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**THE UNIVERSAL DEFINITION OF TERRORISM IN
INTERNATIONAL LAW: IS IT NEEDED? OR IS IT
EVEN POSSIBLE?**

Master's Thesis

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INTRODUCTION

Terrorism is a very old phenomenon that can be traced back to the first century AD, when a Jewish religious-political movement was practicing acts of terror against other Jewish “collaborators” with the Roman rule in Judea, with the purpose of planting fear in the Jewish peoples’ hearts to prevent them from collaborating with the Romans, and go on to achieve their rebellion.¹

The term ‘terrorism’ however, was first used by Maximilien Robespierre -the leader of the Jacobin Club during the French Revolution- to describe their own actions by stating that ‘Terror is nothing other than justice, prompt, severe, inflexible’. During their only two-years ruling the French government, they executed 17,000 opponents, this period is identified as the Reign of Terror (1792-1794).²

However, documenting the history and roots of terrorism have always been a dispute between scholars and historians, due to the many and different definitions of terrorism worldwide, as to this day, we do not have a universally agreed definition of terrorism.

For example, in some history books and articles, you can read that the roots of terrorism date back to the 11th century and the Al-Hashshashin group.³ Because some definitions of terrorism on the one hand, exclude the practices of the Jacobin Club from terrorism, and on the other hand, include political assassinations within the definition of terrorism, which was the tactic adopted by the Al-Hashshashin group.

While some other scholars date the roots of terrorism back to the 19th century and the Fenian Brotherhood and Narodnaya Volya, or even back to other eras.⁴ However, this issue of documenting terrorism, due to the absence of a universally agreed definition, is the least to

¹ G. Chaliand. *The History of Terrorism: From Antiquity to al Qaeda*. Berkeley: University of California Press. 2007, p. 56

² G. Nunberg. *Terrorism: The History of a very Frightening Word* 2001. - www.sfgate.com/opinion/article/HEAD-GAMES-It-All-Started-with-Robespierre-2865759.php (21.08.2019).

³ M. Burgess. *History of Terrorism*. The Wayback Machine: 2012. - www.web.archive.org/web/20120511140810/http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502 (21.08.2019).

⁴ B. Hoffman. *Inside Terrorism*. New York: Columbia University Press 1998, p. 17.

worry about, among other issues which will be discussed in this paper, in purpose to prove that there is need for the adoption of an agreed universal definition of terrorism.

Acts of terrorism might be the most disturbing form of violence, they occur unexpectedly, without warning, during peace times, in the most peaceful locations of a country and, indiscriminately targeting no specific persons, however, what is even more disturbing, is the unclear legal status of terrorism in international law.

The latest international terrorism statistics from START's Global Terrorism Database regarding the year 2017, are 10,900 terrorist attacks, which have killed more than 26,400 people, furthermore, the number of attacks in 2017, is 28 percent higher than it was back in 2012 and, deaths are 71 percent higher.⁵

Currently, there exists a couple hundreds of different definitions for terrorism around the world, either by the international and regional attempts to adopt a universal or regional definition, or by the already-functioning national laws of States. Thirty years ago, in 1988, Schmid and Jongman counted 109 definitions of terrorism, that covered a total of 22 different definitional elements.⁶ Today, according to The Routledge Handbook of Terrorism Research, more than 250 definitions are being used worldwide.⁷

While some of the definitions can be very narrow, to the extent that they may exclude many terrorist activities and, focus solely on using violence for political gains; other definitions may be very broad, that they do not describe any types of violence or motives at all, and further, do not provide any distinction between terrorism and other similar types of violence or even, between terrorism and other 'ordinary' crimes.

⁵ J. S. Rivinius. START's Global Terrorism Database 2018. - www.start.umd.edu/news/terrorist-violence-decreases-worldwide-2017-remains-historically-high (21.08.2019).

⁶ A. P. Schmid, A. Jongman, et al. Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature. New Jersey: Transaction Books 1988, pp. 5-6.

⁷ A. P. Schmid. The Routledge Handbook of Terrorism Research. London and New York: Routledge 2011. - www.dl1.cuni.cz/pluginfile.php/486773/mod_resource/content/1/%5BAlex_P._Schmid_%28Ed.%29%5D_The_Routledge_Handbook_of_T%28b-ok.org%29_copy.pdf (21.08.2019).

For example, the following 2014 Saudi Arabia's terrorism law was described overly broad by Human Rights Watch and by Amnesty International:

“Any act carried out by an offender in furtherance of an individual or collective project, directly or indirectly, intended to disturb the public order of the state, or to shake the security of society, or the stability of the state, or to expose its national unity to danger, or to suspend the basic law of governance or some of its articles, or to insult the reputation of the state or its position, or to inflict damage upon one of its public utilities or its natural resources, or to attempt to force a governmental authority to carry out or prevent it from carrying out an action, or to threaten to carry out acts that lead to the named purposes or incite these acts”.^{8 9}

What is problematic about definitions of such nature, is that they focus on the protection of the government and its interests, rather than the protection of the civilians and the State's interests as a whole.

In a closer approach to the commonly-known concept of terrorism, Ganor proposed the following definition: “Terrorism is the deliberate use of violence aimed against civilian targets in order to achieve political aims; nationalistic, socio-economic, ideological, religious-political.”¹⁰ This definition draws three key elements: 1. Deliberate use of violence 2. Achieving political aims 3. Targeting civilians.

These three definitional elements, represent the three key debates over accepting a universal definition of terrorism by States. Even a slight modification or, re-arrangement of these elements, changes the whole capacity of the definition. For instance, the first element, which is the use of violence, is subject to debates over whether it should be a discriminate or indiscriminate use of violence. The second element, which is the aim/motive/purpose of terrorism, is subject to debates over whether a political motive should be required or not or, a political and religious motives or, any ideological motive should be present. Third, the victimisation element, should it be civilians, persons, non-combatants, public and private

⁸ J. Stork. Saudi Arabia: Terrorism Law Tramples on Rights. Human Rights Watch 2014. - www.hrw.org/news/2014/02/06/saudi-arabia-terrorism-law-tramples-rights (21.08.2019).

⁹ Amnesty International. Saudi Arabia: New terrorism law is latest tool to crush peaceful expression 2014. - www.amnesty.org/en/latest/news/2014/02/saudi-arabia-new-terrorism-law-one-more-tool-crush-peaceful-protest/ (21.08.2019).

¹⁰ B. Ganor. The Rationality of Modern Islamist Terrorism and the Challenge to the Liberal Democratic World. Columbia University Press 2015, p. 8.

properties, further, the State's officials, interests, institutions, military, international relations are, all included the States' debates over the motive element.

