Defining terrorism: stirring up a hornet's nest

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Introduction

On 13 November 2016, Paris marked a year since the series of orchestrated terrorist attacks taking 130 lives. These attacks were the deadliest on the French soil since the Second World War and France remains until today under the state of emergency. The *fluctuat nec megritur* phrase reappeared all over the media, not only to honor Paris and its motto, but to reinforce the impression that ideals, perhaps rather than cities, might be tossed but not sunk. In this yearly timeframe terrorist attacks shook Europe in an unprecedented fashion. However, Africa and the Middle East have suffered much more severe blows. Suicide bombings are continuously occurring across Iraq and Afghanistan, Al Shabaab coordinated attacks across Somalia, Boko Haram's violence is increasing in Nigeria and Cameroon, and the concept of terrorism has never been more present in the international political and legal realms. Amid the current migration crisis and the rise in nationalism and xenophobia in Europe, the political situation is dauntingly reminiscent of the late 30s. And the security situation is, more alarmingly, unprecedented and skeptical of our readiness. Terrorism is a threat to democracy, freedom and fundamental values, and we still find no way to define it.

Indeed, with no existing comprehensive definition of terrorism under international law, combatting terrorism on an international level remains quite difficult as the elements of the crime differ across na-

tional jurisdictions. What is a terrorist act under certain criminal laws is simply an act of murder under others. In addition, the saying that one nation's terrorist is another's freedom fighter has practically become a norm. However, terrorism is widely seen as an international, rather than an exclusively national threat,[1] affecting multiple states at the time.[2]

The core premise of this paper is that an international definition of terrorism would further the mutual cooperation of states in their counter-terrorism efforts. Combatting terrorism without a legal definition of the crime on an international level is still greatly feasible. This is indeed the *status quo* and counter-terrorism efforts are, notwithstanding the lack of a definition, undertaken daily.

This paper posits that by adopting a definition of terrorism, counter-terrorism efforts will be more coordinated, more effective and more systematic, thus harmonizing the international cooperation of states in combatting terrorism. In the same vein, the paper examines the concept of terrorism in international criminal law by exploring the legal framework on counter-terrorism, and likewise addresses issues arising alongside terrorism as a response thereto or as consequences thereof.

The first section of this paper concerns the multifaceted definition of terrorism, its historical emergence and why states should opt to consensually define terrorism for the purposes of modern-day intelligence sharing.

The second section analyzes the current legal framework by looking at international and regional conventions, and national legislations on terrorism. This section thus mostly takes into account the UN Counter-Terrorism Conventions and Protocols, UN General Assembly and Security Council Resolutions and multilateral treaties, regional treaties and national laws with the aim of identifying recurring subjective and

[1] N. Boister, 'Transnational criminal law', (2003) 14 *EJIL* 953 at 972.

[2] Antonio Cassese, 'Multifaceted riminal notion of terrorism in international law', (2006) 4 *JICJ* 933 at 934 (hereinafter "Cassese").

objective elements of terrorism, which could subsequently establish a definition satisfactory to state and non-state entities cooperating in criminalizing and punishing terrorist acts on an international level.

The third section evaluates whether terrorism could be included as a crime in the Rome Statute. It does so both procedurally and substantively, bearing in mind the Kampala Review Conference Report, and assessing whether terrorism should be included as a novel crime or as an additional category under one of the existing crimes, and what would be the benefits of such an inclusion for the jurisdiction of the ICC.

The final section of this paper addresses contemporary issues arising in terrorism, such as intelligence sharing, difficulties surrounding bilateral agreements on extradition, and the current amendments and deliberations on the principle of nationality in respect to foreign terrorist fighters returning to the country of their nationality. In addition, it examines the UNODC's activity in tackling contemporary issues arising in terrorism and the mutual cooperation between states.

Difficulty of Defining Terrorism

Lacking a common definition under international law weakens the potential efforts states could jointly undertake when responding to the threat of terrorism. While some call for an urgent adoption of a working definition – a practical step to be taken beyond the mere semantics[3] – others fear terrorism's definitional ambit and applicability, in particular along the somewhat blurred lines of legally separating 'terrorists' from 'freedom fighters'.[4] On the flip side of the coin, some find an internationally accepted definition of terrorism to be an unattainable goal, and that a definition *per se* is nonessential for states to mutually cooperate in combatting terrorism. In this regard, a brief historical and

[3] D. J. Hickman, 'Terrorism as a violation of the "law of nations": finally overcoming the definitional problem', (2012) 29 *WILJ* 447 at 452 (hereinafter 'Hickman').

[4] T. Stephens, 'International criminal law and the response to international terrorism', (2004) 27 *UNSWLJ* 454 at 458 (hereinafter 'Stephens').

legal background on terrorism sheds light on the more pressing question as to why is it contemporarily important, or not, to establish a universally accepted definition.

1. *Historical and legal background*

Etymologically, terrorism stems from the Latin *terrere* meaning 'to frighten', and "entered into Western European languages' lexicons through French" due to the political context it gained during the French Revolution and Robespierre's '*régime de la terreur*'.[5]Terrorism was thus *ab initio* correlated with state-perpetrated violence. Only in the late 19th century with the insurgence of Russian and French anarchists, the concept of terrorism widens so as to comprise non-state actors in their acts of terror for the purpose of intimidation of other private non-state actors, organizations and states.[6]

Over time, three widely-accepted categories of the crime have emerged chronologically: "(i) state instigated policies of terror applied domestically; (ii) domestic or internal terrorism carried out by private individuals or groups; and (iii) international terrorism, including state-sponsored acts of transnational violence".[7]The past six decades however have witnessed terrorism startlingly thriving.[8]

Since the massacre of Israeli athletes by the Black September organization at the 1972 Munich Olympic Games to Lockerbie, 9/11, Bali bombings, Madrid terror attack, Beslan school siege, Boko Haram coordinated explosions, and to the recent Paris, Brussels, Istanbul, Ankara and Nice attacks, the world is witnessing terrorism on the rise, with no overarching international tool to combat it.[9]

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[5] R. Young, 'Defining terrorism: the evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation', (2006) 29 *BCICL* 23 at 27.

[6] *Ibid*., at 28.

[7] Stephens, *supra* note 4 at 457.

[8] G. Guillaume, 'Terrorism and international law', (2004) 53 *ICLQ* 537 at 538.

[9] A. Cohen, 'Prosecuting terrorists at the International Criminal Court: reevaluating an unused legal tool to combat terrorism', (2011-2012) 20 *MSILR* 219 at 222

Moreover, the concept of terrorism or that of a terrorist may be employed for a variety of purposes, and in a number of different ways.[10] Particularly in situations of armed conflict, terrorism may be evoked as an instrument to discredit the opposite side – whether it is "an individual, a private organization, an insurgent group, a movement of national liberation, a state or a group of states".[11] Sure enough, one ethnical, political, or national group's freedom fighters are another's terrorists. In the mid-1980s, *The Economist* published a study stating that "violent resistance to authority is often justified: not a few of today's presidents and prime ministers were yesterday's guerrillas",[12] and moreover indicating in the study that the principal difference between terrorists and freedom fighters is in their targets. In other words, "*bona fide* guerrillas strike at military targets",[13] whereas terrorists usually target civilians to bring across a political message and dissipate widespread communal fear through their attacks.

Throughout the history of numerous countries, blocs and regions, political and social changes transformed the terrorists of yesterday into the heroes of today, and vice-versa.[14] Without an internationally agreed-upon precise definition of terrorism, it seems somewhat ambitious to put forward large-scale terrorism-prevention mechanisms and legislation while lacking the consent of all nations as to what is the exact ambit of its criminality. The dire need to define terrorism could be labeled as self-evident.[15] However, if the less politically (and legally) delicate and complex crime of aggression has taken such a long time to

(hereinafter 'Cohen'); C. Much, 'The International Criminal Court (ICC) and terrorism as an international crime', (2006) 14 *MSTJIL* 121 at 128.

[10] M. Di Filippo, 'The definition(s) of terrorism in international law' in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 3 (hereinafter 'Di Filippo').

[11] *Ibid*.

[12] See 'How to tell a terrorist', *The Economist* (26 July 1986).

[13] L.F.E. Goldie, 'Profile of a terrorist: distinguishing freedom fighters from terrorists', (1987) 14 *SJILC* 125 at 127.

[14] See Di Filippo, *supra* note 10, at 3.

[15] Cassese, *supra* note 2 at 934.

gain its place in the Rome Statute, it is uncertain when international criminal law could expect a definition of terrorism in the Rome Statute – or elsewhere, if ever at all.

2. *The importance of having a universally accepted definition*

Among the scholarly world, many would concur that the importance of defining terrorism in order to address it globally is long overdue, and that the label has posed an unacceptable conundrum disabling at least a rudimentary, working definition to arise.[16]

Notwithstanding the current disagreement on the definition of terrorism during armed conflict, the Special Tribunal for Lebanon (STL) in its February 2011 Interlocutory Decision found that the definition of terrorism in time of peace indeed exists as a customary rule of international law "on the basis of treaties, UN resolutions and the legislative and judicial practice of States".[17] In other words, jointly recurring elements of terrorism found in the aforementioned sources give rise to a consensus on the definition consisting roughly from the following elements:

> z(i) acts normally criminalized under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally (iii) are politically or ideologically motivated, i.e. are not based on the pursuit of private endsz.[18]

Although mandated to apply Lebanese Law,[19] the STL considered customary law in interpreting the Lebanese Criminal Code and estab-

[16] Hickman, *supra* note 3 at 461.

