

**IX. International Criminal Law,
Terrorism, and Crisis**

Terrorism under the umbrella of International Criminal Law: legislating terror in Egypt under a draconian counter-terrorism law, ex aequo et bono

MOHAMED A. 'ARAFA

Assistant Professor of Law, Alexandria University Faculty of Law (Egypt); Adjunct Professor of Law, Indiana University Robert H. McKinney School of Law (USA)

AND

ADAM J. REVELLO

*BA student, Politics, Pomona College, The author can be contacted at
adam.revello@pomona.edu*

"The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed."¹

Geoffrey Levitt

Introduction: Crisis in the EU, and the need for international perspective

Following the end of the Cold War, many scholars and policymakers believed that Europe had reached an *end of history* in which the continent would live free of existential security threats.² Recent shifts in

¹ See Geoffrey Levitt, 'Is "terrorism" worth defining?'; 13 *Ohio N.U. L. Rev.* 97, 97 (1986).

² See Francis Fukuyama, *The End of History and the Last Man* (2006), <https://books.google.com/books?hl=en&lr=&id=NdFpQwKfX2IC&oi=fnd&pg=PR9&dq=>

geopolitical forces, as well as the rise of the self proclaimed Islamic State, have now put security policy back on the map for Europe. An uncontrolled stream of migration in a borderless Schengen area, coupled with Europe's historical troubles with failed integration and domestic radicalization present a dangerous opportunity for terrorist organizations. As a recent Europol report noted, the security risk posed by terrorism has increased in recent years, and is likely to continue on an upward trajectory for the foreseeable future.³ In 2015 alone, 151 people were killed and 360 wounded as a result of terrorist attacks in the EU.⁴ The ability of ISIL to conduct large scale attacks in Europe, as well as inspire self radicalized terrorists demonstrates the continuing threat posed by radical Islamist groups.⁵ The U.N. Security Council's ("UNSC") unanimous decision to enact a French-proposed resolution affirming that IS is a "global and unprecedented threat to international peace and security," confirms that international terrorism is a global crisis.

European law enforcement agencies will have to step up their efforts in order to combat terrorist threats. However, these efforts will be less effective unless there is a clear and shared understanding of how terrorism should be conceptualized theoretically, and defined legally. Academic analysis of anti-terrorism laws is therefore essential. While Europe faces a particularly high terrorist threat, the EU's counter-terror strategy extends far beyond European borders. Some of the most important axis of cooperation in the fight against terrorist groups exists between the U.S. and the EU, as well as bilaterally between the U.S. and individual EU member states.⁶ In addition to their transatlantic partners, European policymakers collaborate with governments around the world in order to combat terrorist organizations. The inter-

fukuyama +end+of+history&ots=LBQQWsE30D&sig=PB4ZCsQ_BEBazH9x2M9SktweDaM (last visited Aug. 27, 2016).

³ EUROPOL, *European Union Terrorism Situation and Trend Report*(TE-SAT) 2016.

⁴ *Id.*

⁵ *Id.*

⁶ Rik Coolsaet, 'EU counterterrorism strategy: value added or chimera', 86 *Int. Aff. Lond.* 857–873 (2010).

national nature of terrorism in the 21st century necessitates that our efforts to analyze the anti-terrorism legal framework cannot be limited to the EU or its member states. Rather, it is critical to analyze the international criminal law under which terrorism can be prosecuted in a comparative perspective.

Therefore, this chapter will shed some light on the counter - terrorism international legal framework by using the post-Morsi terrorist attacks in Egypt as a case study. Part II frames this legal apparatus by highlighting the lack of theoretical clarity on the meaning of terrorism, and reviewing the sociological literature on the elements of terrorism. Part III furthers this analysis by reviewing terrorist attacks committed in Egypt, and evaluates them under the terrorist-related offenses, treaties and UNSC counter-terrorism resolutions. Part IV examines whether or not there is an international crime of terrorism under international (customary) law, and Part V explores if those attacks rise to the level of war crimes and crimes against humanity (humanitarian law). The chapter concludes by making policy recommendations to combat terrorism.

Terrorism – A Theoretical Overview

The word terrorist is applied to a wide variety of groups engaged in many different types of conflict. Terrorism is most commonly associated with radical Islamic extremist ideologies, or groups like *al-Qaeda* and Islamic State in Iraq and the Levant (“ISIS/*da'esh*”).⁷ However, it is also not uncommon to refer to state terrorism—the institutionalized use of force by a government to control its citizens— or state sponsored terrorism — the practice of governments financing non-government terrorist groups.⁸ States like Turkey even use the word terrorist to refer

⁷ While Islamic extremism does contribute to special kinds of terrorism, there are several other forms; each has their own features and challenges for policymakers. These categories frequently overlap to describe single terrorist groups but are beneficial in providing a way of distinguishing what these groups will target and what motivates them.

⁸ In modern history one could look to the use of violence by Saddam Hussein against the Kurds or even the suppression of democratic protestors in Syria by

to separatist minority groups that respond to state repression by fighting for the creation of a new nation-state.⁹

Despite the ubiquitous nature of the word terrorism in modern political discourse, there is an astonishing lack of consensus as to what exactly terrorism is.¹⁰ The U.S. government alone employs 22 different definitions of terrorism.¹¹ A survey of the academic literature reveals that there are only two characteristics of terrorism which are used in a majority of academic studies. The first characteristic is that terrorism involves some sort of violence, and the second is that the violence be of a political nature.¹² One scholar exemplifies this mode of thinking by defining terrorism as, “violence—or equally important, the threat of violence used and directed in pursuit of or in service of a political aim.”¹³ While most acts considered to be terrorism can surely be classi-

Basher al-asad. Joseph K. Young and Laura Dugan, ‘Survival of the fittest: why terrorist groups endure’, 8 *Perspectives on Terrorism* 2 (2014). See also Mark Jurgensmeyer, *Terror in the Mind of God* (University of California Press 2000).

⁹ Hsiang-en Huang, ‘Is separatism terrorism? Sharnoff’s global views’, May 8, 2014, <http://www.sharnoffsglobalviews.com/uyghur-separatism-terrorism-294/> (“What is the difference between separatism and terrorism and why is it important for governments to understand this?... While separatism is frequently misunderstood, the diversified nature of separatism gives us a chance to examine the difference between separatism and terrorism, which the later could be categorized as an abhorrent act of violence that is perceived as directed against society, and the former is not necessarily using violence to disrupt life.”).

¹⁰ Colin J. Beck & Emily Miner, ‘Who gets designated a terrorist and why?’ *Soc. Forces* 90(2) (2013).

¹¹ Nicholas J. Perry, ‘Numerous federal legal definitions of terrorism: the problem of too many grails’, 30 *J Legis* 249 (2003).

¹² Leonard Weinberg, Ami Pedahzur & Sivan Hirsch-Hoefler, ‘The challenges of conceptualizing terrorism’, 16 *Terror. Political Violence* 777-794 (2004).

¹³ Bruce Hoffman, *Inside Terrorism* (2006), https://books.google.de/books?hl=de&lr=&id=_ayrAgAAQBAJ&oi=fnd&pg=PR1&dq=bruce+hoffman+inside+terrorism&ots=qUa7fErNoW&sig=zv95rP78sdtPg04ApKWSrBj6JiE (last visited Aug 27, 2016), at 2-3. Hoffman goes on to elaborate that it is possible to identify some main features of terrorism. He recited: “By distinguishing terrorists from other types of criminals and terrorism from other forms of crime, that terrorism is: (a) ineluctably political in aims and motives; (b) violent—or, equally important, threatens vio-

fied as political violence, there is a plethora of political violence that most would refuse to define as terrorism. For example, many people would agree that *Al Qaeda's* attack on 9/11 can be thought of as both terrorism and politically motivated violence—violence with the aim of repulsing western influence in the world. However, the U.S. decision to respond by invading Afghanistan was also clearly a form of political violence—violence designed to remove the *Taliban* from political power. While the invasion was decidedly controversial, many would dispute classifying it as a form of terrorism. Adjudicating the debate on whether U.S. intervention in the Middle East is a form of state terrorism is beyond the scope of this chapter. The important point is that simply thinking of terrorism as political violence is insufficient for generating the level of theoretical clarity required to engage in serious legal analysis.

In addition to violence that is politically motivated, terrorism is often considered to be violence perpetrated by an illegitimate actor. For example, Lizardo defines terrorism as any form of violence that is implemented by a non-state actor.¹⁴ This understanding of terrorism relies on the notion that states alone have a monopoly on the legitimate use of force.¹⁵ While Lizardo's theories are certainly relevant in the present, state-centric international legal framework, some consider non-state actors to be morally—if not legally—legitimate. The relevance of

lence; (c) designed to have far-reaching psychological repercussions beyond the immediate victim or target; (d) conducted either by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia) or by individuals or a small collection of individuals directly influenced, motivated, or inspired by the ideological aims or example of some existent terrorist movement and/or its leaders; and (e) perpetrated by a sub national group or non-state entity." *Id.*, at 34-40.

¹⁴ Omar Lizardo, 'Defining and theorizing terrorism: a global actor-centered approach', 14 *World-Syst. Res.* 91-118 (2015).

¹⁵ Colin J. Beck, *Radicals, Revolutionaries, and Terrorists* (2015), https://books.google.com/books?hl=en&lr=&id=HDxUCgAAQBAJ&oi=fnd&pg=PT6&dq=colin+beck+radicals+revolutionaries+and+terrorists&ots=pF_BWvTEI4&sig=dBHqZMUPr57qFAOHOZYndaAebhg last visited Aug 25, 2016).

legitimacy in describing terrorism is captured by the adage *one man's terrorist is another man's freedom fighter*. Indeed, there can be a fine line between repugnant extremist violence and morally justified armed resistance. Angus Martyn elaborated on this point in his briefing to the Australian Congress, in which he stated:

The international community has never succeeded in developing an accepted comprehensive definition of terrorism. During the 1970s and 1980s, the United Nations attempts to define the term floundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination...¹⁶

The use of political violence is especially contentious in these situations because they necessarily involve conflicting claims about the legitimacy of the government in question.¹⁷ It is therefore not surprising that, in recent decades, religious and ethnic activists are by far the most frequent non-governmental actors to employ terrorism.¹⁸ Still, analyzing terrorism as illegitimate, politically motivated violence leaves a murky gray area between terrorism and civil war.