Moreover, there is other major matters, which have played a major role in the States' disagreements over a universal definition, such as the exclusion of self-determination and national liberation movements from the applicability of the definition, or even whether non-State actors should be the only actor which the definition is applicable to, which consequently means excluding State terrorism and, State-sponsored terrorism from the application of the definition, of course, the latter approach was the dominant among States approaches to terrorism, either in their national laws or, in their proposals to international conferences.

For example, countries like the USA and Israel do not favour Ganor's definition; because their domestic definitions include 'non-combatants' and 'persons', instead of civilians, as the targets of terrorism, and limit the perpetrators on 'sub-national groups' and 'organisations'.¹¹

With 19 universal legal instruments regarding terrorism, and the continuous regional and international efforts to legally define and counter terrorism since the 1920's, it is an undeniable fact that terrorism is threatening world peace and security.

On the other hand, this implies that those attempts and approaches are, not effective enough to deter terrorism, due to the fact that none of these conventions has defined terrorism, nor did they regard terrorist acts specifically, as crimes under international criminal law, instead, they simply oblige States to implement the respective offences under their domestic laws. Therefore, why is it so difficult to take more effective steps forward in counter-terrorism by defining it, and include it as a crime under international law?

Behind the long-lasting disagreements and debates over the definitional elements of terrorism, lies reasons which directly affects States' interests, in particular, national security and foreign policy interests. States seek, by widening the scope of applicability of the definition, to benefit their law enforcement and judicial systems from the excessive procedural and investigate

¹¹ S. Sanyal. International Laws to Control Terrorism A Comparative Study 2018. – www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3232739 (22.08.2019).

powers, which the crime of terrorism entails. As some States, have even adopted military approaches towards countering terrorism, such as the dangerous pre-emptive approach.

The absence of an agreed universal definition of terrorism, has opened the door for States to exchange allegations of terrorism and further, to support and fund terrorist groups operating abroad, without a standard which regulates the legitimacy of such behaviours.

One clear example of this issue is the Palestinian group Hamas; while the United States regards it as a terrorist organisation, Russia regards it as a national liberation movement and support it. With the absence of unified definition; One cannot object to either policies, resulting in a loophole for States to support and fund terrorist groups.

The object of this study, is to examine the alleged difficulties of universally defining terrorism in details, and expose them as they are in fact results of the absence of a universal definition rather than, difficulties. For example, there is a large debate which claims a difficulty of distinguishing between terrorism and acts of national liberation movements, however, it is very simple to distinguish between the two concepts; whomever commits acts of terrorism is a terrorist, regardless of the nature of the actor. However, there is some hidden details within this debate, if States adopt this simple approach of defining terrorism, it would include States in the scope of the definition or, if they adopt another approach to distinguish between the two concepts, by limiting the target element to civilians then, they will not be able to regard acts of national liberation movements which direct their attacks only to the State's military, as terrorism.

The most relevant and simple answer to such debates, can be seen in UN General Assembly's 1982 resolution 37/43, although that the resolution has reaffirmed the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by *all available means*, including armed struggle, it has also 'strongly condemned' the establishment and the use of armed terrorist groups, confirming that there is a difference between the two concepts.¹²

This relatively new practiced tactics by States, is making it impossible to universally define and agree on a crime of terrorism, especially when these tactics are being practiced by the same

¹² UN General Assembly Resolution 45/130 of 14 December 1990, para. 16.

States which are considered to be the major decision-makers on the international level. Thus, and after realising what are the reasons which actually prevent the agreement on a universal definition of terrorism, in particular, the States' unwillingness to universally define it. An important question raises: Is the 'universal definition of terrorism' worth going through all of this? Meaning, is this strategy going to contribute to the counter-terrorism efforts? If yes, how is it going to do so? And how can it be done?

Defining terrorism universally, would accomplish the larger part of the counter-terrorism process; by firstly, differentiating terrorism from other rights, such as the right to self-determination and resisting occupation, while confirming that these rights do not include attacking civilians on the one hand, and educating the populations on terrorism, by eliminating any chances of tolerating or sympathising with terrorists on the other hand, as the survival of terrorist groups, highly depend on the support of populations.

Secondly by putting an end to the major misuse of counter-terrorism procedures and label, and the funding of terrorist groups by governments, which create the larger part of the reason behind most of the terrorist attacks around the world.

As Ganor has once stated: "an objective definition of terrorism is not only possible; it is also indispensable to any serious attempt to combat terrorism."¹³ Counter-terrorism cannot be accomplished without obligatory international commitment and co-operation between the States, such as the elimination of any possibilities of providing safe havens for terrorists; by either prosecuting or extraditing them. In the meanwhile, international co-operation in counter-terrorism cannot be achieved without the existence of an agreed definition for terrorism, due to the beforementioned issue of different approaches States adopt towards the definition of terrorism, further, counter-terrorism measures such as criminal extradition is not possible without a unified definition.

The need for co-operation between States is confirmed by the number of international conventions on combating terrorism. However, the issue with this type of conventions that they are not effective enough to actually oblige States, only the agreement on a universal definition of terrorism and adopting it by the United Nations' General Assembly would help in

¹³ B. Ganor. Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?. Police Practice and Research, 3:4. 2002, p. 288.

accomplishing this major step, and I refer in this regard, once again to Ganor: “without a definition of terrorism, it is impossible to formulate or enforce international agreements against terrorism and the need for a definition of terrorism can be seen at almost every phase of contending with terrorism.”¹⁴

Usually terrorism is divided and given terms such as ‘domestic terrorism’ and ‘international terrorism’, however, and considering the mechanism terrorist groups typically operate in, starting from the creation and the funding of such groups, to their transnational movement and recruitment, ending with its impact; national and international terrorism cannot be looked at in isolation from one another.

Terrorism therefore, is like cancer; it is expandable, has impact on other countries and, creates linkages with other terrorist groups abroad and, it is not uncommon that such groups tend to spread and promote their ideology around the world in purpose to gain international support and new recruits.

With the continuous manipulation by the media and politicians, the term ‘terrorism’ is going to proceed towards more ambiguity and more damage to global security, therefore, it is one of those issues which cannot afford delay.

In the first Chapter of this paper, the author will present and analyse the wide variety of terrorism definitions, which were drafted for different purposes by many international and regional treaties and conventions. This analysis will be for the purposes of collecting data on States’ approaches towards defining terrorism and, highlighting the reasons which influence a certain State to seek for a particular definition, to ultimately show two concluding points, first, that the process of defining terrorism must not be subject to secondary factors, such as the protection of governments’ interests and foreign policies, and second, to explain the possible impact of a slight modification in the definitional elements of terrorism. Furthermore, in the last part of the Chapter, the author will study the alleged existence of an international customary rule which criminalises transnational terrorism, and the relation between terrorism and international humanitarian law.

¹⁴ Ibid., p. 300.