[17] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, Appeals Chamber, 16 February 2011 at 3 (hereinafter "STL February 2011 Interlocutory Decision").

[18] Cassese, *supra* note 2 at 937.

[19] 2006 Statute of the Special Tribunal for Lebanon, S/RES/1757, Art. 2.

lished a definition of terrorism derived from custom and the international legal framework:

> As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio,* to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace,* has indeed emerged. 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.[20]

The creative approach that the Tribunal undertook has received both criticism and praise.[21] Whether the Appeals Chamber was right in its conclusion to apply international law while interpreting the Lebanese Criminal Code has been subject to debate,[22] yet it could not have

[20] STL February 2011 Interlocutory Decision, *supra* note 17 at 49-50, para 85.

[21] M. Bernhaut, 'Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging (United Nations Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/I, 16 February 2011)', (2011) 18 *AJIL* 229 at 230; See further K. Ambos, 'Judicial creativity at the special tribunal for Lebanon: is there a crime of terrorism under international law?' 24 *LJIL* 655; B. Saul, 'Legislating from a radical Hague: the United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism', (2011) 24 *LJIL*677.

[22] See S. Kirsch, A. Oehmichen, 'Judges gone astray: the fabrication of terrorism as an international crime by the Special Tribunal for Lebanon', (2011) 1 *DLR*32; M. Gillett, M. Schuster, 'Fast-track justice: the Special Tribunal for Lebanon defines terrorism', (2011) 9 *JICL*989.

been left ignored as it is the very first instance of a Tribunal internationalizing terrorism with the inherent aim to address it globally.[23]

What can however hardly go unnoticed is the fact that without a common international definition of terrorism, coordinated efforts to combat it are severely reduced. As previously mentioned, the STL indeed based its definition of terrorism "on the basis of treaties, UN resolutions and the legislative and judicial practice of States".[24] It is noteworthy that certain scholars find that the definition for terrorism could also be derived from the legislative framework of international humanitarian law, namely from the "principles regarding what behaviors are permitted in conventional wars between nations".[25] These principles stem from the Geneva[26] and Hague Conventions,[27] but they confine and restrict the definition of terrorism solely to the time of armed conflict. It is therefore important to establish a definition of terrorism that would criminalize and punish terrorist acts in times of peace alike in the times of conflict. The current legal framework offers little to the definition of terrorism on an international level.

In this respect, the definition of transnational terrorism of the STL is thus far the finest one we dispose of, yet its long-term impact is currently unpredictable.[28] One may only hope that this definition could be

[23] M. J. Ventura, 'Terrorism according to the STL's interlocutory decision on the applicable law: a defining moment or a moment of defining?', (2011) 9 *JICJ* 1021 at 1027 (hereinafter 'Ventura').

[24] STL February 2011 'Interlocutory Decision', *supra* note 17 at 3.

[25] B. Ganor, 'Defining terrorism: is one man'sterrorist another man's freedom fighter?', (2002) 3 *Police Practice and Research* 287 at 287-9.

[26] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

[27] '1907 Regulations respecting the laws and customs of war on land annexed to The Hague Convention' (IV) Respecting the Laws and Customs of War on Land.

[28] J. Powderly, 'Introductory observations on the STL Appeals Chamber Decision: context and critical remarks', (2011) 22 *Criminal Law Forum* 347 at 362.

the steppingstone for further developments, as the modern day terror is spreading – and the law is hardly budging.

Current Legal Framework

There are currently a total of 19 international legal instruments addressing terrorism.[29] Almost all national legislations include terrorism within their Criminal Codes and Acts.[30] Numerous United Nations General Assembly Resolutions, as well as Security Council Resolutions and Multilateral International and Regional Treaties have addressed it and defined its offences.[31] Nevertheless, obtaining a fixed international definition of terrorism remains problematic.

1. *International legal instruments*

Despite the insurgence of terrorism during the time of the French Revolution, terrorism has only been on the international agenda since the establishment of the League of Nations. The League of Nations attempted to outlaw terrorism by adopting a draft convention for the prevention and punishment of terrorism, and even though the Convention was indeed adopted in 1937, it still did not come into force.[32] This is important to bear in mind from a contemporary perspective, as the efforts of the League of Nations are of great significance to those of the United Nations in creating an international legal framework apt to effectively address and combat terrorism.[33] The 1937 Convention included a definition of terrorism and legally defined it as "all criminal acts directed against a state and intended or calculated to create a state

[29] The United Nations Office on Drugs and Crime, 'Terrorism prevention'. Available at: http://www.unodc.org/unodc/en/terrorism/

[30] Cassese, *supra* note 2 at 937.

[31] *Ibid*.

[32] United Nations Department of Public Information, *International Legal Instruments – United Nations Action to Counter Terrorism.* Available at: http://www.un.org/en/terrorism/instruments.shtml

[33] A. R. Perera, 'The draft United Nations Comprehensive Convention on International Terrorism' in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 152-3 (hereinafter 'Perera').

of terror in the minds of particular persons or a group of persons or the general public".[34] This definition could be regarded as a prototype for more contemporary formulations of terrorism.[35]

There are a plethora of counter-terrorism international legal instruments, frequently adopted following a terrorist catastrophe. But this is hardly the point if for future terrorist attacks we do not dispose of an all-encompassing international legal framework already apt to cover offences systematically.

THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, also known as the Montreal Convention or the Sabotage Convention, was concluded in 1971 and is in force since 1973. With 188 state parties, the Montreal Convention is one of the most adhered to within the international legal framework on terrorism. The primary focus of the Montreal Convention is the safety of civilian aviation and as such, it does not apply to military aircrafts, irrespective of the terrorist acts that may befall these. Article 1 stipulates what exactly constitutes criminal behavior for the purposes of the Convention:

1. Any person commits an offence if he unlawfully and intentionally:
   (*a*) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
   (*b*) Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
   (*c*) Places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it in-

[34] 1937 Convention for the Prevention and Punishment of Terrorism, (1938) 19 League of Nations Official Journal 23. The Convention never entered into force.

[35] Perera, *supra* note 33 at 153.

capable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(*d*) Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(*e*) Communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(*a*) Attempts to commit any of the offences mentioned in paragraph 1 of this article; or

(*b*) Is an accomplice of a person who commits or attempts to commit any such offence.[36]

The Convention further addresses the *aut dedere aut judicare* principle in its Article 7 whereby it states that: "the Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. …". Article 7 is especially relevant in respect to the *Lockerbie*[37]case where the aforementioned principle 'to extradite or to prosecute'[38] was pivotal for both the UN Security Council and the International Court of Justice in resolving the dispute.

THE INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

A further development in the international legal framework on preventing terrorism came about with the adoption of the International

[36] 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 177, Art. 1.

[37] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United States Of America*), Preliminary Objections, Judgment of 27 February 1998, [1998] ICJ Rep. 115.

[38] See M. Plachta, 'The *Lockerbie Case*: the role of the Security Council in enforcing the principle *aut dedere aut iudicare*', (2001) 12 *EJIL* 125.

Convention against the Taking of Hostages, or more commonly, the Hostages Convention in 1979. The Hostages Convention is predominantly concerned with the prohibition of hostage taking,[39] and alike the Montreal Convention, it addresses the *aut dedere aut judicare* principle. The Hostages Convention was negotiated in the context of suddenly increasing episodes of hostage-takings[40] in the 1970s, linked with "national liberation struggles in pursuit of self-determination from colonial regime".[41] The Convention entered into force in 1983, and has 176 state parties as of October 2016 with the accession of Zambia.

PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION, SUPPLEMENTARY TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, commonly referred to as the Airport Protocol, is a Protocol supplementary to the Montreal Convention expanding on its provisions. Most notably, the Protocol encompasses not only terrorist acts aboard the aircraft, but also those at the airport as an affront to the safety of civil aviation. Adopted in 1988, the Airport Protocol entered into force in 1989 and has a total of 174 parties. It equally does not concern itself with military aircrafts or operations.

THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS

The Terrorist Bombing Convention, formally the International Convention for the Suppression of Terrorist Bombings, was adopted in

[39] 1979 International Convention against the Taking of Hostages, 1316 UNTS 205.

[40] See J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (1990).

[41] B. Saul, 'International Convention Against the Taking of Hostages', (2014) UN Audiovisual Library of International Law, Historical Archives.

1997 in response to the truck bombing attack on the US military personnel in Saudi Arabia.[42] Pursuant to Article 2, the Convention criminalizes and punishes these offences:

1. 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.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
   a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
   b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
   c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article 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.[43]

In comparison to earlier conventions, the Terrorist Bombings Con-

[42] S.M. Witten, 'The International Convention for the Suppression of Terrorist Bombings', (1998) 92 *AJIL* 774 at 775 (hereinafter '"Witten').

[43] '1997 The International Convention for the Suppression of Terrorist Bombings', 2149 *UNTS* 256, Art. 2.

vention, although building upon the same typical structure, is rather creative as it expands the ambit of the offences.[44] The Terrorist Bombings Convention does not define terrorism *per se*, as neither did the earlier Conventions, but it rather attempts to characterize which terrorist conduct could be internationally recognized as criminal.[45] The Terrorist Bombings Convention notes for the first time the "general application of broad issues such as bombings of public buildings, destruction of infrastructure and attacks with toxic chemicals and biological agents, substantially expanding international cooperation into areas that had previously largely been addressed solely by local law and bilateral cooperation agreements".[46] The Convention has 169 state parties and entered into force in 2001.