There are other ways of thinking about terrorism that put less emphasis on the legitimacy of the actor. Tilly argues that terrorism should not be conceptualized in terms of the characteristics of the perpetrator, but rather as a tactic or strategy. Specifically, terrorism is "asymmetrical deployment of threats and violence against enemies using means that fall outside the forms of political struggle routinely operating

¹⁶ Angus Martyn, 'The right of self-defense under international law: the response to the terrorist attacks of 11 September', *Australian Law and Bills Digest Group*, Parliament of Australia, Feb. 2001, <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=193762> (provides an international law debate on the use of force by the United States claiming self-defense against the terrorist network *al-Qaeda* in the wake of the September 11 terrorist attacks).

¹⁷Beck, *supra* note 17.

¹⁸Donald L. Horowitz, *The Deadly Ethnic Riot* (2001), <https://books.google.com/books?hl=en&lr=&id=UwA1aaB2WGgC&oi=fnd&pg=PR13&dq=Horowitz,+D.+L.+2001.+The+Deadly+Ethnic+Riot.+Berkeley:+University+of+California+Press.&ots=VGxh7VhTGR&sig=sMsJg6oTTujs3GiQSVfjG0zEVEs> (last visited Aug 27, 2016).

within some current regime.”¹⁹ This definition of terrorism emphasizes the asymmetrical nature of terrorism – therefore distinguishing terrorism from a civil war with evenly matched sides. Rather, terrorism usually involves either a disproportionate use of violence by the state, or the mismatched power dynamic between a government and a non-state actor. By viewing terrorism as a strategy, Tilly’s definition allows for any actor to be considered a terrorist so long as they employ asymmetric violence that is outside of the norms of normal political operations.²⁰ Similarly, Bergessen avoids tricky questions of legitimacy by proposing a three-step model of terrorism based on the relationship between victim and perpetrator. Bergessen argues that there are three relevant parties to any terrorist act—the terrorist, the victim, and the so called target *audience*. For example, an army achieves their political goal by killing enemy soldiers and destroying the other side’s ability to continue fighting. Thus, the target and victims of an attack are usually the same individuals in traditional military strategy. Terrorism on the other hand, is unique in that the political aim of the terrorist cannot be achieved simply by killing the victims directly. Terrorists often kill civilians in the hopes that their governments will give in to the terrorists’ demands in order to prevent further attacks. The proximate victims of a terrorist’s violence are not the target of the violence itself. Rather, the target of the violence is an audience that has the power to make the changes that achieve the terrorist’s goals.²¹

While each of these views of terrorism has its strengths and weaknesses, most definitions of terrorism combine multiple theoretical ap-

¹⁹ Charles Tilly, ‘Terror, terrorism, terrorists’, 22 *Sociol. Theory* 5–13 (2004), at 5.

²⁰ Based on this understanding of terrorism, Tilly generates predictions about the likely forms that terrorism will take. Specifically, “Terror as a strategy therefore ranges from (1) intermittent actions by members of groups that are engaged in wider political struggles to (2) one segment in the modus operandi of durably organized specialists in coercion, including government-employed and government-backed specialists in coercion to (3) the dominant rationale for distinct, committed groups and networks of activists.”

²¹ Albert Bergesen, ‘Three-step model of terrorist violence’, 12 *Mobilization Int. Q.* 111-118 (2007).

proaches. The U.S. Code Title 22 Chapter 38, Section 2656f(d) defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents, usually intended to influence an audience.”²² Similarly, several international legal scholars argue that terrorism “constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted” and “the recurrent use or threatened use of politically motivated and clandestinely organized violence, by a group whose aim is to influence a psychological target in order to make it behave in a way which the group desires.”²³

²² See 22 U.S. Code § 2656f: *Annual Country Reports on Terrorism (LII)/Legal Information Institute*, <https://www.law.cornell.edu/uscode/text/22/2656f>. Also, the US Code defines “international terrorism” as “the activities that include the following three characteristics: (a) violent acts or acts that are dangerous to humans life that violate federal or state law; (b) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and 3-” Also, the U.S. Department of Defense stipulated that “terrorism is the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.” See Cheryl Pellerin, ‘Obama: terrorism threat is real but we will overcomeit’, US Department of Defense, Dec. 7, 2015, <http://www.defense.gov/News-Article-View/Article/633156/obama-terrorism-threat-is-real-but-we-will-overcome-it> (“The United States has become better at preventing complex, multifaceted attacks like those that took place on 9/11,... but terrorists have turned to less complicated acts of violence like the mass shootings at Fort Hood, Texas, in 2009; in Chattanooga, Tennessee, in July; and in San Bernardino, California... The threat from terrorism is real, but we will overcome it,... We will destroy [the Islamic State in Iraq and the Levant] and any other organization that tries to harm us... We will prevail by being strong and smart, resilient and relentless, and by drawing upon every aspect of American power.”)

²³ See C.J. M. Drake, ‘The role of ideology in terrorists’ target selection’, 10 *Terrorism & Political Violence* 2 (1998), at 53-85, <https://www.ciaonet.org/attachments/6047/uploads> (“Ideology plays a crucial role in terrorist’s target selection; it supplies terrorists with an initial motive for action and provides a prism through which they view events and the actions of other people. Those people and institutions whom they deem guilty of having transgressed the tenets of the terrorists’

While each definition differs slightly, they all contain several key conceptual elements of terrorism. All of the above definitions underscore that terrorism is:

- (i) A strategy
- (ii) involving violence
- (iii) used by illegitimate or non-state actors
- (iv) to influence a target/audience
- (v) in order to achieve a political goal

It is difficult to create one parsimonious understanding of terrorism that includes the numerous actions that can be carried out by terrorist groups.²⁴ Using concrete examples of terrorism can help to shed light

ideologically-based moral framework are considered to be legitimate targets which the terrorists feel justified in attacking). See also Walter Laqueur, 'Postmodern terrorism: new rules for an old game', 75 *Foreign Affairs* 5 (1996), <https://webcache.googleusercontent.com/search?q=cache:PEMwWFYKvj0J:https://www.foreignaffairs.com/articles/1996-09-01/postmodern-terrorism-new-rules-old-game+%&cd=1&hl=en&ct=clnk&gl=br> ("From this perspective the recent upsurge of terrorist activity is not particularly threatening. According to the State Department's annual report on the subject, fewer people died...in incidents of international terrorism ... Such figures, however, are almost meaningless, because of both the incidents they disregard and those they count. Current definitions of terrorism fail to capture the magnitude of the problem worldwide. Terrorism has been defined as the sub-state application of violence or threatened violence intended to sow panic in a society, to weaken or even overthrow the incumbents, and to bring about political change.").

²⁴ The significance of the additional concept of 'terrorist' provided by the OED should be recognized; "anyone who attempts to further his views by a system of coercive intimidation." This definition highlights the other essential character of terrorism: that it is a planned, calculated, and indeed systematic act. Hoffman, *supra* note 4. It may be therefore conclude that terrorism would be: (1) the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change; (2) every terrorism act involves violence or the threat of violence; (3) is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack; (4) meant to instill fear within, and thereby intimidate, a wider "target audience" that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general; (5) is designed to create power through the

on what is otherwise an anfractuous discussion. Therefore, against this succinct backdrop, we now turn to Egypt as a case study in order to analyze how international law can be applied to terrorist acts.

Egypt's Attacks After June 30, 2013 Popular Coup: A crusade of 'terrorism', homicide, arson, and suicide bombings

On July 3, 2013, the Military ousted president Mohammad Morsi in response to the calls of millions of Egyptians who took to *Tahir* Square to protest against the Muslim Brotherhood's religious dictatorship. In the aftermath of this historic event, Egypt has witnessed one of the most severe waves of terrorism in modern history.²⁵ The Egyptian court's have responded by barring the Muslim brotherhood (MB) and *ansar beit el-maqdis* ("ABM") as terrorist organizations and forbidden all of their activities.²⁶ While this move has come under some criticism, it is important to understand the Egyptian government's rationale for viewing the MB as a terrorist organization. First, it should be noted that the MB – founded in 1928 by Hassan al-Banna – is considered the most universally influential "Islamist" organization.²⁷ Al Banna denied

publicity generated by their violence; and (6) terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or an international scale.

²⁵ See generally Mohamed 'Arafa, *whither Egypt? Against religious fascism and legal authoritarianism: pure revolution, Popular coup, or a military coup d'état?* 24 *Indiana Int'l. & Comp. L. Rev.* 4 (2014).

²⁶ See Zachary Laub, 'Egypt's Muslim Brotherhood', Jan. 15, 2014, *Council on Foreign Relations* (CFR), para. 3, <http://www.cfr.org/egypt/egypts-muslim-brotherhood/p23991>. See Ryan Mauro, 'Egyptian Muslim Brotherhood videos call for violence', June 2, 2015, *The Clarion Project*, para. 1, <http://www.clarionproject.org/analysis/egyptian-muslim-brotherhood-videos-call-violence>. See U.S. Department Of State, *Terrorist Designation of Ansar Bayt al-Maqdis*, *Media Note*, Office of the Spokesperson, Washington, DC, Apr. 9, 2014, <http://www.state.gov/r/pa/prs/ps/2014/04/224566.htm> ("The Department of State has announced the designation of *Ansar Bayt al-Maqdis* as a Foreign Terrorist Organization (FTO) under Section 219 of the Immigration and Nationality Act and as a Specially Designated Global Terrorist entity under section 1(b) of Executive Order (E.O.) 13224.").