In the second Chapter, the author will argue for the existence of a large need to universally define terrorism and, to further include it as an international crime, by presenting and analysing the difficulties, which are claimed to have been preventing the agreement on a universal definition, and expose those difficulties as States' politics and, results of the absence of a universal definition, rather than difficulties. Further, the author will present the harms and the large impact of State terrorism and State-sponsored terrorism, arguing for the inclusion of such activities in any future universal definition of terrorism, explaining how such a step is essential for combatting terrorism.

In the third, and final Chapter, the definitional elements of the crime of terrorism, will be presented and analysed separately, however, with taking into consideration, the impact of each element on another, and further, the author will explain the impact of rearranging the elements in certain ways on the definition, explaining also, the capacity of different expressions and terms which are usually employed in terrorism definitions.

Keywords: Defining terrorism, Universal definition, Terrorism, Terrorists, Guerrilla warfare, Self-determination, National liberation movements, Occupation resistance.

CHAPTER 1. INTERNATIONAL AND REGIONAL APPROACHES TOWARDS DEFINING TERRORISM

1.1 TERRORISM IN INTERNATIONAL TREATIES

1.1.1 The International Conferences for the Unification of Criminal Law 1930-1935

Some older legal issues, which can be related to modern terrorism legal issues, have begun to attract attention in the nineteenth century Europe, when several States were facing situations of rebellion and sabotage or, other forms of similar political violence, with the perpetrators fleeing the country afterwards, resulting in extradition requests from victim States, which typically, national extradition laws were prohibiting criminal extradition for political offences. That issue of extradition, similarly to modern day extradition issues regarding terrorism, was a result from the fact that States, had different laws on what acts, constitute a political offence.¹⁵

Debates over political offences at that time, in particular, over which acts should be regarded as a political offence, and what exceptions to extradition, should be made, such as assassinations for example, have opened the door for new debates on terrorism.

The first request to an international body, to draw more attention towards terrorism, was made by Romania in 1926, when they requested from the League of Nations to draft a universal convention on recognising terrorism as a punishable crime, however, the request was not successful.¹⁶

The first serious attempts to universally define terrorism however, were during the International Conferences for the Unification of Criminal Law 1930-1935, beginning at the Third Conference in Brussels, the following definition was proposed:

¹⁵ C. V. Wijngaert. *The Political Offence Exception to Extradition*. Boston: Kluwer 1980, p. 191. – I. Stanbrook, C. Stanbrook. *Extradition Law and Practice*. Oxford: Oxford University Press 2000, p.68.

¹⁶ League of Nations, Committee of Experts for the Codification of International Criminal Law, Replies of Governments 1927. (LoN Doc C.196.M.70.1927.V), p. 221.

“The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas will be punished”.¹⁷

Therefore, and since the very first attempts to define terrorism, the victim element of terrorism was proposed as ‘persons, private or State property’, and the motive element was ‘expressing or executing political or social ideas’, which differed terrorism from other ordinary crimes against life or liberty.

However, although that at the time, States in general, were not pursuing any specific hidden goals, by including or excluding certain elements from the definition, compared to modern days politics, because States at the time, were not typically involved in international State terrorism or, in financing terrorism. The process of determining the elements of terrorism was clearly influenced by the reason that attracted attention to terrorism in the first place, which is political violence and extradition laws.

Therefore, States had an interest in including the victim element of ‘persons and state property’, in the purpose to include all types of persons -including military personnel-, instead of only civilians, which was consequently, not a debatable subject matter for good period of time, unlike it was in the case of the motive element, which was not mentioned again in the resolution adopted in the following Conference in Paris.

Later on, the Conference has recommended the adoption of a convention, to assure the universal repression of terrorist attempts.¹⁸ Indeed, by excluding the requirement of a political motive, terrorism becomes easier to be excluded as an exemption to extradition.

The Fifth Conference in Madrid has separated terrorism from crimes creating a common danger, such as provoking international catastrophes and the destroying of art works.¹⁹ Similarly to the previous Conference, the political and social motives were debated again, ultimately leading to the abandonment of a political motive, and only considering a social

¹⁷ B. Zlataric. History of International Terrorism and its Legal Control. Illinois: Springfield 1975, p. 478.

¹⁸ Ibid., p. 479.

¹⁹ Ibid., p. 480.

motive element: “He, who with the hope of undermining social order, employs any means whatsoever to terrorize the population, will be punished”.²⁰

Consequently, The Conference reduced the notion of terrorism to the crime of anarchy.²¹ And ultimately, in the fourth, fifth and sixth Conferences, the political motive was replaced by the pre-condition of aiming to disrupt the State’s functionality or relations, making the element ambiguous and hard to investigate and, to separate it from the victim element, which alongside the motive element, are supposed to differentiate terrorism from other ordinary crimes and other political violence.

In the fourth Conference, the purpose element was presented as the following: “Whoever, for the purpose of terrorizing the population, uses against persons or property...or attempts to interrupt a public service”.²² In the sixth Conference in Copenhagen, a model national legislation was adopted, describing terrorism as the following: “Intentional acts directed against the life, physical integrity, health or freedom, where the perpetrator has created a public danger, or state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance in international relations.”²³ In the final draft of the Conference ‘The Copenhagen Draft’, terrorism was mentioned again in the preamble as the following:

“It is necessary that certain acts should be punished as special offences, apart from any general criminal character which they may have under the laws of the State, whenever such acts create a public danger or a state of terror, of a nature to cause a change in or impediment to the operation of the public authorities or to disturb international relations, more particularly by endangering peace”.²⁴

Although that the previous paragraph from the preamble has affirmed the necessity of recognising terrorism as a separate crime, as the whole series of these Conferences also did, by its own existence, it was to an extent, a bad start to begin discussing the process of defining terrorism by regarding the State’s authority as the main target, and regarding ‘persons’ as the victim or subject of the crime, which includes not only civilians or non-combatants, but also

²⁰ Ibid.

²¹ Ibid., p.481.

²² Ibid., p. 480.

²³ Ibid., p. 482.

²⁴ LoN CIRT, Doc CRT.17, Geneva, 7 January 1936 (Copenhagen Draft), p. 1.

all sorts of persons such as State officials and combatants, as this approach has influenced most of the later international and national approaches to define terrorism.

This was proved problematic later on; as it transfers terrorism from the jurisdiction of courts to the competence of the State's military, opening the door for unlawful 'pre-emptive self-defence' and military interventions, without any seriously imposed limitations on the 'war on terrorism'.

Although that this defining attempt influenced later attempts by some interested States for the previously mentioned reasons, other attempts by academics and States to define terrorism have recognised the dangers of manipulating the elements of the crime in purpose to serve the interests of Governments, assuring the importance of limiting the elements of motive and purpose on terrorising the population, by targeting civilians in the purpose of coercing a State or an International Organisation, to act or to abstain from doing a certain act, a subject which will be discussed in more details later in Chapter 3.