THE CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

The Convention for the Suppression of the Financing of Terrorism, known as the Terrorist Financing Convention, is the first Convention to ever attempt defining terrorism as an international offence, notwithstanding the political sensitivity of the crime. In this respect, it is the most pertinent international utensil in the definitional toolkit of terrorism. The definition of terrorism can be found in the Convention's Article 2(1)(b):

1. 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:
   (b) Any other act intended to cause death or serious bodily injury

[44] See Witten in general, *supra* note 42.

[45] *Ibid.*, at 775.

[46] S.M. Witten, 'The International Convention for the Suppression of Terrorist Bombings' in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 137.

> 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.[47]

The Terrorist Financing Convention was however "sparsely ratified at first and would have made little impact in international relations had it not been for the terrorist attacks of 9/11".[48] This is largely due to the fact that its Article 12(2) requires parties "not to refuse any request for mutual legal assistance on the grounds of bank secrecy".[49]

Signed in 1999, and in force since 2002, the Terrorist Financing Convention provides the very first broad definition of terrorism since the attempt of the League of Nations, which never came to fruition.[50] In addition, the Convention is regarded until today as one of the most significant advances in defining terrorism on an international level. The Terrorist Financing Convention establishes "a treaty framework for several of the obligations imposed upon UN members by the Security Council Resolution 1373",[51] a Resolution passed after the 9/11 attacks as a counter-terrorism measure binding on all UN Member States.

The Terrorism Financing Convention acknowledges terrorism to be an international threat requiring an *in medias res* approach and a precise definition of the elements of the crime. While addressing the objective and subjective elements of terrorism, Cassese points to the Terrorism Financing Convention, which stipulates in Article 3 that terrorism

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[47] '1999 International Convention for the Suppression of the Financing of Terrorism', 2178 *UNTS* 197, Art. 2(1)(b) (hereinafter "Terrorism Financing Convention").

[48] I. Bantekas, 'The International Law of Terrorist Financing', (2003) 97 *AJIL*315 at 324.

[49] Terrorism Financing Convention, Art. 12(2); I. Bantekas, 'The International Law of Terrorist Financing' in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 124.

[50] Stephens, *supra* note 4 at 473.

[51] *Ibid*., at 461.

ought to be 'transnational in nature' in order for it not the fall within the slimmer realm of an exclusively national criminal jurisdiction.[52] In fact, the international component of terrorism is distinctly separated from terrorism on a national level: "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".[53] Thus, the Terrorism Financing Convention focuses on terrorism being strictly an international crime for the purposes of the Convention. It is by far the most successful counter-terrorism treaty with 187 parties.

THE DRAFT COMPREHENSIVE CONVENTION ON TERRORISM

The most recent international attempt to provide a definition of terrorism lies in the United Nations' Draft Comprehensive Convention on Terrorism. This convention remains deadlocked, still being negotiated at the UN Ad Hoc Committee. The Draft Comprehensive Convention has a mandate of producing a treaty-based definition of terrorism in order to enable the international community of states to address and combat terrorism through the means of international criminal law.[54] Its core objective is seen as an expansion of defining terrorist crimes that have not been covered thus far by the international legal framework. More importantly, the Draft Convention seeks to not only expand on the already existing crimes, but to also include new offences "such as serious attacks on the environment and a serious and credible threat to commit a terrorist act".[55]

What both the Convention for the Suppression of the Financing of Terrorism and the Draft Comprehensive Convention on Terrorism address is the transnational nature of terrorism in their common Article 3, therefore ensuring that at least one of the elements of the crime is foreign for the treaties to be applicable. However, there are impediments

[52] Cassesse, *supra* note 2 at 938.
[53] Terrorism Financing Convention, *supra* note 47, Art. 3.
[54] Stephens, *supra* note 4 at 462.
[55] Perera, *supra* note 33 at 157.

to its adoption, as negotiations are in deadlock. The chief impediment in adopting the definition stems from its Article 2, similar in wording to that of the Convention for the Suppression of the Financing of Terrorism.[56] The informal text of the Draft Comprehensive Convention attempts to define the following in Article 2 in juxtaposition to the former Convention:[57]

(1) Any person commits an offence within the meaning of the Convention if that person, by any means, unlawfully and intentionally, causes:
   (a) Death or serious bodily injury to any person; or
   (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
   (c) Damage to property, places, facilities, or systems referred to in paragraph l(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.[58]

Furthermore, Article 2 of the Draft Comprehensive Convention stipulates more *in extenso*"that it is an offence to make a credible and serious threat to commit any of these acts,[59] or to attempt to commit any of these acts",[60] and "an additional provision also makes criminal the participation in, organization of, or contribution to, the commission of any of these acts."[61]

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[56] Stephens, *supra* note 4 at 464.

[57] *Ibid*., at 463.

[58] 2002 Draft Comprehensive Convention, *Report of the Ad Hoc Committee Established by GA Res. 51/210 of l7 December 1996,* UN Doc. A/57/37 (hereinafter 'Draft Comprehensive Convention'.)

[59] See Stephens *supra* note 4 at 464; Draft Comprehensive Convention, Art. 2(2).

[60] *Ibid*; Draft Comprehensive Convention, Art. 2(3).

[61] *Ibid*; Draft Comprehensive Convention, Art. 2(4).

Under both the Terrorist Financing Convention and the Draft Comprehensive Convention, the objective element pertaining to conduct[62] is quasi identical. However the subjective element relating to the purpose[63] of the act in question is lacking. There is nothing in either of these Conventions relating to the widely acknowledged perception that terrorism as an act is innately conducted with the goal of achieving a political purpose, whether in its context or nature.[64] Instead, and pertaining to the context and the nature of the conduct, it follows that the crime fits under the definition of terrorism as long as its specific act of violence is committed with the intention "of intimidating a population, or of compelling a government or international organization to do or abstain from doing any act".[65]

OTHER INTERNATIONAL LEGAL INSTRUMENTS

There is a manifold of other important international legal instruments criminalizing and punishing different forms and circumstances of terrorist activities. Among them are, as a humble example, the Convention on Offences and Certain Other Acts Committed on Board Aircraft,[66] the Convention for the Suppression of Unlawful Seizure of Aircraft,[67] the Convention on the Physical Protection of Nuclear Material,[68] the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,[69] the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental

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[62] See Cassese, *supra* note 2 at 938.

[63] *Ibid*.

[64] See Stephens *supra* note 4 at 464.

[65] *Ibid*.

[66] '1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft', 704 *UNTS* 220.

[67] '1970 Convention for the Suppression of Unlawful Seizure of Aircraft', 860 *UNTS* 105.

[68] '1979 Convention on the Physical Protection of Nuclear Material', 1458 *UNTS* 125.

[69] '1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', 1678 *UNTS* 221.

Shelf,[70] the Convention on the Marking of Plastic Explosives for the Purpose of Detection,[71] and the International Convention for the Suppression of Acts of Nuclear Terrorism,[72] the list being by no means exhaustive.

International efforts to criminalize terrorist activities have been taken since the end of the First Word War,[73] yet it nonetheless appears that global cooperation in jointly and effectively addressing terrorism is somewhat wanting. Whereas on a national level, terrorism can be addressed and tackled much more effectively than on a regional level; the regional framework is sometimes more legally and politically successful than the current international umbrella of counter-terrorism instruments. In this matryoshka-like concept, the smallest doll is curiously the most powerful.

2. *Regional legal framework*

Within the regional legal framework, one may find a plethora of different conventions, among which are, for instance the Arab Convention on the Suppression of Terrorism,[74] the Convention of the Organization of the Islamic Conference on Combating International Terrorism,[75] the European Convention on the Suppression of Terrorism,[76] the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of In-

[70] '1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf', 1678 *UNTS* 304.

[71] '1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection', 2122 *UNTS* 359.

[72] '2005 International Convention for the Suppression of Acts of Nuclear Terrorism', 2178 *UNTS* 229.

[73] B. Saul, 'The legal response of the League of Nations to terrorism' (2006) 4 *JICL* 78 at 80-1.

[74] '1998 Arab Convention on the Suppression of Terrorism'.

[75] '1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism'.

[76] '1977 European Convention on the Suppression of Terrorism', 1137 *UNTS* 93.

ternational Significance,[77] the OAU Convention on the Prevention and Combating of Terrorism,[78] the SAARC Regional Convention on Suppression of Terrorism,[79] and the Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism,[80] *inter alia.*

Irrespective of the fact that these conventions are region-specific, they do share certain similarities that also figure in international legal instruments. Most importantly, a terrorist attack triggered the creation of most of these international and regional conventions. For instance, the ASEAN Mutual Legal Assistant Agreement was initially drafted as a response to the October 2002 Bali Bombings. The subsequent development was the 2007 ASEAN Convention on Counter-Terrorism and both of these conventions are important for the mutual cooperation between member states when combatting terrorism in the region.[81]

Further, the Organization of American States adopted the 'Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance' in 1971 right after "the kidnapping and murder of count Karl Von Spreti, the west German ambassador to Guatemala, in 1970".[82] In turn, the 1977 European Convention on the Suppression of Terrorism followed the international legal developments on terrorism, and was adopted under the auspices of the Council of Europe in order

[77] '1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance', 1438 *UNTS* 194.

