[182] the 1999 Terrorism Financing Convention,[183] the 2005 Nuclear Terrorism Convention,[184] and the draft Comprehensive Convention against International Terrorism.[185]

As a consequence, where an offence is one of 'domestic' rather than international terrorism, a considerable measure of discretion is left to the national legislature in how it defines terrorism in its national law. This has engendered, in Duffy's words, a 'definitional deficit and the creeping reach of the terrorism label today'.[186] The risk is further that '[o]ld style repression of dissent could be legitimized through the language of modern counter-terrorism'.[187]

This does not, however, mean that the government of the day in any given State has *carte blanche* to adopt criminal law pertaining to terrorism in the manner it sees fit. International human rights law will act to render an overly broad crime of terrorism an internationally wrongful act, at the least where the purported offence directly contravenes a protected right. This is so, whether the right is laid down in a treaty to which the State in question is party or exists under customary international human rights law. Rights that would be of special concern as a result of overly broad definitions of offences include the right to life, the right to freedom from torture and other ill-treatment, the rights to liberty and to security, the right to a fair trial, and the right to freedom of peaceful assembly.

If, for example, the legislature in any given State renders all peaceful protests against the government of the day a criminal offence, this would be unlawful under international law. This principle pertains a fortiori to the establishment of terrorism offences. Hence, in relation to the right of peaceful assembly recognized under the 1966 International Covenant on Civil and Political Rights (ICCPR),[188] the Human Rights Committee has stated without caveat that '[t]he mere act of organizing or participating in a peaceful assembly cannot be criminalized under counterterrorism laws'.[189] A similar principle pertains to other fundamental rights, such as the right to freedom of association, the right to freedom of religion, and the right to freedom of speech.

A number of States safeguard national liberation movements from prosecution under domestic law for their involvement per se in armed struggle. In its 2004 Protection of Constitutional Democracy against Terrorist and Related Activities Act, South Africa had excluded from criminal prosecution and extradition as an act of terrorism

> any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter.[190]

[182] Art. 3, 1997 Terrorist Bombings Convention.
[183] Art. 3, 1999 Terrorism Financing Convention.
[184] Art. 3, 2005 Nuclear Terrorism Convention.
[185] Art. 4, draft Comprehensive Convention against International Terrorism.
[186] H. Duffy, 'International human rights law and terrorism: An overview', chap. 22 in Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 332.
[187] K. Roach, 'Comparative Counter-Terrorism Law Comes of Age', p. 26.
[188] Art. 21, International Covenant on Civil and Political Rights; adopted at New York, 16 December 1966; entered into force, 23 March 1976. As of 1 January 2024, 173 States were party to the ICCPR.
[189] Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), UN doc. CCPR/C/GC/37, 17 September 2020, para. 68.
[190] Art. 1(4), Protection of Constitutional Democracy Against Terrorist and Related Activities Act, Act 33 of 2004, published in Government Gazette of the Republic of South Africa, Vol. 476, Cape Town, 11 February 2005, No. 27266, at: https://bit.ly/3GLqgX6.

The Act declared that any such act 'shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity'.[191] In December 2022, however, the South African Parliament revised the text of the 2004 Act. One of the amendments involved the deletion in its entirety of the above exclusion.[192]

Yemen's 2010 law on terrorist financing stipulates that '[c]ases of struggle by various means against foreign occupation and aggression for liberation and self-determination in accordance with the principles of international law shall not be considered as offences covered by this article'.[193]

Many other States explicitly include as an act of domestic terrorism an insurgency or rebellion on their territory. Under IHL, only in an international armed conflict do combatant members of the armed forces enjoy 'combatant's privilege'.[194] This is a customary rule[195] that, following their capture by the enemy, prohibits their trial on charges of direct participation in hostilities or for lawful acts of war.[196]

No corresponding privilege exists in non-international armed conflict. There is only an obligation – if one can call it that – to '*endeavour* to grant the broadest possible amnesty to persons who have participated in the armed conflict' at the 'end' of hostilities.[197] This does not preclude a prosecution being mounted by the authorities under *domestic* law: for example, for treason, for rebellion, or for terrorism, and for acts of violence by members of armed groups that are party to a non-international armed conflict.