²⁷See generally Lawrence Wright, *The Looming Tower: Al-Qaeda and the road to*

the Western model of secular, democratic government, which contradicted his notion of universal Islamic ruling.²⁸ Recently, the MB has advocated violence against the Egyptian police, military, foreigners, judges, embassies, and interests in the region linked to countries that support Egypt's current President 'Abdel Fattah el-Sisi.²⁹ Furthermore, they announced a decision for revolution "with all its means and mechanisms" against the current elected government, focusing attacks on the police, army, and senior public officials. This included a high profile assassination attempt on the Egyptian Interior Minister in 2013.³⁰

Although the government's motivation for cracking down on the brotherhood is understandable, there is some controversy surrounding the state's methods. Specifically, some have criticized the dispersion of the MB-led "*raba'a al-adaweya*." A report issued by the National Council for Human Rights ("NCHR") fact-finding mission found that there was lack of proportionality in use of force by the security forces in specific cases while scattering the sit-in, the peaceful demonstrators did not have an ample opportunity to leave the sit-in, and there was an inadequate attempt to secure safe passage of the peaceful protestors.³¹ However, the same report revealed:

(i) the groups that were responsible of securing the sit-in exposed

9/11 (2006).

²⁸See Bryony Jones and Susannah Cullinane, 'What is the Muslim Brotherhood?' CNN, July 3, 2013, *para.* 11, <http://www.cnn.com/2013/07/03/world/africa/egypt-muslim-brotherhood-explainer/> (last visited Aug. 30, 2016).

²⁹ Mauro, *supra* note 27, at *para.* 2.

³⁰See Stanford University, 'Mapping militant organizations', <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/557> (defining the Islamic State, Sinai Province) (last retrieved Aug. 30, 2016).

³¹*Id.* Also, the report recites: "Armed violence acts erupted in 22 governorates where a number of churches and governmental facilities were burnt and some police stations were attacked. The violence acts lasted for 4 days from the morning of 14/8/2013 until the evening of 17/8/2013, which led to 686 deaths including 622 civilians and 64 policemen. It is believed that most of the civilian casualties were of innocent citizens who happened to be during the indiscriminate firing carried out by some elements or during armed clashes with security forces".

- some of the citizens who were present at the *raba'a* sit-in to torture and cruel treatment for various reasons;
- (ii) many citizens were arrested by the administration of the sit-in, in order to investigate them through the groups securing the sit-in . . . , or against some individuals who used to provide services to the sit-in;
 - (iii) MB and its supporters used children in the political conflict with their opponents;
 - (iv) civilians carried weapons inside the sit-in, and
 - (v) the armed groups in the sit-in used civilians as human shields.³²
- Moreover,

the committee documented through viewing many recorded videos for speakers on the podium of the sit-in, whose words included incitement of violence, fighting and martyrdom. Furthermore, such videos contained paramilitary demos practiced by some members inside the sit-in. The speeches represented a discourse calling for discrimination on the basis of religion and insulting some of the Islamic and Christian religious symbols, which would be described as inciting on hatred. And in return, the committee has monitored a similar speech inciting on violence and hatred against the protesters in some satellite TV channels and some media outlets, such acts represent a violation of the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the international conventions against all forms of discrimination.³³

³² See Law No. 94 of 2003 'Promulgating the National Council for Human Rights', <http://www.nchregypt.org/index.php/en/about-us/establishment.html>. See 'Summary of the National Council for Human Rights fact-finding mission about the disperse of Raba'a al-'Adaweya Sit-in', Mar. 11, 2014, <http://www.nchregypt.org/index.php/en/activities/publications/1424-rabaa-reporttranslation.html> at *para(s)*. 1, 4.1, 5.1, 2.1., 2.2., 6.1., 2.4., 1.2. & 2.3.

³³ *Id.* See International Covenant on Civil and Political Rights (opened for signature Dec. 19, 1966, 999 U.N.T.S., 171 and entered into force Mar. 23, 1976), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

Terrorists succeeded in ending Egypt's Attorney General Justice Hisham Barakat's life in June 2015 through a bomb attack on his car in Cairo. This incident happened shortly after IS called for attacks on the judiciary.³⁴ The Egyptian people have not only felt the brutality of terrorism on their own soil, but also as foreigners abroad. In February 2015, masked militants linked to ISIL slaughtered twenty-one (21) Egyptian Christian workers in Libya, prompting Egyptian warplanes (military) to respond by bombarding *jihadi* targets in Libya.³⁵ "Terrorism" not only kills or injures innocent individuals and strikes against

³⁴ See 'Egypt Prosecutor Hisham Barakat killed in Cairo attack', *BBC News*, June 29, 2015. <http://www.bbc.com/news/world-middle-east-33308518> ("Mr. Barakat is the most senior figure to have been targeted for assassination since a 2013 attempt on the life of the then-interior minister."). In the same month, militants carried out separate attacks near the Pyramids at Giza and the *Karnak* temple in Luxor, two of Egypt's most popular touristic locations. Also, IS claimed liability for a car bomb attack at the Italian Consulate in Cairo in July 2015. See Kareem Fahim and Merna Thomas, 'Egypt's top prosecutor is most senior official to die in insurgency', *N.Y. Times*, June 29, 2015, http://www.nytimes.com/2015/06/30/world/middleeast/road-sidebomb-injures-egypts-top-prosecutor.html?_r=0 ("The rise of the new groups coincided with a shift in the insurgency's focus: After nearly... of attacks mainly against the security services, killing hundreds of soldiers and police officers, the militants have broadened their targets to include civilian officials in the judiciary."). See Michael Georgy, 'Islamic State says behind bombing at Italian Consulate in Cairo', *Reuters*, July 11, 2015, <http://www.reuters.com/article/2015/07/11/us-egypt-blast-idUSKCN0PL05H20150711> ("Islamic State claimed responsibility for a car bomb attack at the Italian Consulate in central Cairo..., in an escalation of violence that suggests militants are opening a new front against foreigners in Egypt.") (last visited Aug. 30, 2016).

³⁵ See 'Egyptian air strikes in Libya kill dozens of ISIS militants', *The Guardian*, Feb. 17, 2015, <http://www.theguardian.com/world/2015/feb/16/egypt-air-strikes-target-isis-weapons-stockpiles-libya> ("The attacks were "to avenge the bloodshed and to seek retribution from the killers," ... "Let those far and near know that Egyptians have a shield that protects them." They followed... ISIS's familiar heartland in Syria and Iraq"). It should be noted that the situation in Libya since February 15, 2011 was referred to the Prosecutor of the International Criminal Court. See UNSC Resolution 1970 (2011), adopted by the Security Council at its 649, 1st meeting, Feb. 26, 2011, <http://www.un.org/en/sc/documents/resolutions/2011.shtml> (last retrieved Aug. 30, 2016).

human rights and fundamental freedoms, but also causes severe damage to victims' families and relatives. This amplifies the impact of terrorism resulting in grave harm to a state's social order, peace, and security.

Egypt's Post June 30, 2013 Attacks under International Treaty Law: Terrorist Related-Criminal Acts Conventions

It is necessary to inspect the relevant international conventions binding on Egypt concerning countering international terrorism.³⁶ Some argue that, unlike other international crimes (*i.e.* war crimes, genocide, aggressions, and crimes against humanity) a comprehensive definition of international terrorism – including all terrorist actions and excluding all non-terrorist acts from its scope – still does not exist.³⁷ Several scholars posit that this is because terrorism is a subjective idea, which “exists in the mind of the beholder, depending upon one's political views and national origins.”³⁸ Therefore, in order to obtain some

³⁶ For further details on Egypt's international obligations under treaties, see generally 'Vienna Convention on the Law of Treaties' (1969), at art. 26, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”).

³⁷ See Matthew J. Manning, 23 *Public Lawyer* 2 (2015), at 9-13, http://heinonline.org.proxy.mckinneylaw.uits.iu.edu/HOL/Page?handle=hein.journals/pubilaw23&start_page=9&i=35 (“Throughout history, terrorism has been difficult to define. For some, terrorism is an offense, and, for others, it is an activity assigned by God; some see it as a distinctive act of maintaining power, and others believe that it is a justified action against oppression; some view it as an attack on peace and security, and others see it as a quest for identity.”). See 'International Legal Instruments, United Nations Action to Counter Terrorism', <http://www.un.org/en/terrorism/instruments.shtml> (last visited Aug. 30, 2016).

³⁸ Roberta Arnold, 'The prosecution of terrorism as a crime against humanity', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004): 979-1000, at 980, para 1., http://www.hjil.de/64_2004/64_2004_4_a_979_1000.pdf. It is noteworthy to acknowledge that the first attempt to formulate a definition of international terrorism had begun during the negotiations of the draft Convention for the Prevention and Punishment of Terrorism (1937), though the attempt failed due to the absence of agreement between the states on the scope and elements of the definition. See

guidance in examining our case, we will be focusing our analysis mostly on the three most crucial multilateral terrorism-related conventions: the International Convention for the Suppression of Terrorist Bombings, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, and the International Convention for the Suppression of the Financing of Terrorism.

1. *Are there multilateral terrorism-related crimes agreements applicable to Egypt' sattacks? Were there "Criminal Acts or Offenses" committed within these treaties?*

The International Convention for the Suppression of Terrorist Bombings 1997 ('Terrorist Bombing Convention') reads:

Any 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, a public transportation system or an infrastructure facility:

- (a) with the intent to cause death or serious bodily injury; or
- (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss."