[78] '1999 OAU Convention on the Prevention and Combating of Terrorism'.

[79] '1987 SAARC Regional Convention on Suppression of Terrorism'.

[80] '1999 Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism'.

[81] R. Gunaratna and G. Cheung, 'Regional Legal Responses to Terrorism in Asia and the Pacific'm in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 757.

[82] M. Sossai, 'The Legal Response of the Organisation of American States in Combating Terrorism', in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 701.

to address terrorist offences.[83]

It is remarkable that in light of these international and regional conventions, the problem of defining terrorism still persists. Given the resemblances between these legal instruments, despite the political sensitivity of terrorism *per se*, the international community ought to arrive at a common definition and common repercussions for terrorist acts in order to equip itself more effectively in combatting terrorism.

3. *National criminal legislations*

Most national legislations contain the definition of terrorism and terrorist acts. The STL, in its 2011 Interlocutory Decision examines numerous national laws and finds that, in respect to terrorism, there are common elements across national legislations. Said elements are viz. the practice and "the use of criminal acts to terrorize or intimidate populations, to coerce government authorities, or to disrupt or destabilize social or political structures".[84]

For instance, Austria,[85] Belgium,[86] Germany,[87] Netherlands[88] and Sweden[89] have almost identical definitions in criminalizing terrorist acts, composed of the above-mentioned elements. In turn, the French Criminal Code[90] is more concise in as much as it defines terrorist offences as those "intended to seriously disturb public order through intimidation or terror".[91] The UK defines terrorism in its Terrorism Act[92]

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[83] C. Murphy, 'The Legal Response to Terrorism of the European Union and Council of Europe', in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2014) at 686.

[84] STL Decision, at 57, para. 93.

[85] Austrian Criminal Code, Sec. 278(c).

[86] Belgian Criminal Code, Art. 137.

[87] German Criminal Code, Sec. 129(a).

[88] Dutch Criminal Code, Arts. 83 and 83a.

[89] 2003 Swedish Law on the Crime of Terrorism at 148.

[90] French Criminal Code 421(1).

[91] STL at 59, para. 93.

[92] 2000 Terrorism Act, Sec. I, as amended by the Terrorism Act 2006 and Counter-Terrorism Act 2008.

as inclusive of a subjective element "of intent to coerce a governmental authority or intimidate a population, but it also requires a political, religious, racial or ideological purpose".[93] The national legislations of Australia,[94] Canada,[95] New Zealand[96] and South Africa[97] have similarly worded definitions of terrorism as the UK.

The STL additionally found that the Latin American countries, particularly Chile,[98] Colombia,[99] Panama[100] and Peru,[101] require in their national legislations "the intent to spread fear and the use of means capable of causing havoc or public danger"[102] when it comes to defining terrorism. These elements also figure in the legislations of India,[103] Russia[104] and the US.[105]

Further, the Interlocutory Decision points out that among the countries that are signatories to the Arab Convention for the Suppression of Terrorism, Egypt,[106] Iraq,[107] Jordan,[108] Tunisia[109] and the United Arab Emirates[110] all sanction in their national legislations "criminal acts that endanger social order and spread fear or harm among the population

[93] STL at 60, para. 94.

[94] 1995 Australian Criminal Code Act, Sec. 100(1).

[95] Canadian Criminal Code, Ch. C-46, Sec. 83(01).

[96] 2002 Terrorism Suppression Act No. 34, Sec. 5.

[97] 2004 Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33, Sec. I(xxv).

[98] Law No. 18314, Arts. 1 and 2.

[99] Colombian Criminal Code, Art. 343.

[100] Panamanian Criminal Code, Art. 287.

[101] Decree Law No. 25475, Art. 2.

[102] STL at 60, para. 95.

[103] 2008 Unlawful Activities (Prevention) Amendment Act No. 35, Sec. 4.

[104] 2006 Federal Law on Counteraction against Terrorism No. 35-FZ, Art. 3.

[105] 18 U.S.C. § 2331

[106] Egyptian Criminal Code, Art. 86.

[107] 2005 Iraqi Anti-Terrorism Act No. 13, Art. 1.

[108] Jordanian Criminal Code, Arts. 147 and 148.

[109] 2003 Tunisian Law 2003-75 against Terrorism and Money-Laundering, Art. 4.

[110] 2004 Decree by Federal Law No. I on Combating Terrorist Offences, Art. 2.

or damage property or infrastructure in a way that endangers society".[111]

In sum, national legislations on terrorism do share considerable amount of common and recurring elements. In coining a comprehensive definition of terrorism that could be more easily accepted by states on an international level, these similarities vividly illustrate that there are shared notions of the crime which could undoubtedly be incorporated in a single definition. The STL's definition of terrorism thus took into account not only international and regional legislative frameworks, but also national common and civil law takes on terrorism. The Tribunal drew the conclusion that state practice and *opinio juris*" had crystallized into the aforementioned definition of terrorism during peacetime".[112] There are unsurprisingly certain alterations between the definitions of terrorism across national legislations based on different motives. For instance, some of the commentators of the Interlocutory Decision find these differences to be grounded in "ideological, political, religious or racial" motives.[113] Political and religious differences persist in respect to the motive behind terrorism. However, the ideology of spreading terror or intimidating a population to get across a political message seems to be the most common element behind the offence. Premeditated fear spreading is likewise one of the most recognized elements in criminalizing and punishing terrorist acts. If the legal and definitional differences of terrorism across national jurisdictions could be juxtaposed as black and white, the gray area of terrorism would still be quite sizable. It is within this vast gray area where the international community could easily find a common definition of terrorism, acceptable to all. What is always more difficult to find is the political will.

[111] STL February 2011 Interlocutory Decision, *supra* note 17 at 57-9, para. 93.
[112] Ventura, *supra* note 23 at 1028.
[113] *Ibid.*

Terrorism as a Crime in the Rome Statute

Terrorism as a crime under the Rome Statute could benefit the international community in defining, criminalizing and punishing the offences there under. During the negotiations at the Rome Conference, there were considerations among the parties to include terrorism as one of the crimes under the Court's jurisdiction. However several reasons, among them the Kafkaesque problem of scope, halted both the initial inclusion and future considerations, similar to those pertaining to the crime of aggression at the Kampala Review Conference of the Rome Statute.

Be as it may, the initial negotiations revealed that terrorism as a crime could potentially fall under one of the three suggested categories: firstly, as a *sui generis* crime, secondly as an offense under the six proposed counter-terrorism conventions,[114] and lastly as a combined offense involving "use of firearms, weapons, explosives, and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property".[115]

Several commentators find that rejecting the inclusion of terrorism as a crime under the Rome Statute, albeit chiefly associated with the problem of properly defining it, was triggered from more than mere semantics.[116] Among these obstacles, a few may be extracted; the first obstacle is the definitional constraint, as the parties to the Conference did not reach a consensus on an acceptable definition (notwithstanding proposals for a working definition, a sort of terrorism in a 'transitional format', adhered to by Cassese and seen in the work of the STL).[117]

The second hindrance in including terrorism under the Rome Stat-

[114] 1998 *Report of the Preparatory Committee on the Establishment of an International Criminal Court* at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (June 15 – July 17 1998).

[115] A. Cohen, *supra* note 9 at 223.

[116] *Ibid.* at 224.

[117] *Ibid.;* See STL February 2011 Interlocutory Decision, *supra* note 17.

ute pertained to the discussion of the gravity of the crime. In other words, genocide, crimes against humanity and war crimes are 'more heinous' to the international community than terrorism, and after all, the ICC was designed with the aim to deal with the most serious offenses as the Court of last resort.[118] Whether there will be any subsequent reviews in particular on the severity of terrorism and thus its potential inclusion in the Rome Statute will depend on a number of factors, one of them without a doubt being the political sensitivity of the issue (already addressed at the Rome Conference as a deterring reason for the inclusion).

On the other hand, some argue that only the most severe form of terrorism[119] could be incorporated in the Rome Statute. However, qualifying what is the most severe form needs to be addressed more accurately. There are suggestions that by limiting terrorism solely to "grave instances of the specific offences"[120] might be a proposal that more State Parties would be prone to accept. The ICC could reference the existing international legal framework on counter-terrorism,[121] and point to a particular set of offences as defined, for example, in the Terrorism Financing Convention. As per deciding on what constitutes the most severe form of terrorism, the ICC itself could decide on a case-by-case basis whether the 'gravity threshold' is met.[122]

1. *Terrorism as a crime against humanity*

Considering Article 7 of the Rome Statute on the crimes against humanity,[123] begs the question of whether terrorism could fit within its

[118] *Ibid.*

[119] See C. Much, 'The International Criminal Court (ICC) and terrorism as an international crime', (2006) 14 *MSTJIL* 121 (hereinafter "Much").

[120] P. J. Wertheim, 'Should "grave crimes of international terrorism" be included in the jurisdiction of the International Criminal Court?', (2003) 22 *Policy & Society* 1 at 4-5 (hereinafter 'Wertheim').

[121] *Ibid.*

[122] *Ibid.*, at 5.