In its judgment in *R* v. *Gul* in 2012, the Court of Appeal (Criminal Division) of England and Wales rejected the assertion that a domestic criminal law offence of terrorism in a non-international armed conflict could not be successfully prosecuted where the defendant was advocating attacks on lawful military objectives under IHL. Although the Court of Appeal's reasoning and certain of its conclusions are at times flawed, it was correct to hold that, under national law, in such a conflict 'there is nothing in international law which would exempt those engaged in attacks on the military during the course of an insurgency from the definition of terrorism'.[198] The following year, the UK Supreme Court confirmed this holding, declaring that

> [e]ven if it were the case that, because of the need to take into account the UK's international law obligations, the wide definition of terrorism had to be read down when it comes to construing those provisions [with extraterritorial effect], that would be of no assistance to a defendant such as the appellant, who is a UK citizen being prosecuted for offences allegedly committed in this country.[199]

[191] Ibid.

[192] S. 1(s), 2022 Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act (Act No. 23 of 2022).

[193] Art. 4, 2010 Law on Combating Money Laundering and Terrorist Financing (Law No. 1 on combating money laundering and terrorist financing).

[194] Thus, Article 43 of the 1977 Additional Protocol to the Geneva Conventions refers to combatant members of the armed forces as having the 'right to participate directly in hostilities'.

[195] See, e.g., G. D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, 3rd ed., Cambridge University Press, Cambridge, 2021, p. 37. As Gary Solis recalls, the 1907 Hague Regulations (and indeed the earlier 1899 Regulations) expressed this in terms of the 'laws, rights, and duties of war'. Art. 1, Regulations concerning the Laws and Customs of War on Land, Annex to the Convention (IV) respecting the Laws and Customs of War on Land; adopted at The Hague, 18 October 1907; entered into force, 26 January 1910.

[196] ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', Opinion Paper, p. 4. See also Swiss Federal Department of Foreign Affairs, *ABC of International Humanitarian Law*, Bern, 2009, p. 13.

[197] Art. 6(5), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); adopted at Geneva, 8 June 1977, entered into force, 7 December 1978 (hereafter, 1977 Additional Protocol II).

[198] Court of Appeal (Criminal Division), *R* v. *Mohammed Gul*, Judgment, [2012] EWCA Crim 280, para. 49.

[199] UK Supreme Court, *R* v. *Mohammed Gul*, Judgment, [2013] UKSC 64, *esp*. paras. 56, 57.

1.4 THE DEFINITION OF TERRORISM IN ARMED CONFLICT

This segues into the international legal definitions of terrorism in situations of armed conflict. The two branches of IHL (also called the law of armed conflict) are Geneva Law and Hague Law. Geneva Law protects persons in the power of the enemy, in particular when they are detained or are civilians in territory occupied by a foreign State in an international armed conflict.[200] The other branch of IHL, Hague Law, regulates the conduct of hostilities: the combat between parties to an armed conflict.[201]

1.4.1 *The Definition of Terrorism in Geneva Law*

In international armed conflict, 'measures' of terrorism are explicitly prohibited against the civilian population. In non-international armed conflict, 'acts of terrorism' are similarly unlawful, but the prohibition also extends beyond civilians to those who formerly took a direct part in hostilities but no longer do so. These are addressed in turn.