1.1.2 League of Nations: 1937 Convention for the Prevention and Punishment of Terrorism

In October 1934, the French Foreign Minister, Louis Barthou, was killed by Croatian separatists, during the assassination of King Alexander I of Yugoslavia, while on a State visit to France.²⁵ France requested the extradition of the suspects after they have fled to Italy, under a treaty of 1870, The Court declined the request on grounds of non-extraditable politically motivated offences.

After two months of political pressure on the League of Nations to respond, the League Council noted in 1934 in a resolution that "the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation".²⁶

²⁵ F. Walters. A History of the League of Nations. London: Oxford University Press 1969, p. 599.

²⁶ LoN CIRT, Geneva, 10 April 1935, LoN Doc CRT.1.

The League Council established the expert committee, CIRT, with the duty of drafting an international convention to ‘assure the repression of conspiracies or crimes committed with a political and terrorist purpose’, without defining the terms ‘political and terrorist purpose’ and ‘terrorist activity’.

An international diplomatic conference have met in November 1937, to draft and adopt a convention based on the final draft by CIRT. Finally, two international conventions were adopted, the first convention for the purpose of defining international terrorist offences, and the second, for the creation of a specialised international criminal court.²⁷

Article 1(1) of the first treaty, the 1937 Convention for the Prevention and Punishment of Terrorism, “reaffirms as a principle of international law, that it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent acts in which such activities take shape”, Article 1(2) defines acts of terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public”.

Despite of that the term ‘state of terror’ had faced objections by States like Belgium, Czechoslovakia and Roumania, that it is ambiguous and open to abuse,²⁸ and that the meaning was not clarified later on, such as how to decide whether a state of terror has occurred or not, or how big the ‘group of persons’ has to be, the state of terror requirement was drafted as a pre-conditional ‘intent element’ to the target ‘victim element’, which is -exclusively- the State.

Further, it was also not clarified which acts can be considered ‘against a State’, as it can be attempts to overthrow the State.²⁹ Or it can be attacks against the State’s interests, relations,

²⁷ LoN Final Act of Conference, Geneva, 16 November 1937, Lon Doc C.548.M385.1937.V; 19 LoN OJ p. 23 – Y. Alexander, et al. Control of Terrorism: International Documents. New York: Crane Russak 1979, p. 19.

²⁸ LoN CIRT, Reports to Council, Geneva, First Session 8 May 1935 (LoN Doc C.184.M.102.1935.V), p. 32 – Third Session (LoN Doc C.194.M.139.1937.V), p. 2 (Czechoslovakia) – Second Session (LoN Doc A.7.1936.V), p. 16 (Roumania).

²⁹ LoN CIRT Second session, *op. cit.*, Draft Article 2, Second session report - CIRT, ‘Suggestion by the British expert for an article to be inserted in the draft convention’, Geneva, 1 May 1935, LoN Doc 3A/17592/15085/VII.

security or public order. Thus, there were proposals by France and Latvia to include private persons and private property in the victim element, but they were not accepted.³⁰

Ultimately, the Convention was considered to be a mean of averting the escalation of an international crisis, rather than a progressive process of legal reform.³¹ Therefore, the Convention attracted only twenty-four signatories, ratified by India only, and never came into force.

1.1.3 International Law Commission (ILC): 1954 Draft Code of Offences against the Peace and Security of Mankind

In 1954, The International Law Commission finished preparing the Draft Code of Offences against the Peace and Security of Mankind, where terrorism was included, however, regarded as an act of aggression by a State towards another.

Therefore, it was not a process of defining terrorism itself; believing by some ILC members that the 1937 League of Nations' definition was 'excellent'.³² Further, based on this belief, the 1937 definition was adopted in the 1951 draft provision.³³

However, this definition was abandoned after objections, which described the expression 'state of terror' as 'antiquated' and 'too literary'.³⁴ Moreover, the whole meaning of the definition was described as 'too confused'.³⁵

Article 2(6) of the Draft defines an offence "against the peace and security of mankind...the undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State".

³⁰ LoN CIRT Second session, *op. cit.*, Appendix III, p. 14.

³¹ F. Walters. A History of the League of Nations. London; Oxford University Press 1969, p. 605.

³² Yearbook of the International Law Commission (1950-Vol.I), p. 127 (Hudson, Francois).

³³ ILC 1951 Draft Code, Article I(5), (1950-Vol.II) ILCYB, p. 58.

³⁴ ILCYB (1950-Vol.I), p. 63.

³⁵ *Ibid.*, pp. 127-128.

Therefore, the provision did not include acts committed by non-State actors, but only acts committed by States against other States.³⁶ Despite that the beforementioned, earlier 1950 draft had included acts by private persons.³⁷

Moreover, there were arguments to include ‘private terrorism with international effects’, but they were declined.³⁸ Further, an ILC member described the term ‘terrorist activities’ as vague,³⁹ while the UK stated that the term is not defined.⁴⁰

Followed by many disagreements regarding the definition of ‘aggression’, the General Assembly postponed the consideration of the 1954 Draft Code until receiving a report from a Special Committee on defining aggression.⁴¹

Later processes of defining aggression have not mentioned the term ‘terrorism’, nor they have addressed the link between aggression and terrorism, which was drawn by the 1954 Draft Code, namely, a 1974 General Assembly resolution on defining aggression, the 1996 ILC Draft Code’s definition and, the 2010 Rome Statute of the International Court’s definition.⁴²

After nearly four decades, the ILC prepared a Draft Code in 1991, with Article 24 proposing an offence where a State agent or, a representative of the State, commits or orders the “undertaking, organizing, assisting, financing, encouraging, or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.”⁴³ In addition to the 1954 draft’s definition, the later draft added the acts of ‘organizing, assisting, financing’, and included the targeting of property.

By including the acts of ‘organizing, assisting, financing’, international terrorism and its impact, were more recognized than ever before. However, yet without including non-State

³⁶ Ibid.

³⁷ ILC 1950 Draft Code, crime no. IV, in UN Doc A/CN.4/25, (1950-Vol.II) ILCYB, p. 253 (Report by Special Rapporteur Spiropoulos).

³⁸ ILCYB (1950-Vol.I), p. 129, p. 166 (ILC Chairperson).

³⁹ ILCYB (1954-Vol.I), p. 130.

⁴⁰ ILCYB (1954-Vol.II), p. 117 (UK).

⁴¹ UN General Assembly Resolution 897 (IX) 1954.

⁴² UN General Assembly Resolution 3314 (XXIX) 1974, ICC Prep.Com Report, UN Diplomatic Conference of Plenipotentiaries on ICC, Rome, 15 June-17 July 1998 (Resolution RC/Res.6).