[123] 1998 Rome Statute of the ICC 2187 UNTS 90, Art. 7 (hereinafter 'Rome Statute').

ambit and whether the ICC Elements of Crimes[124] could bestow it the necessary description. The main advantage in including terrorism as a crime under Article 7 lies in the fact that, *inter alia,* the definition in Article 7 does not include any requirement that the acts committed ought to have been conducted during the time of war.[125]

Cassese claimed that irrespective of the existence of a debate on the definition of terrorism during armed conflict, a definition of terrorism in the time of peace unquestionably exists, and is derived from international custom. The Rome Statute is not prejudiced[126] by the emerging trends of customary international law, and thus a working definition of terrorism in the Rome Statute could potentially be one that excludes situations of armed conflict.

Article 7(1) stipulates that: "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."[127] Further, an 'attack' for the purposes of Article 7 does not need to be military in nature, it is defined in 7(2) as: "a course of conduct involving the multiple commission of acts referred to in paragraph one against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[128] The key terms to focus on in Article 7 of the Statute are the "widespread" and "systematic" nature of the attack, denoting *a priori* that singled-out acts could not qualify as a crime against humanity.

Following Article 7, one may try to *lato sensu* fit in the 9/11 attacks,

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[124] 2011 *Elements of Crimes*, ICC RC/11, replicated from the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court,* Kampala, 31 May -11 June 2010 (hereinafter "Elements of Crimes").

[125] Cohen, *supra note* 9 at 242.

[126] As indeed Article 10 of the Rome Statute stipulates: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

[127] Rome Statute, *supra* note 123, Art. 7(1).

[128] *Ibid*., Art. 7(2).

for example, as a crime against humanity given the context. The most important aspect of including terrorism as a crime under the Rome Statute is to recognize its gravity and punish it accordingly. Such an inclusion could politically and economically damage the reputation of the State Parties financing or supporting terrorism, a damage that on its own might indirectly deter states from certain activities.

By potentially including the crime of terrorism under Article 7 of the Rome Statute, it is imperative to assess whether the crime would be one found in the enumerated list of acts, or would it otherwise fall under Article 7(1)(k) of the Statute describing "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".[129]

It is noteworthy in this respect to look at the drafting history of the Statute and assess whether the most suitable venue for the inclusion of terrorism as a crime under Article 7 of the Rome Statute would be to incorporate it under Article 7(1)(k), as an 'other inhumane act', always maintaining the threshold of the attack being widespread and systematic. The very evolution of the crimes against humanity, dating back to the Nuremburg Charter in fact suggests that terrorism "developed against the background of crimes against peace and war crimes (…) and thus it can be argued that there is no ground to assert that terrorism, a concept well established at the time that crimes against humanity were recognized, was intended in any way to be included under this category".[130] Further, Article 22 of the Rome Statute has been pithily drafted in order to safeguard the precision of the Statute and the jurisdiction of the Court over the specific crimes: "The definition of a crime shall be strictly construed and shall not be extended by analogy (…)".[131]

The inclusion of terrorism as a crime against humanity under the Rome Statute is an ambitious task, yet perhaps one just as challenging

[129] Rome Statute, *supra* note 123, Art. 7(1)(k).

[130] Cohen, *supra* note9 at 243.

[131] Rome Statute, *supra* note 120, Art. 22(2).

as including it elsewhere under the Statute. Certain commentators argue that due to the political nature of the crime, there might simply be no place for terrorism as a crime against humanity under the Statute.[132] This is due to the potential complications that might arise from the very prosecution of terrorist acts under Article 7, despite the contention that the very inclusion of terrorism is not necessarily beneficial for the widening of the ICC's jurisdictional scope.[133]

However, the nature of certain terrorist attacks is not to be categorically rejected *ab ovo.* Stating that "even the most blunt and clear terrorist attacks, such as the Munich massacre, the Pan Am flight 103 bombing, 9/11, and November 13 Paris attacks will encounter difficulties if prosecuted under Article 7"[134] is only partially correct. This is simply due to the lack of a definition apt of alleviating these alleged difficulties. One should not be quick to flatly assume that in light of the drafting history rejecting terrorism, a seemingly closed door would never reopen to include the crime under Article 7.

Moreover, prospective judicial and political advantages of enabling the ICC to prosecute terrorist acts under its jurisdiction must be thoroughly studied.[135] As a matter of fact "the ICC must be able to protect itself against becoming the platform on which States Parties try to score political points against another State Party, by generously referring to the ICC situations that they consider to imply the commission of crimes of terrorism".[136] In considering judicial and political advantages of including terrorism in the Rome Statute, one of the possible benefits is the likelihood that greater objectivity shall be granted to highly sensitive national cases than they would otherwise enjoy in a particular state court.[137]

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[132] See J. G. Starke, 'International terrorism and international law', (1987) 61 *ALJ* 311.

[133] See Cohen in general.

[134] Cohen, *supra* note9 at 245.

[135] C. Much, *supra* note 119 at128.

[136] *Ibid.,* at 133.

[137] *Ibid.,* at 135.

Such outright simplicity is however too good to be true. It is important to bear in mind the *modus operandi* of the referral of a situation to the ICC. Should a sensitive, and highly politicized case concerning terrorism (under the hypothesis the Court has jurisdiction over the crime) arise in any other way but a state self-referral, the 'greater objectivity' advantage would surely hide behind the clouds of political doubts of some states vis-à-vis others.

Another important aspect of this puzzle is state cooperation. The ICC has thus far struggled to continuously obtain state cooperation, specifically in regards to arrest warrants.[138] In analogy, it is probable that individuals assumed to have committed terrorist acts would, in one way or another, be sheltered by other states or terrorist organizations thus diminishing the effectiveness of having ICC prosecuting the crime of terrorism.

2. *Terrorism as any other crime under the Rome Statute*

Despite the popularity of strictly considering the inclusion of terrorism in the Rome Statute either as a crime against humanity or a standalone crime, one ought to evaluate whether any other crime under the Statute could be equally suitable for the inclusion of terrorism.

Firstly, it is safe to eliminate the crime of aggression as a potential crime under which terrorism could fit in. Secondly, one would perhaps be inclined to say the same for genocide, yet there are interesting takes on the matter reasoning that the *dolus specialis* of genocide could indeed be detected in a terrorist attack directed against the members of a particular group (*nota bene* only 'national, ethnical, racial or religious'[139] groups would qualify) if the aim were to destroy the members of the mentioned group in whole or in part. Nevertheless, as interesting and as creative these assertions are, the very core intention of terrorist acts is seldom to destroy members of a group.

Indeed, the Terrorism Financing Convention acknowledges that the

[138] B. Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography* (2012), at 49.

[139] 1998 Rome Statute of the ICC 2187 UNTS 90, Art. 6.

deaths and injuries of victims are not an end *per se*, but rather "leverage to achieve another goal".[140] For example, and with quite a stretch, attempting to place the 9/11 under the crime of genocide is impossible for the simple reason that under the Rome Statute the wording of Article 6 requires members of a particular group to be members on 'national, ethnical, racial or religious' grounds. The 9/11 attacks could have been directed at the 'Westerners' and capitalists, yet not strictly against the groups under Article 6. Americans as a category could likewise hardly meet the threshold, due to the specificity of the attack directed strictly at a trade center in New York, rather than ubiquitously targeting Americans as members of a group.

Entertaining the idea of broadening the category of a group would do it more damage than good. Both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda stated when addressing genocide, that the group, in the former case ought to be specific and cannot be described negatively (i.e. "non-Muslims"), and in the latter, that the four grounds mentioned in respect to groups are strong indicia, and that the members of a group are those who the perpetrator perceives them to be.[141]

Terrorism as an act of genocide is thus at best superfluous to the already well-established definition encompassing the most important elements, and at worst, legally harmful.

The reason why the crimes against humanity section of the Rome Statute would be the optimum fit for the inclusion of terrorism is indeed its context that does not require that there be a conflict. As the STL indicated moreover, terrorism in the time of peace is very much present.[142]

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[140] Terrorism Financing Convention, *supra* note 47, Art. 2(1)(b); Cohen, *supra note* 112 at 242.

[141] *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T (2 September 1998); *Prosecutor v. Goran Jelisić, Judgment,* IT-95-10-T, Trial Chamber (14 December 1999); *Prosecutor v. Milomir Stakic,* Judgment, IT-97-24-T, Appeals Chamber (22 March 2006).

[142] See STL February 2011 Interlocutory Decision.

Further, including terrorism as a war crime is perhaps even more laborious than including it as a crime against humanity given the context of the crime. The reason the inclusion of terrorism as a war crime should not be ignored *in toto* lies in the dynamics of tomorrow, as future military and political strategies are radically uncertain. 'War on terror', as exclaimed by the former US President George W. Bush, has to be understood as metaphorical[143] rather than as a dramatic political statement. States might indeed engage in military actions labeling it as a war on terror, as the US has done in 2001 by going to war against Afghanistan due to its support of terrorism.[144]

In this context, it is problematic to situate terrorism as a war crime, although it could resemble perhaps a new war strategy, alike the German blitzkrieg or the guerilla warfare at the time. Under the category of war crimes, terrorism could potentially fit an outlawed act if directed against civilians during conflict. Cassese notes that the Rome Statute, which thoroughly lists classes of war crimes under Article 8, in fact, fails" to mention resort to terror against civilians"[145] yet stresses out that "this argument would not (…) be compelling (…) as various provisions of the ICC Statute are not intended to codify existing customary rules, is borne out by Article 10 of the Statute".[146]

The Statutes of both the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone allow these tribunals jurisdiction over the act of terrorism, the former in its Article 4,[147] and the latter in its Article 3,[148] hence denoting the intention of the drafters to regard terrorism as an act that may be considered a war crime.[149] In addition,

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[143] Y. Dinstein, 'Comments on War', (2004) 27 *Harvard Journal of Law & Public Policy* 877 at 886.