1.4.1.1 Measures of Terrorism against Persons in the Power of the Enemy in International Armed Conflict

The 1949 Geneva Convention IV generally concerns the protection of civilians in international armed conflict. In addition to prohibiting hostage-taking, it contains an express prohibition of 'all measures' of 'terrorism' against civilians in occupied territories or against protected persons in the territory of a party to an armed conflict.[202] The ICRC's 1958 commentary on the provision offers little in the way of clarification of the unusual formulation, nor does it elucidate precisely what the provision envisages. The commentary does, however, observe that 'in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike'.[203]

The treatment meted out by the Nazis to civilians in occupied Europe during the Second World War does, however, offer an idea of what was envisaged. In 1948, former Field Marshal Erhard Milch was found guilty of war crimes pertaining to the 'slave labor and deportation to slave labor of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons'.[204] Mr Milch had been charged in connection with slave labour and deportation to slave labour of 'the civilian populations of Austria, Czechoslovakia, Italy, Hungary, and other countries and territories occupied by the German Armed Forces'.[205] In its judgment, the US

[200] Thus, in its 1987 commentary on the two 1977 Additional Protocols to the four Geneva Conventions, the ICRC noted that in 'the legal literature, the expression Geneva law is used fairly commonly to designate the rules of humanitarian law laying down the right of victims to protection'. ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, p. xxvii.

[201] ICRC, Commentary on the 1977 Additional Protocols, p. xxvii.

[202] Art. 33, Convention (IV) relative to the Protection of Civilian Persons in Time of War; adopted at Geneva, 12 August 1949; entered into force, 21 October 1950.

[203] ICRC Commentary on Article 33 of 1949 Geneva Convention IV, 1958, at: https://bit.ly/2LbfkLJ, p. 226.

[204] US Military Tribunal II, *US* v. *Milch*, Judgment, 31 July 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II (1997), available at: https://bit.ly/3sNmDLq, p. 790.

[205] Ibid., p. 360.

https://doi.org/10.1017/9781009309103.002 Published online by Cambridge University Press

Military Tribunal declared that 'it is an undoubted fact that the foreign workers were subjected to cruelties and torture and the deprivation of decent human rights merely because they were aliens'.[206]

The extermination of more than one million Jews perpetrated by the *Einsatzgruppen* in Eastern Europe, first in Poland and later in the Soviet Union, was mentioned in the Introduction to this book. Atrocities against civilians were also committed across occupied Western Europe. For example, on 10 June 1944 the SS Panzer Division *Das Reich* destroyed the French village of Oradour-sur-Glane, a small farming village near Clermont-Ferrand in Central France. The SS soldiers rounded up everyone they found in the village and concentrated them on the market square. Thereafter, they took the 197 men to several barns on the edge of town and locked them in, while the 240 women and 205 children were locked in the village church.[207] The soldiers set fire to the barns and threw grenades through the windows of the church, shooting those who sought to escape the flames.

After 642 inhabitants, including seven Jewish refugees, were dead, the company looted the empty dwellings and burned the village to the ground. Only seven villagers survived the massacre: six men and a woman, all injured. About fifteen other inhabitants of the village were able to escape the Germans before the massacre started or evade the round-up by hiding.[208] No reason was given for the barbarity, but the intimidatory message being communicated to the population of northern France was unmistakeable.

The 1977 Additional Protocol I, which applies also to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination',[209] does not specifically refer to either measures or acts of terrorism. That said, in the fundamental guarantees that apply as a minimum standard to all who fall under the power of a party to an international armed conflict in accordance with the Protocol, many of the prohibited acts, such as murder, mutilation, torture, the taking of hostages, and collective punishments,[210] as well as arbitrary executions,[211] clearly constitute potential predicate offences for terrorism.[212] Surprisingly, in its detailed study of customary IHL issued in 2005, the ICRC did not identify a discrete rule prohibiting measures or acts of terrorism against those in the power of the enemy.

1.4.1.2 Acts of Terrorism against Persons in the Power of the Enemy in Non-international Armed Conflict

Article 3 common to the four 1949 Geneva Conventions, which applies to all situations of non-international armed conflict, does not specifically refer to acts of terrorism either, although similar to the fundamental guarantees referred to in Section 1.4.1.1, many of the prohibited acts, such as murder, mutilation, torture, the taking of hostages, and arbitrary executions, clearly