⁴³ ILCYB (1990), Draft Article 16(1), p. 336.

actors and, without the existence of a universal definition of terrorism; it becomes impossible to link the acts of ‘organizing, assisting, financing’ by a State, with a non-State actor whom has committed the actual crime of terrorism.

Furthermore, some ILC members suggested that, groups of individuals could threaten peace and security and thus, liberation movements and international corporations must be included.⁴⁴ The following States also were of that opinion and thought that terrorism should cover private conduct: (Belarus, Denmark, Finland, Iceland, Norway, Paraguay, Sweden and the UK).⁴⁵

Other governments (Australia and the Netherlands), thought about the provision that it was too imprecise to impose criminal liability.⁴⁶ There also was the difficulty of proving subjective terror and notes were raised by some ILC members.⁴⁷

1.1.4 1998 Rome Statute of the International Criminal Court

Article 5 of the 1998 Draft Rome Statute has included three offences of ‘crimes of terrorism’, after a request by the UN General Assembly to the Preparatory Committee to consider terrorism.⁴⁸ The first offence:

“The undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror; fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them”.

As one can notice, the ‘persons’ target element is still present in terrorism definitions, resulting in the inclusion of combatants and State officials of all sorts and rankings. However, this

⁴⁴ ILCYB (1990), p. 338 (Njenga), p. 339 (Benama), p. 338 (Pellet).

⁴⁵ ILC (45th Session), Comments and Observations from Governments (1993), UN Doc A/CN.4/448 – L. Sunga. *The Emerging System of International Criminal Law*. The Hague: Kluwer 1997, p. 202 (Belarus, Denmark, Finland, Iceland, Norway, Paraguay, Sweden and the UK).

⁴⁶ L. Sunga. *op. cit.*, p. 202.

⁴⁷ ILCYB (1990), p. 338 (Koroma).

⁴⁸ UN General Assembly Resolution 51/160 (1996).

definition is not limited to armed conflicts, as it was in the 1996 ILC Draft Code. What makes this definition more unique however, is the motive element which became far broader than the earlier definitions, covering any sort of justifications ‘of such other nature’.

Moreover, no demands by the perpetrator or, a purpose to ‘coerce the State’, are required to qualify the act as a terrorist act; it is enough to link the perpetrators with a ‘political, philosophical, ideological, racial, ethnic, religious’ way of thinking to consider the act ‘terrorism’. With only the State having the authority to decide whether there exists ‘terror; fear or insecurity’, this definition makes it ‘simple’ for States to consider any attack against them as a terrorist attack.

The third offence covers the use of “firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.” Linking ‘indiscriminate violence’ to terrorism gives the definition objectivity and, more ability to specify commonly-known modern day terrorist attacks.

Thirty-four countries argued that terrorism, threatened global peace and security, shocked the conscience of humanity and, occurred increasingly, frequently and on a larger scale, thus, they demanded including the crimes of terrorism.⁴⁹ Also, jurisdictional disputes between States, were believed to be an issue in regards to terrorism, and by granting the Security Council and the ICC, the jurisdiction over it; would help diffuse a smaller issue that can escalate to a become a bigger one between disputing States, due to the political character of terrorism.

However, those States had different approaches towards terrorism; India, Turkey and Sri Lanka, proposed the inclusion of terrorism within crimes against humanity.⁵⁰ Turkey also stated that ‘systematic and prolonged terrorism against a civilian population’, should be included. Albania recommended that ‘institutionalized state terrorism’ should be covered.

⁴⁹ ICC Prep.Com, Summary of Procs, 25 Mar-12 Apr 1996, UN Doc A/AC.249/1 (7 May 1996), para 66.

⁵⁰ Official Records of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 15 June-17 July 1998 (UN Doc A/CONF.18314.Vol.III), p. 242 (India, Sri Lanka and Turkey).

Russia however, believed that the offences should be limited to ‘only the most serious terrorist attacks’⁵¹. Other States such as Egypt, UAE, Yemen, Saudi Arabia and Kuwait, were going towards the direction of excluding national liberation movements.⁵²

An alternative definition was proposed to the Conference by a number of States, which defines terrorism as the following:

“An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime”.⁵³

By removing the reference to acts such as the ‘undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating’, and ‘against another state’ from the draft Article 5, this definition now covers non-international terrorism, however, modifying the target element to ‘against innocent persons’, excludes State terrorism from the scope of application, considering that States view persons who seek to overthrow a government as non-innocent.

Ultimately, the offences were not included in the Rome Statute. A resolution was issued by The Conference stating that “despite widespread international condemnation of terrorism, no generally acceptable definition could be agreed upon.”⁵⁴ Many of the States which were against including the offences, stated that terrorism is a serious crime but, they will wait until it is clearly defined before codifying it.⁵⁵

⁵¹ Ibid., (Vol II), p. 106, p. 124, p. 179, p. 276, p. 330 (Turkey); p. 82 (Albania); p. 115, p. 177, p. 289 (Russia).

⁵² Ibid., p. 281 (Egypt); p. 177 (UAE); p. 178 (Yemen); p. 179, p. 293 (Saudi Arabia); p. 289 (Kuwait).

⁵³ Ibid., (Vol III), p. 222 (Coordinator draft), p. 242 (India, Sri Lanka and Turkey); p. 248, p. 354 (Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey).

⁵⁴ Resolution E, Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 17 Jul 1998 (UN Doc A/Conf.183/10).

⁵⁵ K. Kittichaisaree. *International Criminal Law*. Oxford: Oxford University Press 2001, p. 227.

1.1.5 1996 Comprehensive Convention on International Terrorism

In 1996, the UN General Assembly established the Ad Hoc Committee to ‘elaborate an international convention for the suppression of terrorist bombings’ and, subsequently, “an international convention for the suppression of acts of nuclear terrorism... and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”.⁵⁶

By 2002, States reached an agreement on most of the Draft.⁵⁷ However, a disagreement over the application to armed forces and armed conflicts (Article 18), was the reason preventing the adoption of the Draft. The Coordinator stated that, only by resolving Article 18, States would be able to reach an agreement over the preamble and the definitions in Articles 1 and 2.⁵⁸

The preamble states that “all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed”, furthermore, Article 2 defines the offence as when a person “unlawfully and intentionally causes death or serious bodily injury to any person”; “serious damage to public or private property”; “damage to property, places, facilities, or systems...resulting or likely to result in major economic loss.”⁵⁹ When the purpose of the conduct is, “by its nature or context, to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act”.⁶⁰

By including no reference to a political motive or an aim, the treaty succeeds to exclude the offences from the exception to extradition.⁶¹ The requirement of compulsion, apply only to States and international organisations, thus, it does not apply to political parties or national liberation movements. And by referring to ‘serious damage’, the offences apply broader than the reference to the expression ‘extensive destruction’, which is used by the EU Framework Decision.