[144] *Ibid.*

[145] Cassese, *supra* note 2 at 945.

[146] *Ibid*.

[147] 1994 Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), UN Doc. S/RES/955, Art. 4(d).

[148] 2002 Statute of the Special Court for Sierra Leone, 2178 UNTS 138, Art. 3(d).

[149] Cassese, *supra* note 2 at 945.

the Terrorism Financing Convention[150] supports the view that terrorism may be committed during times of war, and not exclusively in times of peace, and the "ILC Draft Code of Crimes against Peace and Security of Mankind takes the view that 'acts of terrorism' committed in internal conflicts constitute war crimes."[151]

It is not farfetched to assume that in time of war, terrorism may indeed constitute a war crime under certain conditions, namely that there be intent, since "motive becomes immaterial in terrorist acts as war crimes. In time of armed conflict, actions designed to spread terror in the enemy are always 'public' in nature and personal motives…"[152] and as such, they do not deserve any *stricto sensu* legal attention.

Consequently, there are meritorious arguments for including terrorism in the Rome Statute under both the crimes against humanity and war crimes, yet given how there is not one category exclusively overpowering another in the prospect of inclusion, the question of whether terrorism could be a standalone crime in the Statute is worth the analysis. In this respect, the Terrorist Financing Convention may lend its definition for considering terrorism as a novel crime.

3. *Terrorism as a standalone crime*

Another alternative is to incorporate terrorism in the Rome Statute as a completely novel crime, which could be done following the amendment procedure.[153] The crime of terrorism under the Rome Statute could reflect the suggestions initially brought forth during the Rome Conference. In addition, the crime could reflect the international counter-terrorism conventions and protocols, particularly the definition currently existing under the Terrorist Financing Convention.

In this respect, it is important to note that there are currently 124 State Parties to the ICC,[154] and only two have not signed the Terrorism

[150] Terrorism Financing Convention, *supra* note 44, Art. 2(b).

[151] Cassese, *supra* note 2 at 946.

[152] *Ibid.* at 948.

[153] Rome Statute, *supra* note 123 Art. 121.

[154] International Criminal Court, 'The state parties to the Rome Statute'. Avail-

Financing Convention, these being Chad and Zambia. Therefore 98,4% of the ICC State Parties at least recognizes the terrorist offences falling under the definition of the Terrorism Financing Convention.

However, when looking at the reservations and objections made by state parties or signatories to the Terrorism Financing Convention, one notices the declarations under Article 2(1)(b) to be recurring. Article 2(1)(b) states the following:

"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: (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."

The recurring declarations under Article 2(1)(b) made by Member States such as Egypt, Jordan, Kuwait, Namibia, Syria, Yemen (of which only Jordan, Namibia and Yemen are also state parties to the ICC) commonly concern "national resistance … including armed resistance against foreign occupation and aggression with a view to liberation and self-determination"[155] whereby the word resistance is sometimes replaced with the word 'struggle', and colonialism is added alongside 'foreign occupation and aggression' in Namibia's reservation, for instance.[156]

These declarations and reservations subsequently result in simi-

able at: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[155] See Terrorism Financing Convention, *supra* note 47, Ch. XVIII Penal Matters – *Declarations and Reservations*. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en

[156] *Ibid.*

larly-worded objections of 26 predominantly Western State Parties.[157] The first objection concerns limiting the scope of the Convention; the second defeating the object and purpose of the Convention; and lastly, that these reservations are contrary to Article 6 of the Convention pursuant to which "State Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".[158]

In addition, Article 19 of the Vienna Convention on the Law of Treaties entitled 'Formulation of reservations' stipulates that "a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (c) … the reservation is incompatible with the object and purpose of the treaty".[159] The objecting State Parties made reference to Article 19 of the Vienna Convention on the Law of Treaties, with a remark that such an objection does not 'preclude the entry into force of the Convention" between the objecting State Party and that which made a reservation.[160]

Cohen notes that, in light of the high percentage of the ICC State Parties equally being Parties to the Terrorism Financing Convention, the sole novelty of terrorism under the Rome Statute would be to "in-

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[157] See Terrorism Financing Convention, *supra* note 44, Ch. XVIII Penal Matters – *Objections.* Available at: https://treaties.un.org/pages/ViewDetails.aspx?Src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en. *Nota bene*, these countries include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Switzerland, UK and US.

[158] *Ibid.*

[159] '1969 Vienna Convention on the Law of Treaties', 1155 *UNTS* 331, Art. 19(c).

[160] See Terrorism Financing Convention, *supra* note 47, Ch. XVIII Penal Matters – *Objections.* Available at: Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en.

troduce ICC jurisdiction over it".[161] Although an exorbitantly high percentage of ICC State Parties are also parties to the Terrorism Financing Convention, these declarations and reservations illustrate a lack of agreement in accurately defining terrorism and shed light on a deeper problem. In other words, being a State Party to the Terrorism Financing Convention and the Rome Statute does not *ergo* produce a sealed deal on a definition of terrorism. As reservations and declarations demonstrate, this is hardly the case, and the link thus weakens drastically.

4. *Benefits of the ICC jurisdiction over terrorism*

Besides, terrorism as a crime under the Statute would have to be defined, as the fundamental principle of *nullum crimen sine lege, nulla poena sine lege* mandatorily needs to be satisfied.[162] Some argue that the "inclusion of treaty-based crimes within the jurisdiction of the ICC would place too great a call on the resources of the Court".[163] It is nonetheless important to bear in mind that terrorist attacks occur more often in developing states and that foreign terrorist fighters are commonly situated in these states. For this reason, including a treaty-based crime could assist the developing states since usually they do not "have the resources to engage in large-scale intelligence gathering, which was often required for the prosecution of terrorist and drug-related crimes".[164] What can hardly be denied is that the developing states would be able to respond more "effectively to terrorism if the burden of investigating, prosecuting and punishing terrorists is shared with other States Parties to the Statute".[165]

In addition, including terrorism within the jurisdiction of the ICC

[161] Cohen, *supra* note9 at 238.

[162] Wertheim, *supra* note 120, at 3-4.

[163] *Ibid.*, at 6.

[164] Report of the *Ad Hoc* Committee on the establishment of an international criminal court', (1995) *UNGA* 50th Session, Supplement No.22, A/50/22, 1995, at 18, para. 82.

[165] Wertheim, *supra* note 120, at 6.

could standardize the substantive law on the matter. In respect to sentencing practices, the ICC would follow an agreed upon procedure and eliminate any inconsistencies in sentencing that currently exist in various states for similar, or even, identical terrorist offences.[166] A startling example, for instance is that sentences imposed on aerial hijackers in the US, Cuba and Iran range from "death by hanging to complete amnesty".[167] Therefore the ICC could set a standard in sentencing that will have no oscillations due to a precise defining of the offences.

Some scholars posit that terrorism is altogether not a crime to be tried and punished domestically.[168] This is not because the offences and the sentences vary drastically, as that could equally be the case for other, less contentious crimes. This is mainly due to the fact that there is an underlying uncertainty in how to address terrorism domestically.[169] Having terrorism as a crime under the ICC jurisdiction would thus alleviate these uncertainties.

It is also the case that certain states employ double standards when dealing with terrorist offences domestically and internationally, as they do with their own nationals vis-à-vis foreign nationals.[170] In light of these inconsistencies and occurrences of double standards, the ICC appears to be a forum that could adequately address terrorism[171] and assist State Parties in their counter-terrorism efforts.

Considering terrorism as a novel crime under the Rome Statute would by and large necessitate a precise definition of the crime before any further undertakings. The most comprehensive definitions of ter-

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[166] *Ibid.*, at 14.

[167] See C. Silverman, 'An Appeal to the United Nations: Terrorism Must Come Within the Jurisdiction of an International Criminal Court', (1997) 4 *New England International and Comparative Law Annual* 1 (hereinafter "Silverman").

[168] *Ibid.*

[169] *Ibid.*

[170] Y. Dinstein, 'Terrorism as an International Crime', (1989) 19 *Israel Yearbook of Human Rights* 55 at 56.

[171] Silverman, *supra* note 167 at 16.

rorism are found in the Terrorist Financing Convention[172] and the 2011 STL's Interlocutory Decision.[173]

A model definition of terrorism could potentially be drafted as a combination of these two definitions under the Rome Statute and would read as follows:

1. The Court shall have jurisdiction in respect to terrorism.
2. For the purpose of this Statute, terrorism means any of the following acts when intended to cause death or serious bodily injury to a injury to a person, when the purpose of such acts, by their 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; or threatening such an act[174]
   (a) murder;
   (b) kindapping;
   (c) taking of hostages;
   (d) enslavement;
   (e) torture or inhuman treatment;
   (f) arson and bombarding;
   (g) extensive destruction of property;
   (h) any other act constituting an offence within the established framework of counter-terrorism conventions and custom.