Also, it states that:

Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

.. Any person also commits an offence if that person:

- (a) participates as an accomplice in an offence as set forth in

Upendra D. Acharya, 'War on terror or terror wars: the problem in defining terrorism', 37 *Denver J. Int'l L. & Policy* (2009), at 657-658. Therefore, instead of adopting a "top-down" (deductive perspective) in establishing the international legal framework of countering terrorism by firstly adopting an inclusive concept for the crime of international terrorism, the international community opted, for practical grounds, to adopt a "ground-up" (inductive trend) in that area.

- paragraph 1 or 2; or
- (b) organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or
 - (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”³⁹

A number of post June 30 attacks in Egypt fall under the acts forbidden by this agreement and accordingly create “offences” under it. A number of attacks were carried out through bombed cars and suicide bombers against public (governmental) officials, police, and military “places” and “facilities,” with the *intent* to cause death or serious bodily injuries, mainly to the police, military personals, judges, and foreigners.⁴⁰ Also “attempts” to commit such crimes, even those that fail

³⁹See ‘International Convention for the Suppression of Terrorist Bombings’ (adopted by the UN General Assembly Dec. 15, 1997 & entered into force May 23, 2001, Egypt acceded on Aug. 9, 2005), at arts. 2(1), 2(2) & 2(3), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&lang=en. It also said “this 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 6(1)(2)... to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.” *Id.*, at art. 3.

⁴⁰ Examples are numerous. See *ISIS Claims Responsibility for Cairo Car Bomb that Wounds 29*, CNN, Aug. 20, 2015, <http://www.cnn.com/2015/08/19/middleeast/egypt-explosion/> (“ISIS claimed responsibility for a car bomb attack that wounded at least 29 people in Cairo..., saying it was retribution for the execution of six men...”). See Erin Cunningham and Heba Habib, ‘Suicide bomber, 2 other armed men target Egypt’s temple site at Luxor’, *The Washington Post*, June 10, 2015, https://www.washingtonpost.com/world/middle_east/suicide-bombers-target-egypts-famed-temple-site-atluxor/2015/06/10/

due to effective security force involvement, still fall under this treaty.⁴¹ The convention is not “inapplicable” in some of these attacks, because the “offence” in each of these acts was deployed in more than a single state close to Egypt. Most of the explosive devices were either smuggled from the Gaza strip or Libya, and some of the perpetrators, organizers, contributors, and directors were not Egyptians.⁴² In some circumstances the convention is not “inapplicable,” because states have a basis to exercise jurisdiction when the offence is committed in an attempt to compel that state to practice political pressures on the Egyptian government or to stop dealing with or assisting the Egyptian government.⁴³

Article 7(2) of this Convention stipulates “upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law in order to ensure that person’s presence for the purpose of prosecution or extradition.” Therefore, all state parties should search for and extradite to Egypt, or prosecute in good faith, persons within their territories who committed, attempted, participated, organized, directed or contributed in the commission of any of the aforementioned “crimes.” Because the treaty is not voided by the multi-state nature of the perpetrators and crimes, failure to do so

454aa76c-0a7e-43ef-ab9d-c48dfc6752de_story.html (“Militants with explosives battled Egyptian security forces outside the ancient *Karnak* temple in Luxor..., striking one of Egypt’s most famous tourist sites and raising fears over the potentially expanding reach of the country’s Islamist insurgency.”).

⁴¹ See ‘1 dead, 9 hurt in car bomb blast at Italian Consulate in Egypt’, *CNN*, July 11, 2015, <http://www.cnn.com/2015/07/11/middleeast/egypt-cairo-explosion/> (last retrieved Aug. 30, 2016) (“A car bomb exploded outside the Italian Consulate in downtown Cairo, killing at least one person and significantly damaging part of the building, Nine others were injured in the blast,...Various social media accounts that belong to ISIS supporters have been sharing a statement they say is from the terror group claiming responsibility for the attack...”).

⁴² Acharya, *supra* note 40.

⁴³ However, the attacks which were committed only in Egypt and no other state(s) has basis to exercise jurisdiction on, do not fall under this pact, though they could fall under other international, regional, and domestic legal regimes.

would be in breach of the *aut dedere aut judicare* procedural universal norm.⁴⁴

Similarly, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 ("Diplomatic Agents Convention") states: "the intentional commission of:

- (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (b) a violent attack upon the official premises, the private accommodation or the means of transport or an internationally protected person likely to endanger his person or liberty;
- (c) a threat to commit any such attack;
- (d) an attempt to commit any such attack; and
- (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law."⁴⁵

Several post June 30 attacks fall under the deeds described by this treaty and hence constitute "offenses" under it. For example, the car bomb attack against the Italian Consulate in Cairo in July 2015, which ISIL claimed responsibility for, does not fall only under the acts pro-

⁴⁴ *Id.*, 'Terrorist Bombing Convention', *supra* note 33, at art. 7(2). Additionally, the Egyptian Constitution discusses the current "war on terrorism" in one of its transitional provisions and reads: "The State commits to fighting all types and forms of terrorism and tracking its sources of funding within a specific time frame in light of the threat in represents to the nation and citizens, with guarantees for public rights and freedoms. The law organizes the provisions and procedures of fighting terrorism, and fair compensation for the damages resulting from it and because of it." See 'Constitution of the Arab Republic of Egypt': January 18, 2014 (Egypt), at art. 237, https://www.constituteproject.org/constitution/Egypt_2014.pdf.

⁴⁵ 'Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons' (adopted by the UN General Assembly Dec. 14, 1973 & entered into force Feb. 20, 1977, Egypt acceded on June. 25, 1986), at art. 17(1), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-7&chapter=18&lang=en. Also it states "each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature. *Id.*, at art. 2(2).

hibited by the Terrorist Bombing Convention, but also under this one.⁴⁶ This is because an *intentional* commission of a violent attack upon the official properties of an internationally protected person occurred.⁴⁷ According to the Vienna Convention on Consular Relations 1963, a foreign consul is an official of a State who is entitled to exceptional safety from any attack on his person and freedom.⁴⁸ Therefore, the Diplomatic Agent's Convention is especially relevant for this attack. In contrast to the Terrorist Bombing Convention and the Terrorist Financing Convention, under this convention there is no prospect that the crime could be considered a *pure* domestic crime. It cannot be excluded from the scope of application of the convention because the Diplomatic Agents Convention prohibits crimes committed against internationally protected persons. Thus, the crime is inherently and automatically considered transnational.⁴⁹ Additionally, MB members could be considered as having committed "crimes" prohibited by the Diplomatic Agents Convention.⁵⁰ Therefore, considering Article 7 of this Conven-

⁴⁶ *Id.*

⁴⁷ This Convention stipulates that "Internationally protected person" means: "Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household." *Id.*, at art. 1(1)(b).

⁴⁸ 'Vienna Convention on Consular Relations' (adopted by the UN General Assembly Apr. 24, 1963 & entered into force Mar. 9, 1967, Egypt acceded on June 21, 1965), at art. 77, <http://legal.un.org/avl/ha/vccr/vccr.html>. Thus, the foreign consul is considered an "internationally protected person" under the Diplomatic Agents Convention. So, the car bomb attack against the consulate is proscribed under it.

⁴⁹ *Id.*

⁵⁰ For example, in July 2013, a MB leader called on to lay siege to the U.S Embassy in Cairo to protest what he said was American support for the ouster of "Islamist" President Morsi. Thus, this "call to siege" the US Embassy could be considered to fall under Article 2(1)(a) of this agreement which prohibits the intentional commission of any assault, threat to commit or an attempt to commit any such attack upon the person or liberty of an internationally protected person. See 'Egyptian Muslim Brotherhood Leader Calls for Attack on US Embassy, *News max*,

tion which states: "the State Party in whose territory the alleged offender is present shall... the purpose of prosecution..." all state parties should search for and extradite to Egypt, or prosecute, in a good faith, persons present on their territories allegedly committed, threatened, attempted or participated in the commission of any of the aforementioned "crimes," otherwise, *aut dedere aut judicare* is breached universally.⁵¹

In the same vein, the International Convention for the Suppression of the Financing of Terrorism 1999 ("Terrorist Financing Convention") instructs:

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

- (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁵²

Furthermore, it states:

Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1

July 22, 2013, <http://www.newsmax.com/Newsfront/muslim-brotherhood-us-embassy/2013/07/22/id/516421/>.

⁵¹ Arnold, *supra* note 40.

⁵² 'International Convention for the Suppression of the Financing of Terrorism' (adopted by the UN General Assembly Dec. 9, 1999 & entered into force Apr. 10, 2002, Egypt acceded on Mar. 1, 2005), at art. 2(1).

of this article”... Any person also commits an offence if that person:

- (a) participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
- (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
- (c) contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
 - (ii) be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.”⁵³

Generally, persons who provided or collected funds in order to carry out any of the previously mentioned “offences” committed in Egypt, which are prohibited by the Terrorist Bombing Convention, could be charged with “participating” or “contributing” in those crimes banned by the convention. This is because of Article 2(3)(a)(c) states that any person commits an offence if that person “participates” as an accomplice in an offence as set [in it] or in any other way “contributes” to the commission of one or more offences as set [in it] by a group of persons acting with a common purpose.⁵⁴ Persons who pro-

⁵³ *Id.*, at arts. 2(4) & 2(5). Further, it states: “this Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.” *Id.*, at art. 3.