⁵⁶ UN General Assembly Resolution 51/210 (1997).

⁵⁷ UN General Assembly Ad Hoc Committee Report (2003), Suppl. 37 (A/58/37), p. 8.

⁵⁸ UN General Assembly Ad Hoc Committee, PR L/2993 (1 February 2002).

⁵⁹ UN General Assembly 56th Session, 6th Committee, Working Group Report: Measures to Eliminate International Terrorism, 29 October 2001 (UN Doc A/C.6/56/L.9, Annex I), p. 16 (Informal Coordinator texts).

⁶⁰ Draft Comprehensive Convention, Articles 2(2), (3), (4)(a)-(c).

⁶¹ *Ibid.*, Article 14.

Disagreements began to rise again when Malaysia, representing 56 States of the OIC, argued to exclude “people’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination”.⁶²

This argument was in the purpose of counter-balancing the exclusion of the acts of States’ armed forces. The Non-Aligned Movement supported the proposal, while, other States objected, stating that “a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination”.⁶³

To settle this dispute, The International Committee of the Red Cross (ICRC), suggested to define the term ‘armed forced’ as to cover both of government forces and organised armed groups.⁶⁴

Although that this approach would provide the needed balance, it might be too broad in certain situations. Some states sought the exemption of liberation fighters only to the extent that they do not target civilians.⁶⁵ An approach that some States would not support, however, it would create the perfect balance.

1.1.6 The Sectoral International Counter-Terrorism Treaties

Despite the failure of the international community to agree on a universal definition on terrorism, they found themselves in multiple periods of times, facing new phenomena of terroristic activities, which forced them to universally address the certain activities and declare it as criminal, with the purpose of gathering international co-operation and acceptance under the auspices of the United Nations, whenever a signing State finds itself in position of combating such undefined criminal activities.

- 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.
- 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.
- 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

⁶² S. Subedi. The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law. *International Law Forum* 4 (2002), p. 163.

⁶³ Ibid.

⁶⁴ ICRC Report, Geneva, 2002. ‘Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law’, p. 5.

⁶⁵ UN General Assembly Ad Hoc Committee Report, Eighth Session (28 June-2 July 2004), *op. cit.*, p. 7, para 16; p. 11, para 8.

- 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.
- 1979 International Convention against the Taking of Hostages.
- 1980 Convention on the Physical Protection of Nuclear Material.
- 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.
- 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.
- 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.
- 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection.
- 1997 International Convention for the Suppression of Terrorist Bombings.
- 1999 International Convention for the Suppression of the Financing of Terrorism.
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.
- 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.
- 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.

Combining approximately fifty offences, in particular, ten offences regarding civil aviation; sixteen regarding shipping platforms; nearly twelve offences regarding crimes against persons; two offences regarding the financing of terrorism and, seven offences involving the use or the threat to use bombs and nuclear materials.

The expressed main purposes and obligations by these treaties overall, are to implement the offences set in the treaties into domestic national laws and, to impose punishments which reflect the gravity of such crimes and, to provide the national courts with broad jurisdiction over these offences, in purpose to ultimately achieve a ‘universal jurisdiction’; by granting national courts different jurisdictions based on the nationalities of both the offender and the victim, a territorial jurisdiction or, even just by the mere presence of the person on the territory of a State.⁶⁶

In addition, obligations which regard these offences as non-political; for extradition purposes, and to agree on co-operation in investigations and exchange of information.

⁶⁶ 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 4; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Art. 5; Protocol for the Suppression of Unlawful Acts of Violence at Airports, Art. 3; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Art. 3; 1979 International Convention against the Taking of Hostages, Art. 5; 1979 Convention on the Physical Protection of Nuclear Materials, Art. 8(1)-8(2); 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Art. 6; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, Art 3; 1997 International Convention for the Suppression of Terrorist Bombings, Art. 6; 1999 International Convention for the Suppression of Financing of Terrorism, Art. 7.

The abovementioned treaties share three main characteristics, first, the adoption of operational definitions for each specific act, without the agreement on a general definition of terrorism; to provide flexibility in defining each act as discussed further below.⁶⁷

Second, the absence of a motive requirement; in purpose to gather the agreement of States concerned. Third, the focus was entirely on acts committed by non-State actors, excluding State terrorism; also, for consensus purposes.⁶⁸

The scope of the treaties is generally limited to activities of an international character, for example, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, is only applicable when protected persons are in a foreign State,⁶⁹ the Conventions regarding civil aviation, is only applicable to acts on international flights and airports,⁷⁰ the Convention on maritime safety, generally applies to acts on ships which travel in international water,⁷¹ the Convention on taking of hostages, is not applicable when “the offence is committed within a single state and the hostage and alleged offender are nationals of that state and the alleged offender is found in the territory of that State”.⁷²

The two Conventions on financing terrorism and terrorist bombings, include a similar provision, though exclude offenders whom fled the State after the committing the crime; for extradition purposes,⁷³ on the other hand, the two Conventions on nuclear materials and continental platforms, are the only conventions which apply to nationals when committing the offences in the territory of their States.⁷⁴⁷⁵

⁶⁷ A. Byrnes. “Apocalyptic Visions and the Law: The legacy of September 11” (2002), p. 11. - <https://openresearch-repository.anu.edu.au/bitstream/1885/41104/3/Byrnes30May02.pdf> (14.04.2020).

⁶⁸ Ibid.

⁶⁹ 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Art. 1(a).

⁷⁰ 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 3(3); Convention on the Safety of Civil Aviation, Art. 4(2); Protocol for the Suppression of Unlawful Acts of Violence at Airports, Art. 1; Convention on the Safety of Maritime Navigation, Art. 4(1).

⁷¹ 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 4(1).

⁷² 1977 International Convention against the Taking of Hostages, Art. 13.

⁷³ 1999 International Convention for the Suppression of the Financing of Terrorism, Art 3; International Convention for the Suppression of Terrorist Bombings, Art. 3.

⁷⁴ 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Art. 2(1); Convention on the Physical Protection of Nuclear Material, Art. 2(1).

⁷⁵ D. O'Donnell. "International treaties against terrorism and the use of terrorism during armed conflict and by armed forces" (2006), p. 860. - <https://www.corteidh.or.cr/tablas/a21937.pdf> (14.04.2020).

Generally speaking, these treaties do not require any special intent or motive, which is the main element -alongside the element of targeting civilians-, which distinguish terrorism from other ordinary crimes, further, where one of the treaties requires a certain intent, it is not properly effective in terms of differentiation.