The only aspect left out of the merger of the definitions of terrorism brought forth by the Terrorist Financing Convention and the STL's Interlocutory Decision is the context of armed conflict. Indeed, terrorism, unlike originally stipulated in the Terrorist Financing Convention, can occur during the time of peace, which is the primary focus of the Interlocutory Decision.

5. *Terrorism at the Kampala Review Conference*

At the Kampala Review Conference in 2010, delegations found that it was premature to include terrorism in the Rome Statute, notwith-

[172] See Terrorism Financing Convention, *supra* note x, Arts. 2(1)(b), 3.

[173] STL February 2011 Interlocutory Decision, *supra* note 17 at 3.

[174] *Ibid.*, at 49-50, para 85.

standing their condemnation of the crime and their support for counter-terrorism measures.[175] The reason why states have found the potential inclusion of terrorism as premature is due to a lack of definition. Indeed, delegations have reiterated that a "clear definition agreed to in the United Nations was a precondition to inclusion of terrorism in the Statute".[176]

Although the delegations proposed the establishment of a working group on terrorism, they also recalled that at the UN it was quite complex to establish a definition of terrorism, and that a working group would likely face similar difficulties.[177] It was therefore suggested that the Assembly "await the outcome of the work in the United Nations forum".[178]

However, the delegation of Netherlands has stated that certain preparatory steps ought to be taken straightaway in order to criminalize and punish terrorism.[179] Therefore Netherlands proposed amending Article 5 of the Rome Statute so as also to include the crime of terrorism in the jurisdiction of the court:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
   a) The crime of genocide;
   b) Crimes against humanity;
   c) War crimes;
   d) The crime of aggression;
   e) The crime of terrorism.[180]

Paragraph 3 of the Article would nevertheless read that "the Court

[175] '2010 Report of the Working Group on the Review Conference', ICC-ASP/8/20 at 55, para. 43.

[176] *Ibid.*

[177] *Ibid.*, at 55, para 44.

[178] *Ibid.*

[179] *Ibid.*, at 65.

[180] *Ibid.*, at 66.

shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".[181]

Netherlands's proposal on how to include terrorism under Article 5 of the Rome Statute resembles the inclusion of the crime of aggression. Although the Netherlands had proposed an inclusion of the crime of terrorism under the Statute, it was still "with a deferral of the exercise of jurisdiction by the Court until the definition and the modalities for the exercise of such jurisdiction had been agreed to".[182] The proposal was however turned down.[183]

Once again the lack of an international definition of terrorism posed hurdles around every legislative corner. The process of including aggression in the Rome Statute was neither straightforward nor easy, and terrorism is prone to even more legal and political controversy. The Achilles heel of terrorism in international law lies in its lack of a common definition. Once the crime is clearly defined, there will be more possibilities to end the impunity for the crime of terrorism, under the Rome Statue or elsewhere in the international realm.

Contemporary Issues in Terrorism

The most pressing contemporary issues in terrorism revolve around strengthening mutual cooperation between states in combatting the crime in a timely manner.[184] States have to further adjust their counter-terrorism strategies vis-à-vis the recent upsurge in foreign terrorist

[181] *Ibid.*

[182] *Ibid.*, at 54.

[183] W. A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: closing the loopholes' (2010) 23 *LJIL* 847 at 851.

[184] K. Prost, 'The need for a multilateral cooperative framework for mutual legal assistance' in L. J. van den Herik & N. Schrijver (eds.), *Counter-terrorism and International Law* (2013) at 93.

fighters, and a rise in terrorist training worldwide. States have in this respect concluded bilateral treaties to fortify their mutual commitment in addition to the international or regional counter-terrorism conventions they may be parties to. A collateral issue that surfaces however regarding foreign terrorist fighters is the principle of nationality. States thus confront the problem of a foreign terrorist fighter, being a national of a state in question, returning after training abroad and potentially engaging in criminal activities.

1. *Bilateral agreements for extradition*

One of the leading organs in addressing terrorism on a global level is the United Nations Office on Drugs and Crime's (UNODC) Terrorist Prevention Branch. The UNODC cannot impose a definition on states, and a definition, as in any treaty, ought to be agreed upon by state parties.[185] The question however is whether terrorism can still be effectively combatted without an internationally agreed upon definition.

Albeit under the wing of a legal framework, terrorism indeed remains a highly politicized issue.[186] When it comes to the *aut dedere aut judicare principle*, even if the states in question have both ratified a treaty embodying such a provision, the difficulty often lies within the political nature of terrorism.[187] It is moreover possible that alongside an international treaty, two states will establish a specific bilateral agreement as a response to a particular terrorist act, and agree to extradite the person who is believed to have allegedly committed it. This was the case with Abu Qatada and the bilateral agreement for his extradition between the UK and Jordan,[188] as well as with Hassan Diab, extra-

[185] UNODC Officer (anonymous), (24 June 2015) *Interviewed by the author in the UNODC headquarters, Vienna* (hereinafter 'UNODC Officer').

[186] *Ibid.*

[187] *Ibid.*

[188] See *Othman (aka Abu Qatada) v. Secretary of State for the Home Department*, (2013) *EWCA* Civ. 277; *Othman (Abu Qatada) v. the United Kingdom*, Decision of 9 May 2012, ECtHR Application No. 8139/09; See further L. Early and L. Garlicki, 'Case of *Othman (Abu Qatada) v. The United Kingdom European* Court of Human

dited from Canada to France on the basis of their bilateral agreement where he was charged with first-degree murder.[189]

Without an internationally agreed upon definition on terrorism, and without necessarily referring to an international legal instrument in place, states opt to cooperate bilaterally in their efforts to combat terrorism. The choice of states to prosecute and extradite terrorist acts more accurately and effectively is praiseworthy.[190] Not all of these efforts are regrettably as commendable. For instance, while states tend to form bilateral extradition agreements, they often fail at sharing ample intelligence on their list of designated terrorists.[191] In the case of Brussels attacks of 22 March 2016, Turkey notified Belgium and the Netherlands about one of the bombers, deported twice from Turkey and labeled as a foreign terrorist fighter.[192] Both Belgium and the Netherlands failed to heed the warning, demonstrating a serious lack of cooperation, rather than a failure of intelligence sharing.

In the aftermath of the Brussels attacks, the security levels in Brussels were raised with the military deployed at high-risk locations, including the EU institutions. However, the soldiers allegedly carry rifles with no ammunition[193], which only supports Schneier's "security thea-

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Rights (Fourth Section) Judgment', (2012) 24 *IJRL* 294; C. Michaelsen, 'The Renaissance of non-refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights' (2012) 61 *ICLQ* 750.

[189] See K. Roach, 'Section 7 of the Charter and National Security: Rights Protection and Proportionality versus Deference and Status', (2010-2012) 42 *OLR* 337.

[190] See UNODC Officer, *supra* note 185.

[191] J. Kleijssen, Council of Europe's Director of Information Society and Action against Crime, (6 April 2016) *Interviewed by the author at the Council of Europe, Strasbourg.*

[192] S. Osborne, 'Brussels attack: President Erdogan says bomber was caught in Turkey last year and deported to the Netherlands', (2016) *The Independent*. Available at: http://www.independent.co.uk/news/world/europe/brussels-attacks-president-erdogan-bomber-turkey-belgium-deported-isis-terrorist-terror-a6948341 html

[193] European External Action Service Counter-Terrorism Officer (anonymous), (28 April 2016) *Interviewed by the author in the EEAS headquarters, Brussels*.

ter" narrative aimed at describing the practice of providing the public with a feeling of increased security through investing in largely ineffective and artificial countermeasures.[194]

2. *Foreign terrorist fighters*

The UNODC Terrorism Prevention Branch insists on mutual cooperation between states in matters relating to terrorism, especially in light of the emerging phenomenon of foreign terrorist fighters.[195] According to the Soufan Group, a New York-based international consulting firm, "over 30,000 fighters from 100 countries have joined the civil war in Syria of which over 5,000 originate from Western countries", also confirmed by the US intelligence.[196]

Furthermore, de Kerchove, the EU Counter-terrorism Coordinator, stated in September 2016 that approximately 5000 Europeans have gone to fight in Iraq or Syria.[197] Most foreign fighters however originate from the North African and Middle Eastern region.[198] It is important to note, beyond mere semantics, that not all foreign fighters are terrorists.

Definitions of foreign fighters are numerous. For instance, certain scholars studying the Jihad movement in Chechnya defined the foreign fighters as ''non-indigenous, non-territorialized combatants who, motivated by religion, kinship, and/or ideology rather than pecuniary re-

[194] See B. Schneier, *Beyond Fear: Thinking sensibly about security in an uncertain world* (2003).

[195] See UNODC Officer, *supra* note 185.

[196] R. Barrett, 'Foreign fighters in Syria'(6 June 2014) *The Soufan Group.* Available at: http://soufangroup.com/foreign-fighters-in-syria/; with an update on recent figures from December 2015: http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf

[197] See P. Joannin, 'The assimilation of terrorists and foreigners is a serious mistake which does not match reality', (2016) European interview n°90, *Fondation Robert Schuman.* Available at: http://www.robert-schuman.eu/en/doc/entretiens-d-europe/ee-90-en.pdf; J. de Roy van Zuijdewijn, 'The foreign fighters' threat: what history can (not) tell us', (2014) 8 *Perspectives on Terrorism* 59.