⁵⁴ *Id.*, at art. 2/3(a)(c). Also persons provided or collected funds in order to carry out any of the mentioned “crimes” committed in Egypt which are banned under the Diplomatic Agents Convention, could be charged with “participating” in

vided or collected funds in order to carry out any of the previous "offences" or "crimes" committed in Egypt could be charged with committing an "offense" within the scope of Article 2/1(a)(b) of the Terrorist Financing Convention. This article forbids providing/collecting funds, or "attempting," "participating," "organizing," or "contributing" to commit this act, in order to carry out "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, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁵⁵ Therefore, based on Article 10(1) of this convention, all state parties should search for and extradite to Egypt, or prosecute in good faith, persons present in their territories allegedly provided financial support to MB or ABM, with the knowledge of any of their engagements in offences prohibited by the aforementioned settlements.⁵⁶

On the multi-national level, the Arab Convention on the Suppression of Terrorism 1998 and the Organization of African Union Convention on the Prevention and Combating of Terrorism 1999 set various definitions for terrorism.⁵⁷ Furthermore, in February 2010, pursuant to a decision taken by the African Union ("AU") Assembly, the AU

committing those crimes prohibited by the latter convention, under its Article 2(1)(e), which considers any act constituting "participation" as an accomplice in any attack according to the convention shall be made a crime under domestic laws.

⁵⁵ *Id.*

⁵⁶ For further details on foreign financial support to terrorism-related offences/groups, see Amr Adly, 'Investigating the Muslim Brotherhood economy', *The Tahrir Institute For Middle East Policy*, July 7, 2014, <http://timep.org/commentary/investigating-muslim-brotherhood-economy/>. See also Ryan Mauro, 'Call in Congress to sanction Turkey, Qatar for terror support', *The Clarion Project*, Dec. 11, 2014, <http://www.clarionproject.org/analysis/members-congress-sanction-turkey-qatar-terror-support>

⁵⁷ See 'The Arab Convention on the Suppression of Terrorism' (adopted by the General Secretariat of the League of Arab States Apr. 22, 1998 & entered into force May 7, 1999, Egypt ratified on Dec. 14, 1998), at art. 40, <http://www.refworld.org/docid/3de5e4984.html>

Commission appointed consultants to work on drafting an amended protocol on the Statute of the African Court of Justice and Human Rights ("ACJHR"). The draft protocol empowers the Court with a criminal jurisdiction over international crimes and several transnational crimes such as "terrorism."⁵⁸ Even if this protocol entered into force, the *Nullum crimen sine lege* procedural principle will prohibit the Court from trying perpetrators of violent attacks in Egypt, except those perpetrators who committed attacks after the date of entry into force of the Protocol regarding Egypt. The only exception is if the Court, joining the growing opinions and judgments, finds that it can try those suspects on the ground that the international crime of terrorism has already been defined and prohibited under customary international law.⁵⁹

2. *Does the commission of terrorism-related "crimes" mean terrorism criminal offenses under multilateral agreements: are the perpetrators "criminals" or "terrorists"?*

The next question is if these offenses and crimes are considered international "terrorism" crimes, and whether their perpetrators are considered "terrorists" from a legal perspective.⁶⁰ There is an obviously doctrinal practice which seems to name the offenses and crimes prohibited by the terrorist-related conventions as "terrorist acts", "terrorism of-

⁵⁸ This draft protocol is still pending adoption by the AU Assembly, then to be opened to ratification, then to enter into force, which if happened, it will be considered the first regional court and the second international court to have jurisdiction on the terrorism crime during peace time, which as such will represent a significant step towards the assurance of terrorism as an international crime.

⁵⁹ The first international court to have jurisdiction on the crime of terrorism in peace time is the Special Tribunal for Lebanon ("STL").

⁶⁰ See Antonio Cassese, 'Terrorism is also disrupting some crucial legal categories of international law', 12 *Eur J. Int'l. L.* 993 (2001), at 994. Naomi Norberg, 'Terrorism and international criminal justice: dim prospects for a future together', 8 *Santa Clara J. Int'l. L.* 11 (2010), at 18. ("Despite greater harmonization of definitions since the 1990s, there are still unresolved issues that make agreement on a comprehensive definition unlikely in the near future and that point to fundamental differences between terrorism and international crimes.").

fenses" or "crimes", and the perpetrators of these offenses and crimes as "terrorists".⁶¹ There is also a major doctrinal attitude which—despite identifying the lack of a settled legal definition international terrorism—does not strictly stick by this recognition, and instead uses "terrorist acts", "terrorism offenses" or "terrorism crimes" and "terrorists" phrases in referring to offenses and crimes prohibited by the terrorist-related agreements and their perpetrators.⁶² For example, the father of international criminal law, Professor M. Cherif Bassiouni recites:

terrorism' is a value-laden term. Consequently, it means different things to different people, a characteristic that perhaps is best expressed in the saying, "What is terrorism to some is heroism to others," and has never been satisfactorily defined... instead, the legislative international legal framework is comprised of thirteen international conventions, adopted over a span of thirty-two years (1969-2001), that apply to different types of terrorist acts, including: airplane hijacking . . . the use of bombings and explosives in terrorist acts...⁶³

How can a crime be characterized as a terrorist act, without an initial satisfactory characterization of terrorism? This is particularly rele-

⁶¹ On the draft 'Comprehensive Convention on International Terrorism', see generally Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 Dec. 17 1996, 6th Session (Jan. 28/Feb. 1 2002), General Assembly Official Records 57th Session Supplement No. 37 (A/57/37), <http://www.un.org/documents/ga/docs/57/a5737.pdf>. See also generally Mahmoud Hmoud, 'Negotiating the draft Comprehensive Convention on International Terrorism', 4 *J. Int'l. Crim. Just.* 1031, 1043 (2006), at 1031-1032.

⁶² See, e.g., Acharya, *supra* note 32, at 668. See also, e.g., Cassese, *supra* note 62, at 937 [FN 6] ("Art. 2(1)(b) [of the 1999 UN Convention for the Suppression of the Financing of Terrorism] provides that terrorism is 'any... 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 an act.'").

⁶³ See M. Cherif Bassiouni, 'Legal control of international terrorism: a policy-oriented assessment', 43 *Harv. Int'l L. J.* 83 (2002), at 101.

vant because of the observation that none of the terrorism-related agreements mentions the word terrorist or terrorism in their operative provisions. Axiomatically, there must be another legal basis Bassiouni relied on to reach a conclusion that the “offenses” and “crimes” incorporated in these convention’s texts are *per se* terrorist acts.⁶⁴ Yet, recourse to this universal legal process, in our case, is not a plain navigating route for two main causes: one general and one specific.⁶⁵ The general one is that international legal interpretation process is a subjective skill of art rather than an objective discipline of science. Therefore, it is not expected that this process will always lead to an actual definite outcome.⁶⁶ The specific reason relates to the notion that specific interpretation rules are applicable to terrorism-related conventions. The International Criminal Law (“ICL”) flavor of the terrorism-related pacts will certainly subject this analysis to the purview of the current discussion on the conflict between the applicability of the treaty interpretation norms and the particularity of the ICL’s *nullum crimen sine lege* principle (principle of legality of crimes and punishments), during the course of interpreting international criminal terminology.⁶⁷ In this case, the

⁶⁴ Acharya, *supra* note 40.

⁶⁵ The interpretation rules differ depending on whether the term under interpretation is a part of a customary international law rule, international treaty, international constitutional instrument, general principle of law, international resolution, international unilateral act or a domestic legislation, and on whether the term is of a criminal or a non-criminal nature.

⁶⁶ Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission* (1966), Vol. II, *Commentary* (4), at 218, http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (last visited Aug. 30, 2016) (“In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.”).

⁶⁷ Dov Jacobs, ‘Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories’, in: Jean d’Aspremont and Jörg Kammerhofer (eds.), *International Legal Positivism World* (Cambridge Univ. Press 2012), at 31 *para* 5.2.2.1. (“The practical tensions between the Vienna Convention and the Principle of Legality: Discussions on the rules of interpretation of ICL Statutes often ignore the ‘elephant in the room’ that is the requirements of the principle of legality.

terrorism-related resolutions are considered international treaties. Therefore, the first part should be subject to the treaty interpretation rules incorporated in the Vienna Convention on the Law of Treaties ("VCLT").⁶⁸ Meanwhile, these terrorism-related agreements comprise criminal provisions preventing and punishing terrorism-related offenses and crimes, which *per se* drags these instruments under the ICL purview. This appears to be guided by the legality principle which provides for strict interpretation, prohibition of analogy, and the *favor rei and in dubio pro reo* principles in criminal contexts.⁶⁹ Hence, concerning the interpretation of the Terrorism Bombing Convention, the terms "offence" and "offender," wherever mentioned in it, shall be interpreted in accordance with the previous elements stated in Article 31 of the VCLT.

The next task is to assess the *object and purpose* of the convention.

In fact, there is often a contradiction between the rules laid down in the Vienna Convention and the principle of legality."). Therefore, hypothetically, interpreting a typical criminal provision under customary international law, the Rome Statute of the ICC (which is considered an international treaty), general principles of law, the Statute of the ICTY (which is considered a UNSC resolution), and a domestic criminal law can possibly generate different legal effects, due to the possible distinct interpretation rules applied to different legal rules, obligations and acts.

⁶⁸ See the heading of Article 31 of the VCLT is a "General Rule of Interpretation", *supra* note 38. It reads:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise...: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account... (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

⁶⁹ Jacobs, *supra* note 69, at 37.

The preamble of this agreement states: “the States Parties to this Convention [...] deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,”⁷⁰ “recalling also the Declaration on Measures to Eliminate International Terrorism...,” in which, *inter alia*, “the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed,...”⁷¹ noting that the Declaration also encouraged States “to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter.”⁷² Accordingly, it could be argued that the object (purpose) of this convention is to prevent, combat and prosecute a specific form of terrorist acts and that the same apply regarding its *context* (either the prevention or combatting of either terrorism, acts of terrorism or terrorist attacks).⁷³

⁷⁰ ‘Suppression of Terrorist Bombings Convention’, *supra* note 33, at *para.*2 of the preamble.

⁷¹ *Id.*, at *para.* 4 of the preamble.