For example, the Convention which concerns hostage-taking, requires that the act must be “in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act.”⁷⁶ creating no differentiation between terrorism and the ordinary crime of hostage-taking for a personal benefit, due to the inclusion of coercing natural persons or any group of persons, while not requiring a political or a public aim.

While most of these treaties do not require any intent whatsoever, such as the two Conventions on the safety of maritime navigation and civil aviation, some other treaties require an intent, only for other acts which do not involve violence, for example, the Convention on the Physical Protection of Nuclear Material, criminalises the theft and the threaten of using a nuclear material regardless of the intent, in the meanwhile, criminalises the threaten of theft of such materials, only when it is intended to compel a State, an international organisation or, a natural or legal person.⁷⁷

The International Convention for the Suppression of the Financing of Terrorism on the other hand, criminalises the funding of violent acts whenever such acts are intended to “intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act”.⁷⁸

Despite the significance of including the requirement of intimidating a population, as the first treaty of the beforementioned treaties to do so; this intent was kept independent from the other purposes of intimidating a State or an international organisation, which politicises the crime of terrorism, moreover, the expression ‘intimidate’, is much broader than the concept of terror.

⁷⁶ 1979 International Convention against the Taking of Hostages, Art. 1(1).

⁷⁷ 1980 Convention on the Physical Protection of Nuclear Material, Art. 7(1).

⁷⁸ 1999 International Convention for the Suppression of the Financing of Terrorism, Art. 2(1)(b).

Furthermore, and regarding the politicisation of terrorism, another observation on the sectoral treaties is that the older treaties focus on the protection of civilians rather than the military of a State, reflecting a clearer concept of terrorism as it was originated from the ‘reign of terror’ during the French revolution.

For example, the Conventions concerning civil aviation and their Protocol, exclude acts against military and police aircrafts and military airports from their scope of application.⁷⁹ The Convention concerning the protection of internationally protected persons, protects military personnel only whom are attached to diplomatic missions.

Furthermore, the 1988 Convention concerning maritime navigation, excludes acts against warships and military or police vessels from its scope of application,⁸⁰ and the Protocol, includes acts against platforms which are used only for economic benefitting.⁸¹ Later Conventions however, include acts against military personnel, properties and interests, and make references to International Humanitarian Law in this regard.⁸²

The newer treaties on the other hand, equally regards attacks against the armed forces of a State as terrorism, which lowers the level of society’s condemnation and gravity of terrorist attacks.⁸³

Moreover, military personnel of a State generally enjoy a certain degree of immunity under the newer treaties, such as the two Conventions concerning nuclear terrorism and terrorist bombings, for example, the 1997 International Convention for the Suppression of Terrorist Bombings excludes acts committed by military armed forces of a State in the exercise of their official duty from the scope of its application,⁸⁴ even if their acts were committed during peacetime and thus, not covered by other provisions of International Humanitarian Law.

⁷⁹ 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 3(2); 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Art. 4(1).

⁸⁰ 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 2(1).

⁸¹ 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Art. 1(3).

⁸² D. O'Donnell, "International treaties against terrorism and the use of terrorism during armed conflict and by armed forces" (2006), p. 863. - <https://www.corteidh.or.cr/tablas/a21937.pdf> (16.04.2020).

⁸³ *Ibid.*, p. 879.

⁸⁴ 1997 International Convention for the Suppression of Terrorist Bombings, Art 19(2).

Remarkably, the major -and might be the only- regional Conventions on combatting terrorism which make references to the offences in these sectoral treaties, while, not defining terrorism, are the Council of Europe's Convention on the Prevention of Terrorism, the Inter-American Convention against terrorism, the South Asia Association for Regional Cooperation's Convention and the Association of Southeast Asian Nations' Convention.

Overall, it is said that, in certain situations, we should make use of any means available, in this particular situation however, we should not, and in fact, we should reject it and demand for a completely precise definition of terrorism which reflects the society's condemnation and the actual horrors of terrorism, rather than to reflect certain governments' needs and interests.

1.2 TERRORISM IN REGIONAL ORGANISATIONS

1.2.1 League of Arab States: 1998 Convention for the Suppression of Terrorism

An example of overly broad definitions of terrorism, is the League of Arab States' definition, which defines terrorism as:

“Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resource”.⁸⁵

Most definitions to this day are an evidence that terrorism, must not be defined in purpose of securing governments' interests and policies or ideologies. While criminalisation usually comes in response to a new phenomenon, the definition has to reflect the common understanding of the crime.

⁸⁵ 1998 Arab Convention on the Suppression of Terrorism, Art. 1(2).

The expression ‘in pursuit of a criminal agenda’, along with the definition in general, have the capacity to include most ordinary violent crimes. Due to the large number of terrorist activities in that region and, the variety of terrorist groups and their methods, further, considering their knowledge of the investigating methods and procedures of the law enforcement in these countries; it makes it difficult for law enforcement to collect enough evidence for courts, to prosecute for terrorism. In any case however, this cannot be a justification to adopt such a dangerously broad definition.

Amnesty International stated that this definition, can be ‘subject to wide interpretation and abuse, and in fact does not satisfy the requirements of legality’.⁸⁶ The terms ‘violence’ and ‘threat’, are not clarified thus, the definition can include trivial infringements. Furthermore, it is unknown, what level of danger is required by the expression, ‘placing lives, liberty or security in danger’ to convict a person of terrorism, nor how is it to measure the required level of danger.

Moreover, Article 2(a) excludes ‘all cases of struggle by whatever means, including armed struggle against foreign occupation and aggression’, without the referring to any prohibitions on targeting civilians. Therefore, this definition grants States, the ultimate freedom of selectivity to prosecute for terrorism, depending on whether the State recognises a certain group as a national liberation movement or, as a political opponent.

1.2.2 Organisation of the Islamic Conference (OIC): 1999 Convention on Combating International Terrorism

Due to the large overlap in member States with the Arab League, the OIC’s Convention is similar to the Arab League’s Convention in many aspects, however, much broader and, includes a wider range of acts which are solely directed against the State; and the reason behind this, is likely to be that some States such as Turkey, Pakistan and Indonesia, are members of the OIC, but are not members of the Arab League, and these States face frequent attacks directed against their governments, besides the actual terrorist attacks, thus, and as in the case

⁸⁶ Amnesty International. ‘The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights’ (2002), p. 18.

with most States, they would be in favour of regarding all sorts of attacks as terrorism, in purpose to combat such attacks with excessive powers and more public acceptance.

Article 1(2) of the Convention defined terrorism as “any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States”.

Like the Arab League’s Convention, the OIC’s Convention excludes national liberation movements from being regarded as terrorism,⁸⁷ contradicting the principle they have adopted in their definition, that motives and intentions are irrelevant, however, they could have avoided this contradictory by limiting the lawfulness of national liberation movements’ armed struggle to targeting the occupying State’s interests and combatants.