[206] Ibid., p. 790.
[207] United States Holocaust Memorial Museum, 'Oradour-sur-Glane', accessed 1 February 2022, at: https://bit.ly/3GDjLWs.
[208] Ibid.
[209] Art. 1(4), 1977 Additional Protocol I.
[210] Art. 75(2), 1977 Additional Protocol I.
[211] Art. 75(4), 1977 Additional Protocol I.
[212] In a separate section of its commentary on other provisions in the Protocol, the ICRC describes terrorism as being 'understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack'. ICRC Commentary on Article 44(2) of the 1977 Additional Protocol I, para. 1690 note 27.

constitute predicate offences. A specific, 'absolute' and 'unconditional' prohibition[213] of 'acts of terrorism' is, though, incorporated in the 1977 Additional Protocol II,[214] which binds parties to the non-international armed conflicts falling within its particular material scope.[215] The provision is broad in ambit, applying to protect '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'.[216] Hence, exceptionally, acts of terrorism may be committed against those who formerly participated directly in hostilities (e.g., by taking part in fighting) and not only against civilians.

In the view of the ICRC, the term 'acts of terrorism' in the Additional Protocol II covers 'not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect'.[217] Thus, for example, the deliberate destruction of civilian homes, schools, or medical facilities, as well as the murder or torture of civilians or those *hors de combat*, at least where the intent or effect was to terrorize the population, would be encapsulated by the prohibition.

1.4.2 *The Definition of Terrorism in Hague Law*

Within the conduct of hostilities (the *fighting* in the vernacular), the use of terror tactics against the civilian population is explicitly prohibited in identical terms by the two 1977 Additional Protocols. It is thus stipulated that '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[218] This is also a customary rule, as the ICRC confirms, applicable to all armed conflicts.[219]

The acts proscribed by the prohibition constitute, the ICRC avers, a 'special type of terrorism'.[220] As its commentary on the Additional Protocols explains: 'Air raids have often been used as a means of terrorizing the population, but these are not the only methods. For this reason, the text contains a much broader expression, namely 'acts or threats of violence' so as to cover all possible circumstances.'[221] The concept of 'terror' in the context of IHL was defined by the ICTY in its 2005 judgment at trial in the *Galić* case as 'extreme fear'.[222]

The ICRC commentary notes that acts of violence during conflict 'almost always give rise to some degree of terror among the population' and further that 'attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender'. Accordingly, the Hague Law prohibition on terrorizing civilians is limited to acts of

[213] H. Gasser, 'Prohibition of Terrorist Acts in International Humanitarian Law', *International Review of the Red Cross*, No. 253 (1986), 200–12, at: https://bit.ly/3R3M4WR, at p. 200.

[214] Art. 4(2)(d), 1977 Additional Protocol II.

[215] These are where dissident armed forces or other organized armed groups fighting State armed forces have effective control of part of that State's territory such as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Art. 1(1), 1977 Additional Protocol II. As of 1 January 2024, 169 States were party to the Protocol and a further three States were signatories.

[216] Art. 4(1), 1977 Additional Protocol II.

[217] ICRC, Commentary on the 1977 Additional Protocols, at: http://bit.ly/2IGhscP, para. 4538.

[218] Art. 51(2), 1977 Additional Protocol I; and Art. 13(2), 1977 Additional Protocol II.

[219] ICRC, Customary IHL Rule 2: 'Violence Aimed at Spreading Terror among the Civilian Population'.

[220] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, para. 4538.

[221] ICRC commentary on the 1977 Additional Protocols, para. 4785.

[222] ICTY, *Prosecutor* v. *Galić*, Judgment (Trial Chamber) (Case No. IT-98–29-T), 5 December 2003, para. 135. This interpretation was effectively confirmed in the judgment at trial in the *Blagojević* case two years later, even though the charge itself was of persecution as a crime against humanity. ICTY, *Prosecutor* v. *Blagojević and Jokić*, Judgment (Trial Chamber) (Case No. IT-02–60-T), 17 January 2005, para. 590. In making its determination, the Trial Chamber explicitly referred to the IHL rule in the 1977 Additional Protocol I. Ibid., para. 589.