⁷² *Id.*, at *paras.* 5, 6, 7 & 9 of the preamble. Also, “terrorist attacks by means of explosives or other lethal devices have become increasingly widespread” and “being convinced of the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators.”

⁷³ It shall be taken into account, together with the context “*any relevant rules of international law applicable in the relations between the parties,*” it could be claimed that those “*any relevant rules of international law*” contain the legality principle and thus its interpretation restrictions, based on the actual existence of this principle within the corpus of ICL as reflected in various international tribunals judgments and doctrine. Further, considering that “*a special meaning shall be given to a term if it is established that the parties so intended,*” it could be argued that Article 2 of the Terrorism Bombing Convention represents an obvious kind of that intention of the parties, by which they intended by using the sentence “*any person commits an offence within the meaning of this Convention if...*” to mean by the term “offense” the com-

Thus, we can interpret the terms “offence” and “offender” in the Terrorism Bombing Convention within the regular meaning to be given to them in their context which comprises the convention’s preamble and in the light of the object and purpose of the convention. Based on this approach, the term “offence” would possibly mean a “terrorism offence” and the term “offender” would possibly mean a “terrorist offender.”⁷⁴

mission of any of the enumerated acts in the Article only without going beyond that and calling this “offence” or the commission of one of the enumerated acts as a terrorism offence or a terrorist act.

⁷⁴ On the other hand, taking into account, together with the context any significant rules of international law applicable in the relations between the parties (within the meaning of Article 31(3)(c) of VCLT), which include the legality principle and so its interpretation limitations which provide for strict interpretation, prohibition of analogy and the *favor rei and in dubio pro reo* rules in criminal frameworks, would not be in favor of adding to the term “offence” the “terrorism” feature and attaching to it the meaning of a “terrorism offence” and adding to the term “offender” the “terrorism” character and attaching to it the meaning of a “terrorist offender,” mainly in light of the more severe consequences and severe legal agenda linked to terrorism internationally and domestically, which apparently would not be in favor of the accused/offender. In this respect, the ICL stated in its commentaries on the draft articles of treaty interpretation in the law of treaties (1966): “It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties.” The interpretation may lead to a result which is “manifestly absurd or unreasonable” within the meaning of Article 32(b) of the VCLT, which provides for one of two situations which triggers the application of the “supplementary means of interpretation” incorporated in Article 32 of the VCLT. Article 32 of the VCLT states: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” See the heading of Article 32 of the VCLT, *supra* note 38, is a “Supplementary Means of Interpretation.” Pierre Klein, ‘International Convention for The Suppression of Terrorist Bombings’, para. 2 (“Beginning in the early 1990s, the United Nations General Assembly undertook to play a leading role in efforts to counter terrorism. The 1994 adoption of the Declaration on Measures to Eliminate Interna-

In this regard, Article 38 of the Statute of the International Court of Justice (“ICJ”) is seen to provide a general indication of the sources of international law. It provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law...⁷⁵

The legality norm is a fundamental domestic one which traditionally affected the substantive criminal law corpus in most of the world’s legal systems. Additionally, it has a factual presence in the ICL corpus and is referred to and relied on in several international criminal tribunals’ decisions.⁷⁶ In some cases, this principle is enshrined in interna-

tional Terrorism...”).

⁷⁵ See Anthony Aust, ‘Vienna Convention on the Law of Treaties’ (1969), *Max Planck Encyclopedia of Public International Law* [MPEPIL], June 2006, para. 14, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>

⁷⁶ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Chapter 7 (Cambridge University Press 2009), at 1 (“The history since World War II, set out above, shows that the law has changed since Nuremberg. The central aspects of the principle of legality in criminal law, especially the non-retroactivity of crimes and punishments, are now rules of customary international law. The following statement of the principle of non-retroactivity of crimes and punishment best states the rule as a matter of customary international law applicable both in national and international courts: No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; ... This

tional agreements, such as the Rome Statute of the ICC. It could be argued that this principle has mounted the steps to the ICL field on the stairs of the general principles of law recognized by civilized nations, as some interpret it to be based on international custom.⁷⁷ In addition, one might suggest that the aforementioned principle has risen to the status of *jus cogens* (peremptory norm). As a result, the principle of legality interpretation limitations could be claimed to be based on the three sources of international law (international conventions, international custom, and the general principles of law).⁷⁸

Furthermore, the principle of legality prohibits retroactivity in criminal contexts. Article 31(3)(b) of the VCLT states: "there shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," which opens the door to retroactivity in criminal matters.⁷⁹ The principle of legality interpretation limitations will govern the interpretation of the mentioned convention

is a formulation from two international humanitarian law (law of armed conflict) treaties, Additional Protocols Nos. I and II to the Geneva Conventions of 1949. However, it is quoted here because it sums up the state of both customary international human rights law and international humanitarian law, based on the practice and *opinio juris* of states (including their treaty practice), the practice and law of international organizations (especially international criminal courts), writings of publicists and other evidence.").

⁷⁷ 'Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, case no. STL-11-01/I, Feb.16, 2011, *para.* 32, <http://www.refworld.org/docid/4d6280162.html> ("These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts.").

⁷⁸ Gallant, *supra* note 78.

⁷⁹ Jacobs, *supra* note 69, at 32-33. ("It would be cumbersome to systematically analyze the ways in which the application of this rule may contravene with the principle of legality. For example, the reference to subsequent practice in Article 31(3) could very well conflict with the rules on non-retroactivity.") ("Equally, whereas ambiguity of a term is to be resolved through the supplementary means of interpretation according to Article 32, the principle of legality would require that any ambiguity be resolved in favor of the accused.").

in case this principle has risen to the status of a *jus cogens* norm. It will also govern if the applicability of *lex specialis* or *lex posterioris* settled under ICL broadly to be controlling regarding the application of successive treaties relating to the same issue.⁸⁰ This analysis also applies to the interpretation of the Terrorism Financing Convention, and would mostly lead to the same consequence.⁸¹

In this respect, the UNSC counter-terrorism resolutions issued under Chapter VII of the Charter of the United Nations could help in pinpointing the international legal framework related to terrorism by assessing terrorism's threat to international peace and security.⁸² The latest resolution stated that the Council

recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act,

⁸⁰ *Id.* (discussing the conflict of international legal norms and obligations in international field and *jus dispositivum* norms).

⁸¹ However, concerning the Diplomatic Agents Convention, the case would differ. Even the agreement is seen to form part of the international community's "law enforcement" response to terrorism, the ICJ stated that "the Court, however, noted "that the purpose of the 1973 Convention is to prevent serious crimes against internationally protected persons and to ensure the criminal prosecution of presumed perpetrators of such crimes..." Also, the convention has no reference to the word "terror," "terrorist" nor "terrorism" in its preamble. Thus, the convention was negotiated in response to a series of kidnappings and killings of diplomatic agents beginning in the late 1960s and hence, its purpose and preamble make it in non-typical standing than that of the Terrorism Bombing Convention and the Terrorism Financing Convention in respect of interpreting its crimes as "terrorism crimes".

⁸² (Around 48 resolutions). The Council's anti-terrorism measures issued under Chapter VII of the UN Charter between 2001 and 2004 did not set a definition for terrorism. However, in late 2004, the Council acting under Chapter VII of the Charter of the United Nations, adopted resolution 1566 (2004).

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.⁸³

Many of post June 30, attacks in Egypt fall under the acts prohibited by this resolution. All these attacks constitute crimes under Egyptian criminal (Penal Code) law which criminalizes homicide, injury, bombing, arson and terrorism crimes, and the attempt or incitement to commit [criminally participate/conspiracy] those crimes.⁸⁴ Moreover, all the attacks which were committed after August 15, 2015, fall under the Egyptian Counter-terrorism Law which criminalizes a very large and diverse collection of terrorist acts, and penalizes them with punishments consistent with their grave nature.⁸⁵ All the attacks were committed with the intent to kill or seriously injure military and police personnel, state officials and civilians. Moreover, the attacks were motivated by the desire to provoke terror in the community, compel the government to restore the ousted President, and cease its counter-terrorism actions, especially in the *Sinai Peninsula*.⁸⁶ Thus, under this

⁸³ Resolution 1566 (2004) was adopted by the Security Council at its [505,3rd meeting, Oct. 8, 2004], <http://www.un.org/en/terrorism/sc-res.shtml> (last retrieved Aug. 30, 2016).

⁸⁴ See, e.g., Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, Aug. 1937, at arts. 237-240 (Egypt), <http://www1.umn.edu/humanrts/research/Egypt/criminal-code.pdf> (last visited Aug. 30, 2016).

⁸⁵ See, e.g., 'Egyptian Counter Terrorism Law', *Al-Jarida Al-Rasmiyya*, Aug. 15, 2015 (Egypt), http://www.atlanticcouncil.org/images/EgyptSource/Egypt_Anti-Terror_Law_Translation.pdf. This law was preceded by the 'Terrorist Entities Law', Dec. 12, 2015, <http://www.atlanticcouncil.org/blogs/menasource/egypt-s-new-terrorism-law> (last retrieved Aug. 30, 2016) (defining the terrorist entity and their member's criterions).

⁸⁶ *Id.*

resolution (binding on all states), Egypt has a legal obligation to prevent such attacks. When this is not possible, Egypt is responsible for ensuring that such attacks are punished by penalties consistent with their serious nature.⁸⁷ Under operational paragraph number (2) of the resolution, all states are called to cooperate fully with Egypt in order to find or deny safe haven to suspects. This is based upon the principle to extradite or prosecute any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of [those] “terrorist” acts. This is especially true for states in the Middle East and Europe which host individuals charged by the Egyptian judicial authorities with financing, directing, organizing or planning those attacks.⁸⁸

International Terrorism Criminal Offense under Customary International Law: Egypt Attacks, *Quo Vadis*?