[198] *Ibid.*

ward, enter a conflict zone to participate in hostilities''.[199] Others described foreign fighters more restrictively as agents who "have joined, and operate within the confines of an insurgency, lack citizenship of the conflict state or kinship links to its warring factions, lack affiliation to an official military organization, and are unpaid".[200] Labels also vary, as foreign fighters may also be called 'transnational insurgents in intrastate conflicts',[201] or simply, 'transnational fighters'.[202]

When it comes to defining foreign terrorist fighters specifically, the Global Counterterrorism Forumdescribes them as "individuals who travel abroad to a State other than their States of residence or nationality to engage in, undertake, plan, prepare, carry out or otherwise support terrorist activity or to provide or receive training to do so".[203] In the 'The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon', the forum seeks to assist governments in their policies addressing foreign terrorist fighters.[204] The work of the Global Counterterrorism Forum on foreign terrorist fighters has been noted in the UN Security Council Resolutions 2178[205] and 2195.[206] The UN Security Council Resolution 2178 uses a

[199] See C. Moore & P. Tumelty, 'Foreign fighters and the case of Chechnya: a critical assessment', (2008) 31 *Studies in Conflict and Terrorism* 412.

[200] See T. Hegghammer, 'Should I stay or should I go? Explaining variation in Western jihadists' choice between domestic and foreign fighting' (2013) 107 *American Political Science Review* 1.

[201] Kristin M. Bakke, 'Copying and Learning from outsiders? Assessing diffusion from transnational insurgents in the Chechen wars', (2010) *PRIO Working Paper* at 4.

[202] R.A. Pape & J.K. Feldman, *Cutting the Fuse: The explosion of global suicide terrorism and how to stop it* (2010) at 59.

[203] '2014 The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon'. Available at: www.thegctf.org/documents/10162/159879/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf

[204] *Ibid.*

[205] UN Doc. S/RES/2178 (2014), at 3, 8.

[206] UN Doc. S/RES/2195 (2014), at 3.

slightly more detailed definition of foreign terrorist fighters: "foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[207] The UN Security Council Counter-terrorism Committee and Counter-Terrorism Committee Executive Directorate employ this definition.

Foreign terrorist fighters most commonly join or are recruited by the Islamic State of Iraq and Levant (also referred to by the ISIS, ISIL and Daesh acronyms) and the Al-Nusrah Front (AFN). The UN Security Council expressed grave concern on foreign terrorist fighters and terrorist organizations in the aforementioned conventions[208] and urged "Member States, in accordance with domestic and international law, to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters".[209] In the latest Convention, the wording of the Security Council intensified, as well, as it urged, "as a matter of priority that Member States ratify, accede to, and implement the relevant international conventions (…) and the international counter-terrorism conventions and protocols."[210] Therefore, the international legal framework remains of paramount importance, and likely, if properly used, a better tool in countering terrorism than bilateral agreements.

3. *Nationality principle and statelessness*

A sub-issue that has been recently emerging is that of nationality and potential statelessness of foreign terrorist fighters returning to their country of origin after having gone to fight. The difficulties that countries face thus revolve around the principle of nationality, which

[207] UN Doc. S/RES/2178 (2014), at 2.
[208] *Ibid.* at 2, 5, 7;UN Doc. S/RES/2178 *supra* note 93 at 2, 6.
[209] UN Doc. S/RES/2178 *supra* note 93 at 4, para. 3.
[210] UN Doc. S/RES/2195 (2014) at 3, para. 3.

every human being is entitled to pursuant to various legal instruments in place.[211]

There appears to be room to straightforwardly deprive a foreign fighter with two nationalities of one. This is possible under French law,[212] whereby a dual national charged with "terrorist offences may be stripped of his or her French nationality".[213] Under Swiss law on the other hand,[214] the threshold is a tad higher, albeit not unattainable as dual nationals' citizenship may be revoked "if their conduct seriously prejudices Swiss interests or Switzerland's reputation".[215] It is however still doubtful whether stripping a foreign fighter of the only nationality he holds, thus rendering him stateless, is advisable.

The question that is hardly addressed is whether stripping a foreign fighter of his nationality, only in case of him or her having a further nationality, might not go against the principle of equality of all citizens.[216] In other words, irrespective of how many nationalities an individual holds, he should either be stripped of the one in question or not at all.[217] There are limited exceptions to statelessness permitted under the 1961 Convention on the Reduction of Statelessness whereby the only nationality of a citizen may be revoked where his conduct is "seriously prejudicial to the vital interests of the State".[218] Conversely, the Euro-

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[211] See for example '1948 Universal Declaration of Human Rights', 999 *UNTS* 302, Art. 15(1); '1961 Convention on the Reduction of Statelessness', 989 *UNTS* 175, Art. 8(1) (hereinafter 'Convention on the Reduction of Statelessness'); '1997 European Convention on Nationality', Art. 4(a)-(b) (hereinafter 'European Convention on Nationality').

[212] Code civil français, Art. 25.

[213] 'Foreign fighters under international law', (October 2014) Academy Briefing No. 7 *Geneva Academy of International Humanitarian Law and Human Rights* at 55 (hereinafter 'Academy Briefing No. 7').

[214] 'Federal Act on the Acquisition and Loss of Citizenship', Art. 49.

[215] Academy Briefing No. 7, *supra* note 100 at 55-56.

[216] H. Tuerk, former Vice-President of ITLOS, (26 June 2015) *Interviewed by the author at the UN, Vienna.*

[217] *Ibid.*

[218] 'Convention on the Reduction of Statelessness', *supra* note 98, Art. 8(3)(a)(ii).

pean Convention on Nationality strictly prohibits statelessness, with no exceptions as to the conduct of the individual in question.[219]

Of course, each state is free to determine "the rules that regulate acquisition and deprivation of its nationality".[220] For instance, the UK introduced a legislative amendment, under which a citizen may be stripped of his nationality even if it were to render him stateless.[221] The Netherlands is considering the same,[222] and as are Norway[223] and Australia.[224]

Should this ever become a norm within a regional or an international framework, albeit highly unlikely, it needs to be very delicately drafted. The Universal Declaration of Human rights, as well as the Convention on the Reduction of Statelessness have strengthened the principle of nationality, which may indeed be undergoing transformation from a right to a privilege. It is pertinent to safeguard these laws and not allow citizens to lose their nationality on a whim of a government. While security issues are pressing, there is no doubt that these formulations ought to be considered, but they ought to be addressed cautiously.

A definition of terrorism that all states could concur with could be a decisive and precise platform for these national considerations. It

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[219] European Convention on Nationality, *supra* note 98, Art. 7(1)(d).

[220] *Nottebohm Case* (*Liechtenstein* v. *Guatemala*), Judgment of 6 April 1955, [1955] ICJ Rep.4 at 20.

[221] British Nationality Act 1981 (as amended), Section 40.

[222] 'Participants in Jihadist Training Camps to Lose Dutch Citizenship', (July 2014) *Government of The Netherlands.* Available at: www.government.nl/issues/dutch-nationality/news/2014/07/16/participants-in-jihadist-training-camps-to-lose-dutch-citizenship.html

[223] G. Mezzofiore, 'Norway 'To make citizens fighting for Isis stateless', (27 August 2014) *International Business Times.* Available at: www.ibtimes.co.uk/norway-make-citizens-fighting-isis-stateless-1462776

[224] L. Taylor, 'Tony Abbott close to winning over Cabinet and Labor on citizenship laws', (21 June 2015) *The Guardian*. Available at:www.theguardian.com/australia-news/2015/jun/21/tony-abbott-close-to-winning-over-cabinet-and-labor-on-citizenship-laws

would thus ensure that terrorism as an international offence is not tolerated, and that the sentences imposed on terrorist acts do not stretch like a harmonica across national jurisdictions.

Conclusion

Every week terrorist acts make the headlines of newspapers across the globe. And globally, there is no common definition of terrorism. There is little doubt that states can, and do, cooperate mutually in combatting terrorism without an international definition of the crime. When dealing with terrorism nationally, there are national criminal laws in place. When dealing with terrorism transnationally however, the cooperation largely depends on the understanding of the parties involved on what constitutes terrorist offences, and what information and intelligence they are willing to share to begin with.

Coining a definition that could be acceptable to state parties under a treaty or in the Rome Statute can hardly hurt. Objectifying the crime of terrorism would indeed further the international cooperation and enhance counter-terrorism strategies. We could jointly tackle terrorism once it is precisely established what the crime consists of. Anything else resembles a stab in the dark. Moreover, including terrorism as a crime in the Rome Statute would assist states with a scarcity of resources in intelligence gathering in order to both prevent terrorist acts, and prosecute those persons who have allegedly committed them.

Most of the international and regional conventions and protocols on counter-terrorism were in fact enacted after a terrorist attack. With laws thus coming *post hoc* an attack begs the question of would an occurrence of an unprecedented, large-scale and widespread terrorist attack subsequently give rise to a definition of terrorism. Bearing in mind that international and regional legal instruments emerge as a response to an already committed terrorist act, a definition of terrorism has long missed the boat.

Foreign terrorist fighters are rising in number and ISIS is becoming self-sufficient, with practically no external financing needed. Punishment for the commission of identical terrorist acts should not range

from impunity to death sentences across national jurisdictions. When one man's terrorist becomes all men's terrorist, the political sensitivity of the issue will be alleviated and an international definition of terrorism will arise. But then it might be too late, even for staging the theater of security.