violence whose primary purpose is to spread terror among the civilian population 'without offering substantial military advantage'.[223] As Dinstein has observed, large-scale aerial bombardments that are 'pounding' military objectives and 'breaking the back of the enemy armed forces' are not unlawful according to this rule, even if they lead to a 'collapse of civilian morale'.[224] Accordingly, in its judgment in the *Prlić* case, reversing the decision at trial, the ICTY Appeals Chamber held that the destruction of the Old Bridge at Mostar could not amount to terrorization of the civilian population since it constituted a lawful military objective in the circumstances prevailing at the time.[225]

Indiscriminate bombing of cities was widely practised in the Second World War, especially of German cities by the United States Air Force (USAF) and the British Royal Air Force (RAF) and of Japanese cities by the USAF. The bombing of Hamburg and later Dresden, in particular, killed tens of thousands of German civilians for negligible military advantage: less than 10 per cent of German industrial production is said to have been cut by the bombing.[226] After Dresden was bombed on 13 February 1945, even Churchill expressed doubts as to the value of the raid, writing in a memorandum: 'It seems to me that the moment has come when the question of bombing of German cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed.'[227] That is not to downplay the illegality or inhumanity of the Blitz (the shortened German term used to describe the bombing of British cities from 1940) and the later use of the indiscriminate V-1 and V-2 weapons, which were equally criminal in intent and in operation. About 60,000 people, the overwhelming majority civilians, would be killed in the Blitz, around half of them in London.[228]

The dropping of the atomic bomb on Hiroshima and then on Nagasaki in August 1945 was designed to intimidate and coerce the Japanese into ending the war quickly and preserving American lives. A uranium fission bomb was dropped over Hiroshima on 6 August 1945, detonating directly over Shima Hospital in the centre of the city at 8:15 am. Every doctor, nurse, and patient in the hospital was killed instantly. Everything within a 500-metre radius of Ground Zero was charred; ground temperatures briefly attained 4,000 degrees Celsius.[229] Tens of thousands of people within a two-kilometre radius were 'burned, decapitated, disembowelled, crushed and irradiated'. The sudden, precipitate drop in air pressure 'blew their eyes from their sockets and ruptured their eardrums; the shockwave cleaved their bodies apart'.[230] There were minimal military objectives in Hiroshima. Strategic nuclear weapons are the epitome of indiscriminate terror weapons.

Terrorizing too can be conventional weapons. In the last decade, the link between acts carried out with a view to terrorize civilians, such as targeted or indiscriminate bombardment and crimes against humanity, has been widely seen in the armed conflicts in Syria. In 2014, the UN Commission of Inquiry on Syria found that the government had employed a military strategy targeting the civilian population, combining long-lasting sieges with continuous air and ground bombardment. In neighbourhoods around Damascus, civilians were targeted on the basis of their perceived opposition to the government. Innocent civilians would be attacked for merely

[223] ICRC commentary on the 1977 Additional Protocols, para. 1940.
[224] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed., pp. 168–69, para. 490.
[225] ICTY, *Prosecutor* v. *Prlić*, Judgment (Appeals Chamber) (Case No. IT-04–74-A), 29 November 2017, paras. 411 and 425–26.
[226] A. Marr, *The Making of Modern Britain*, Pan Books, London, 2009, p. 423.
[227] T. Luckhurst, 'Dresden: The World War Two bombing 75 years on', *BBC News*, 13 February 2020, at: https://bbc.in/2VdKhnk.
[228] Marr, *The Making of Modern Britain*, p. 354.
[229] P. Ham, *Hiroshima Nagasaki*, Macmillan, United Kingdom, 2011, p. 357.
[230] Ibid., p. 358.

residing in or originating from these neighbourhoods. The Commission of Inquiry concluded that the Syrian regime 'has carried out a widespread and systematic attack against the civilian population of Aleppo to punish and terrorize civilians for supporting or hosting armed groups, in an apparent strategy to erode popular support for those groups'.[231]

1.5 CONCLUDING OBSERVATIONS

This chapter has sought to lay bare the complexity of the nature of terrorism's definition under international law. In the absence of a Comprehensive Convention on International Terrorism, States are of course bound by the sectoral or regional terrorism treaties to which they are party. *Pacta sunt servanda* – the duty to interpret and apply treaties in good faith – is a fundamental rule of international law. There is, however, no customary law definition of international terrorism in peacetime (and a fortiori no corresponding international crime per se).[232] Whether those engaged in national liberation struggles outside armed conflict are international terrorists when they engage in certain acts thus remains unsettled as a matter of customary law.