Article 38 of the Statute of the International Court of Justice (“ICJ”) states that the court shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states. These rulings draw from numerous sources including international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified scholars of various nations, as subsidiary means for the determination of rules of

⁸⁷ UN Charter, at arts. 25 & 39. In addition, many of the attacks constitute offences within the scope of and as defined in the international conventions and protocols concerning terrorism.

⁸⁸ On Egypt’s international legal obligation under UNSCR, see generally UN Charter, at arts. 25 & 39, <http://www.un.org/en/documents/charter/chapter5.shtml> & <http://www.un.org/en/documents/charter/chapter7.shtml> (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”) (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”). See ‘Security Council Resolutions and Records of Meetings, United Nations Action to Counter Terrorism’, <http://www.un.org/en/terrorism/sc-res.shtml>.

law. Thus the existence of customary international law requires the presence of State practice (*usus*) and a belief that such practice is required, prohibited or allowed, as a matter of law (*opinio juris sive necessitatis*).⁸⁹

In February 2011, the Special Tribunal for Lebanon (“STL”) issued a significant decision stating that “a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged.”⁹⁰ In this landmark decision, the Court argued that “there is a commonly shared agreement on the need to fight international terrorism in all its forms and irrespective of its motivation, perpetrators, and victims, on the basis of international law.”⁹¹ The Court inspected several international devices and said that “numerous regional treaties have defined terrorism as “criminal acts intended to terrorize populations or coerce an authority.”⁹² It claimed that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable.”⁹³ Also, it relied on the Terrorist Financing Convention, and said that it provides the UN’s clearest definition of terrorism, which includes the elements of (i) a criminal act (ii) intended to intimidate a population or compel an authority, and is limited to those crimes containing (iii) a transnational

⁸⁹ See Customary IHL, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin.

⁹⁰ See *Interlocutory Decision*, *supra* note 79. The Court said: “This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”

⁹¹ The Court based its opinion on a number of treaties, UN resolutions, and the legislative and judicial practice of States which, in the court’s opinion, evince a general *opinio juris* in the international community, accompanied by a practice consistent with such opinion.

⁹² *Id.*, at *paras.* 86, 88, 89, 90, 91 & 100.

⁹³ *Id.*

aspect.⁹⁴ Then, it referred to a number of domestic judgments, claiming that in recent years domestic courts have reached concordant conclusions about the common elements across national legislation that define terrorism. These include the use of criminal acts to terrorize or intimidate populations, to coerce government authorities, or to disrupt or destabilize an international crime of terrorism.⁹⁵

In this domain, the STL referred to the Supreme Court of Canada in *Suresh v. Canada* (Minister of Citizenship and Immigration) in which the latter said:

We are not persuaded [...] that the term 'terrorism' is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated International Convention for the Suppression on the Financing of Terrorism, G.A Res. 54/109, December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(a), defining 'terrorism' as '[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex' [...] Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2 (1) (b) defines 'terrorism' as 'Any [...] 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

⁹⁴ *Id.* It claims that the Terrorist Financing Convention and most of the regional and multilateral conventions regarding terrorism incorporate into their definition of terrorism the specific offences criminalized in a long line of terrorism-related conventions. Likewise, the court argued that the domestic statutes of countries around the globe consistently define terrorism in similar if not identical terms to those used in the international instruments.

⁹⁵ The court said that "those domestic courts have either explicitly referred to a customary international rule on the matter of terrorism, or have advanced or upheld a general definition of terrorism that is broadly accepted. The court argued that judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year."

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.' [...] This definition catches the essence of what we understand by 'terrorism'.⁹⁶

All in all, it seems that the STL and the other national courts are not the only courts which reached the conclusion that there exists an international crime of terrorism under international law.⁹⁷

International Humanitarian Law, Customary International Criminal Law and Post June 30 Egypt Attacks: Armed Conflicts, War Crimes, and Crimes Against Humanity

Generally speaking, violent attacks committed with the intent to spread fear among the populace, directly or indirectly coerce a national or international authority, and are accompanied with a transnational element could establish crimes under terrorism related conventions, or even an international crime of terrorism under customary international

⁹⁶ *Id.* The STL also referred to the Italian Supreme Court of Cassation in *Bouyahia Maher Ben Abdelaziz et al.*, in which the latter stated that "a rule of customary international law [is] embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of Terrorist Bombings..." Additionally, the STL referred to the First "Judge of Amparo" on *Criminal Matters in the Federal District of Mexico*, who noted that "the multiple conventions to which reference has been made, provide that the crimes of genocide, torture, and terrorism are internationally wrongful in nature and impose on member States of the world community the obligation to prevent, prosecute and punish those culpable of their commission."

⁹⁷ In fact, England Court of Appeal in *Regina v. Gul* [2012] cited the 2011 STL Decision, and concluded that "[i]t was common ground that international law has developed so that there is an international crime of terrorism at least in time of peace..." Moreover, France Court of Cassation stated in *Réunion Aérienne v. Libya* [2011] "...prohibition on acts of terrorism can be ranked as a *jus cogens* norm of international law, which takes precedence over other rules of international law and can constitute a legitimate restriction on jurisdictional immunity..." See Thomas Weatherall, 'The status of the prohibition of terrorism in international law: recent developments', 46 *Georgetown J. Int'l. L.* 2 (2015), at 605.

law. However, in cases of armed conflict, those attacks could also be seen as violations of international humanitarian law (“IHL”). Therefore, it is necessary to review IHL principles in order to determine if Egypt’s “*War on Terrorism*” is considered a war of *non-international* character.

According to Geneva Conventions (1949), “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:

- (1) persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”⁹⁸

⁹⁸ Egypt ratified the four Geneva Conventions on November 10, 1952. It is generally agreed that most of the norms incorporated in these conventions are reflec-

The Additional Protocols recites “this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁹⁹

AP II is applied without any adverse distinction to all persons affected by an armed conflict as previously defined.¹⁰⁰ For AP II to apply, there must be: (i) an armed conflict; (ii) not covered by Article 1 of AP I; (iii) taking place in the territory of a High Contracting Party; (iv) between its armed forces and dissident armed forces or other organized armed groups; (v) which under responsible command; (vi) exercises such control over a part of its territory; (vii) as to enable them to carry out sustained and concerted military operations.¹⁰¹ Therefore, the application of Common Article 3 and AP II on the situation in Egypt depends on the intensity of the conflict. However, the absence of an ample definition of armed conflict not of an international character opens

tive of customary international law. Egypt acceded also to AP II on October 9, 1992. Besides, the Additional Protocol to the Geneva Conventions states “this Protocol, which develops and supplements Article 3 common to the Geneva Conventions of August 12, 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol..., and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

⁹⁹ *Id.*, at art. 1(2).

¹⁰⁰ *Id.*, at art. 2(1). In addition, AP II states that the civilian population as such, as well as individual civilians, shall not be the object of attack, and that acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Moreover, it is prohibited under AP II to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

¹⁰¹ Nevertheless, AP II considered situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts, thus out of the scope of its application.

the door to extensive disagreement.

Several elements are clear in the Egyptian case. The conflict in Egypt is armed and is taking place between governmental forces and other groups, and not between two or more states. Furthermore, the violence is being conducted on Egyptian territory which is a party to AP II. However, it would be controversial to consider the non-government groups (ABM, MB, etc.) as “organized,” acting under responsible “command,” or exercising control over a part of Egypt’s “territory.” This last element is important because it permits them to carry out “sustained and concerted” military operations and to “implement AP II.”¹⁰² It should be noted that most of the attacks committed were intended as a collective punishment to all Egyptians as a response to the ouster of President Morsi and to the prosecution of MB members’ violations in breach of AP II.¹⁰³ Also, most of those attacks could be considered terrorism acts under AP II because they are considered acts

¹⁰² Therefore, one would claim that the administrative sort of organization and hierarchy groups like ABM and MB have is sufficient to consider them organized groups, and though these groups are not commanded by a single commander(s) for both of them, each has its own commander(s) whose orders find compliance among his affiliates, and that the certain locations in *Sinai’s* desert which ABM shelters in and controls are sufficient and enable it to carry out sustained and concerted armed military operations and to implement AP II, and that MB’s failure to control certain locations even would exclude it from AP II’s scope of application, would not affect its subjection to Common Article 3 which do not require a territorial control prerequisite, besides it could be argued pro MB’s subjection to AP II as a contributor, participator or sponsor to ABM and its activities. On the other hand, one would argue that groups like these do not possess the sort of organization and commandship required by AP II, because many of the violent attacks are done through voluntarily suicides driven primarily by the false religious believes spread out by those groups, and that the certain locations in *Sinai’s* which ABM shelters in and controls cannot be considered in the meaning that ABM is controlling a part of Egypt’s territory, but rather these “tiny places” ABM inhabit should be viewed as ordinary domestic criminal dens. Besides, this opinion could be supported by arguing that the attacks are isolated by which AP II would not apply, and would not rise to the level of an armed conflict of non-international character required by Common Article 3.

¹⁰³ AP II, at art. 4(2)b.

of terrorism under customary international law and Egyptian laws.¹⁰⁴

On the procedural level, the International Criminal Court (“ICC”) does not have the power to exercise jurisdiction on these breaches in Egypt, as the violations were not committed on a territory of a state who is party to the Rome Statute or has accepted the court’s jurisdiction. Furthermore, the alleged offenders are unlikely to be nationals of a state party to the Rome Statute.¹⁰⁵ In the same vein, the rules of the Geneva Conventions and AP I governing situations under armed conflict of international character stipulates what is called the “Grave Breaches Mechanism.” Under this mechanism, perpetrators of these crimes should be held criminally liable under international law, meaning that state parties should search for and prosecute those perpetrators.¹⁰⁶ This does not mean that Common Article 3 and AP II violators will escape “international prosecution.” Rather, there is a growing trend of jurisprudence and judicial decisions proving that state practice accompanied by opinion *juris* have evolved, creating a customary international rule.¹⁰⁷

¹⁰⁴ AP II, at art. 4(2)d. Moreover, those attacks are considered acts of violence the primary purpose of which is to spread terror among the civilian population, which is prohibited under AP II. Furthermore, several attacks were directed against historic monuments, such as “Karnak” temple, and places of worship, such as Christian churches, in breach of AP II. *Id.*, at art. 16.

¹⁰⁵ See ‘The Rome Statute of the International Criminal Court’, at art. 12(2). [Rome Statute circulated as document A/CONF.183/9 of July 17, 1998 & entered into force on July 1, 2002], https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹⁰⁶ *Fourth Geneva Conventions*, at art. 146 & AP I, at art. 85.

¹⁰⁷ See Thomas Graditzky, ‘Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts, 1322 *Red Cross Int’l. Rev.* (1998) (<https://www.icrc.org/eng/resources/documents/misc/57jp4l.htm>). Therefore, though Common Article 3 and AP II violators would not be held criminally responsible under international treaty law, but under customary international law. Thus, all states should search for and extradite to Egypt, or prosecute, in a good faith, members of the attacking groups like ABM and MB allegedly violated Common Article 3 and AP II rules, otherwise, those states would be in breach of a procedural customary international law norm.

While Crimes Against Humanity (“CAH”) have developed under customary international law, numerous global mechanisms have dealt with CAH in the past. These include the statutes of the International Military Tribunal (“IMT”), the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the International Criminal Court (“ICC”).¹⁰⁸ Although the definitions of CAH incorporated in all these instruments are mostly similar, they are not identical.¹⁰⁹ The definition of CAH, in the light of Article 7 of the Rome Statute, includes murder or other inhumane acts which intentionally cause great suffering or serious injury to body or to mental or physical health. These actions rise to the level of CAH when committed as part of a widespread or systematic attack

¹⁰⁸ See., e.g., IMT Charter, at art. 6(c) (“Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”) (“Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”). See also e.g., ICC Statute, at art. 7 & ICTY Statute, at art. 5 (“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”).

¹⁰⁹ Regarding CAH under customary international law, the International Law Committee (“ILC”) incorporated under its Draft Code of Crimes Against the Peace and Security of Mankind (1996) (“Draft Code”) a definition for CAH, which could be argued that it is reflective of customary international law. According to the CAH definition in this Code, murder, or other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group, count as a CAH.

directed against any civilian population.¹¹⁰ Many of the attacks in Egypt constitute CAH under the definition of the International Law Commission ("ILC")'s Draft Code under Article 18.¹¹¹ Most of the conflicts were in the form of murder, and other inhumane acts which harshly damage physical and mental integrity, health and human dignity, and caused mutilation and severe bodily harm to military and police members, officials and civilians. Moreover, these acts were committed in a "systematic manner" and on a "large scale."¹¹²

The ILC's commentaries clarify the meaning of "systemic manner" by stating in the previously mentioned Draft Code that:

The first alternative [systematic manner] requires that the inhumane acts be "committed in a systematic manner" meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to ex-

¹¹⁰ Rome Statute *supra* note, 99, at art. 7 ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."). See also *Id.*, at art. 7(2)a.

¹¹¹ See 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries', *International Law Committee* (1996), at 47, http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

¹¹² *Id.*

clude a random act which was not committed as part of a broader plan or policy.¹¹³ The second alternative [large scale] requires that the inhumane acts be committed “on a large scale” meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.

The fact that the attacks succeeded in killing several people and injuring a great number, and that the victims are from different categories (military, police, judges, officials, civilians, and foreigners), indicate that the acts were directed against a multiplicity of victims, rather than being isolated acts committed by a perpetrator acting on his own initiative and directed against a single victim. Most of the attacks in Egypt constitute CAH under the latter’s definition in the ILC’s Draft Code. However, only a portion of those attacks constitute CAH under the definition in Article 7 of the Rome Statute.¹¹⁴ Thus, these attacks could not be counted as a constituent part of a CAH under the Rome Statute, even if these attacks killed/injured civilian victims accidentally, as long as the latter was not intended by the attackers. However, other attacks could still count as CAH under this Statute. This is particularly true for the attacks that involved multiple murders and other cruel acts

¹¹³ *Id.* Likewise, the attacks were instigated and directed by organizations and groups in the meaning of Article 18 of the Draft Code, thus, the attacks actually rise to the level of CAH under this provision.

¹¹⁴ Because though the elements in both concepts are much similar, the Rome Statute definition conditioned that the acts should be committed against a civilian population. Thus, in interpreting this requirement, the ICC’s Pre-Trial Chamber stated that “the condition of ‘directed against’ means that ‘the civilian population must be the primary object of the attack and not just an incidental victim of the attack.’” Furthermore, the Pre-Trial Chamber noted that the term ‘civilian’ is not defined in the Statute but that ‘according to the well-established principle of international humanitarian law, “[t]he civilian population (...) comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.”’

against the civilian population in the meaning of Article 7(2)a.¹¹⁵ Considering that a CAH is considered one of the most serious crimes, besides war crimes and genocide, the commission of it triggers the application of procedural principles represented in the universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*).

Towards an Approach of Fighting International Terrorism: Conclusion and Policy Recommendations

Although there are vast differences between Europe and Egypt, both societies are currently struggling to manage unprecedented levels of terrorism. By analyzing recent events in Egypt, we have demonstrated the ways in which different forms of political violence fall within the international legal definitions of terrorism. This international legal framework is crucial to fighting what is undeniably a global challenge. Lessons learned from Egypt are not only essential for European leaders looking for a common legal system to combat terrorism, but also for policy and decision makers around the world attempting to fight one of the most challenging crimes of the 21st century. Egypt's latest wave of unrest began in mid-2013, following the ousting of President Morsi. This generation of violent attacks, which started and developed with the Arab Spring uprisings, is characterized by more sophisticated techniques, more organized hierarchal leadership of the violent groups, and more international cooperation of terrorist organizations. This wave of attacks, which occurred in Egypt for the purpose of changing the *status quo*, are comparable to the violence happening across the Middle East and North Africa ("MENA") region, as well as in Europe. Many of the "participants" and "contributors" to

¹¹⁵ See *Prosecutor v. Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, June 15, 2009, para. 76, (citing ICTY case law, in particular *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/2), ICTY App. Ch., June 12, 2002, paras. 91-92. ICC Commentary, Centre for International Law Research and Policy (CILRAP), <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentaryromestatute/commentary-romestatute-part-2-articles-5-10/#c1867>

these attacks, who either participated through direction, inducement, financing or aiding, are currently outside Egypt enjoying safe haven in other countries. This situation continues despite the fact that they have been requested for judicial proceedings by Egyptian criminal courts. Hosting states have declined to affirmatively respond to these requests for either political, economic or legal considerations. However, as long as members of terrorist organizations are allowed to function externally, violence will continue to plague Egypt.

There are several measures that states and international organizations can take in order to combat terrorism. First, it is essential to improve the law enforcement piece of the picture. The Judiciary should be strong, independent, and have the capacity to leave no case pending. This includes providing severe punishments to those who are on the apex of terrorist organizations as well as ensuring that the *rule of law* extends throughout states. Increasing the law enforcement capabilities of states will allow countries to take on more responsibility for combatting terrorism within their own borders. This will decrease reliance on powerful countries like the United States, hopefully reducing U.S. involvement in the politics of other countries and ameliorating the resentment that Western influence breeds. Furthermore, sustained international coordination is essential for effectively confronting transnational terrorist groups. As has been argued throughout this chapter, Egypt has suffered as a result of other states refusing to prosecute or extradite suspected terrorists. Increased cooperation goes hand in hand with working closely with regional and international organizations to build global consensus and promote international criteria for combating terrorism. Protection of citizens and the reduction of vulnerabilities in critical infrastructure is also important. This includes defense of external borders, improvement of transport security, and protection of strategic targets. States can strengthen national capabilities through practical assistance, information exchange between police and judiciary, tackling terrorist financing, and depriving terrorist organizations of the means by which they mount attacks and communicate (money laundering and terrorist financing laws). In a spirit of solidarity, states

can also prepare for, manage, and minimize the consequences of a terrorist attack by refining their abilities to deal with the aftermath, the response coordination, civil protection mechanism review, development of risk assessment, and the victim's needs.

While this article is premised on the value of prosecuting terrorism, it should be noted that equal (if not more substantial) efforts should be placed on preventing radicalization in the first place. As is noted in the theoretical overview, minority religious and ethnic groups are still the most likely to engage in terrorism. This is probably related to the fact that minority groups are often deprived of food, shelter, land, and economic opportunity, and see terrorism as a last resort. Therefore, solving disputes between peoples of different religions and ethno-national identities is one of the steps to fight terrorism. Furthermore, it is necessary that states break cycles of corruption which inhibit economic growth in order to ensure that marginalized citizens have economic opportunity. While it is impossible to stop the globalization that many terrorist groups respond to, it is possible to reduce certain aspects of it that are particularly responsible for engendering terrorism. For example, government's can crack down on the dissemination of propaganda by terrorist groups in order to slow down waves of radicalization, as well as inhibit the diffusion of terrorist tactics.

Prosecuting terrorism and preventing radicalization are difficult tasks that will require an immense commitment of resources and focus by many governments. However, Egyptians, Europeans, Americans, as well as people from around the world have already suffered greatly at the hands of terrorist organizations. Terrorism will continue to disrupt and destroy the lives of civilians unless governments increase efforts to fight terrorist organizations and change the underlying conditions that are conducive to radicalization. Cooperation of the international community under a common legal framework is necessary to collectively reach these goals. Let us hope that through cooperation, we can achieve peace one day.