On the high seas, a right of search of suspected piratical vessels exists, but not for vessels containing suspected terrorists who do not meet the customary law definition of pirates as codified in the UN Convention on the Law of the Sea. Gaps in the right of search are filled by the SUA Convention and its 2005 Protocol between States Parties to those treaties, but the corresponding rights of visit do not apply to States not party as a matter of custom.

Purely 'domestic' terrorism is within the bounds of municipal law, and a measure of discretion is afforded to the executive and the legislature in this regard. That said, international law will intervene where the scope of legislation is capricious or where it violates fundamental human rights. A State that renders the lawful exercise of fundamental human rights a terrorist offence in its domestic law engages its international responsibility.

In armed conflict, attacks by air, on the ground, and at sea whose primary purpose is to terrorize the civilian population are prohibited under the customary and treaty law of the Hague. Bombardment is an obvious means by which to do so. Attacking lawful military objectives in the conduct of hostilities, however, including so-called internationally protected persons when they meet the IHL definition of a military objective, does not constitute terrorism under the law of armed conflict.

The prohibition of acts of terrorism against detained civilians or of measures of terrorism against the population in an occupied territory is equally a customary rule of IHL, despite the ICRC's relative silence on the matter.[233] Hostage-taking is always unlawful under international

[231] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/27/60, 13 August 2014, para. 104.

[232] Thus, the ILC's proposed text in 1995 of an international crime of international terrorism for the Statute of the International Criminal Court received significant pushback from States. See Draft Article 24, 'Draft Code of Crimes against the Peace and Security of Mankind', Thirteenth report on the draft code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, UN doc. A/CN.4/466, paras. 111 *et seq*. The draft crime read as follows: 'An individual who is an agent or representative of a State commits or orders the commission of any of the following acts: . . . 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.'

[233] In confirming the customary rule prohibiting terror attacks in the conduct of hostilities, the ICRC avers that the rule is 'supported by the wider prohibition of "acts of terrorism" in Article 4(2)(d) of Additional Protocol II' and that the UN Secretary-General had 'noted that violations of Article 4 of Additional Protocol II have long been considered violations of customary international law'. ICRC, Customary IHL Rule 2: 'Violence Aimed at Spreading Terror among the Civilian Population'.

law, whether that occurs inside or outside armed conflict.[234] It may readily be considered as an act of terrorism wherever the object of the hostage-taking is civilians and the aim of the action is to strike extreme fear into the civilian population. In the context of armed conflict, the taking of hostages is unequivocally prohibited. In peacetime, the 1979 Hostage-Taking Convention fully applies.[235]

The customary rule of 'combatant's privilege' will not allow a party to an international armed conflict to prosecute an enemy combatant that it detains for his or her mere direct participation in hostilities, including for acts of terrorism under domestic law. Only if the combatant has committed a war crime may a prosecution be lawfully engaged. In a situation of non-international armed conflict, however, no combatant's privilege exists, and thus the State may potentially charge a detained fighter with terrorism offences under its domestic law even when they comply with the rules of international humanitarian law.

[234] It is the specific intent that characterizes hostage-taking, distinguishing it from the deprivation of liberty as an administrative or judicial measure. ICRC, Customary IHL Rule 96: 'Hostage-Taking', at: https://bit.ly/3GPHRgS.

[235] Torture and rape are similarly always prohibited under international law irrespective of the prevailing circumstances. Where the intent is to terrorize, they may justly be considered also as acts of terrorism. In certain cases, such acts also amount to international crimes.