Overall, the reason that makes the OIC’s definition of terrorism overly broad is, first, although that it requires the aim of criminal plans to be for the purpose of terrorising people, it is ineffective considering that this element, creates a one terroristic act, besides other acts described in the definition, and it is not cumulative.

Therefore, any act of violence or threat of using violence, without requiring any motive or intent whatsoever behind it, which threatens to harm people -as all violence and threats do- or, ‘exposes’ any facility or public or private property to ‘hazards’ or seizing them, or ‘endangers’ a national resource, or threatens the stability, territorial integrity, political unity or sovereignty of a State, is regarded as terrorism. According to this definition, terrorist crimes are literally countless.

Moreover, the definition uses many vague expressions and terms, for example, the term ‘violence’ in the definition does not refer to only unlawful acts, and it is not clarified for the

⁸⁷ 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism, Art. 2(a).

purposes of the Convention.⁸⁸ Further, the expression ‘exposing to...hazards’ is an overly broad expression which can include any mere threats to properties and to the environment.

1.2.3 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism

After the collapse of the Soviet Union, the new independent republics faced difficulties in dealing with the post-Soviet conflicts, thus, there was a need for a full co-operation in securing the borders, exchange of intelligence and extradition matters, for this purpose, the 1999 treaty was adopted.

Although that the criminalisation of terrorism by States is not required by the treaty, Article 1 defined terrorism as acts of violence against persons or the threat to commit such acts with the purpose of “undermining public safety, influencing decision-making by the authorities or terrorizing the population”, in addition to damaging property or the treat to damage with the purpose of endangering lives, harming property or ‘other consequences dangerous to society’, in addition also to ‘other acts classified as terrorism’ by the national laws and the international anti-terrorism treaties.

Therefore, by the combination of separating the element of terrorising the population, as a one purpose in acts against persons, and separating the element of endangering lives in acts against property, the vague expression ‘other consequences dangerous to society’ in this treaty, clearly reflects the concerns and pressures that the CIS States were experiencing at the time of drafting the treaty, as it qualifies to be a general security co-operation treaty rather than an anti-terrorism treaty, due to the overly wide range of activities it covers outside the actual concept of terrorism.

Furthermore, Article 4 requires from States to not regard those acts as other than criminal, for the purposes of extradition, on the other hand, Article 9 grants the member States an option to refuse extradition requests if it may “impar its sovereignty, security, social order or other vital interests or is in contravention of its legislation or international obligations”, therefore, the

⁸⁸ B. Saul. *Defining Terrorism in International Law*. New York: Oxford University Press 2010, p. 157.

treaty results in that it obliges the member States to regard a very wide range of acts as nothing other than criminal, while Article 9 contradicts extradition purposes.

1.2.4 Organisation of African Unity (OAU): 1999 Convention on the Prevention and Combating of Terrorism

The OAU Convention on the Prevention and Combating of Terrorism, was adopted in 1999, requiring States to regard as terrorism, any criminal act under the member States national laws, which “may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage”, as defined in Article 1(3)(a).

The act, to be regarded as a terrorist act, must be calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or, to disrupt any public service or, to create a public emergency or a general insurrection.

Expressions such as inducing a government to ‘adopt or abandon a particular standpoint’, the intimidation of the general public and the creation of a public emergency or a general insurrection are, broad expressions which may create an overlap between terrorism laws and national security laws, or even, may include violent protests, which are neither terrorist nor a concern of national security.

Same as with the Arab League’s Convention, the OAU Convention excludes acts by national liberation or self-determination movements from being regarded as terrorism,⁸⁹ while the next provision states: “Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.”⁹⁰ which makes the Convention contradicted.

⁸⁹ 1999 OAU Convention on the Prevention and Combating of Terrorism, Art. 3(1).

⁹⁰ *Ibid.*, Art. 3(2).

1.2.5 Shanghai Co-operation Organisation: 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism

The Organisation which consists of six Central-Asian States (China, Russia, Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan), was established in 2001, for the purpose of strengthening the political, security and economic co-operation between member States.

The Shanghai Convention on Combating Terrorism, Separatism and Extremism, states in the preamble that “terrorism, separatism and extremism constitute a threat to international peace and security and the promotion of friendly relations among States...regardless of their motives, and cannot be justified under any circumstances”.

Article 1(1)(1) defines terrorism as violent acts against persons or property “when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act”, and acts against persons when “intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict”.

The attachment of ‘separatism’ -which do not take forms of terrorism- to terrorism and extremism in one convention, is not surprising, since the definition of terrorism in the convention includes acts directed solely against the public security or, for the purpose of compulsion, separately from the intimidation purpose. Moreover, the term ‘public security’ is not defined, even only for the purposes of the Convention, thus, it is completely subject to the Court’s discretion.

On the other hand, the definition excludes attacks directed against combatants during both international and non-international armed conflicts from being regarded as terrorism, however, due to the broadness of the definition in general and, due to the term ‘public security’ in particular, it is doubtful to what extent this clause is capable of providing protection.

1.2.6 European Union: 2002 Council Framework Decision

Based on a definition by an EU Council Common Position in 2001, which was for the purpose of freezing the funds and assets of listed terrorist persons and entities; complying with Security Council Resolution 1373.⁹¹ The EU Framework Decision's definition was adopted to provide a common European arrest warrant,⁹² Article 1(1) reads as the following: "Offences under national law, which, given their nature or context, may seriously damage a country or an international organization when committed with the aim of:"

"Seriously intimidating a population, or unduly compelling a Government of international organization to perform or to abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization".

Like the definition of the Draft Comprehensive Convention, the EU's definition separates the aim of intimidating a population as an independent aim from the other potential aims of compulsion and destabilization. While other definitions require a level of fear or intimidation within the population as a commonly known character of terrorism, or as an intention at most, the EU's definition permits the State to regard acts of more political-likely character, as terrorism.

As for the expression 'given their nature or context', as a qualifying expression, it is unclear and insufficient to pre-determine the character of terrorism, which consequently eliminates the need to prove the intention, as this expression was included in the definition of the 1999 Terrorist Financing Convention, in purpose to remove the need to prove a subjective mental state.⁹³

⁹¹ EU Council Common Position 2001/931/CFSP, Art 1(3); EU Council Common Position 2001/154/CFSP (1), (26 February 2001).

⁹² 2002 EU Framework Decision on the European Arrest Warrant and the Surrender Procedures.

⁹³ UN General Assembly, Fifty-fourth Session, Sixth Committee, Report of the Working Group (26 October 1999), (UN Doc A/C.6/54/L.2), p. 62.

Moreover, it differs from the 1999 Terrorist Financing Convention by adding the terms ‘seriously’ and ‘unduly’ to the aims of intimidation and compulsion, which narrow the definition by excluding less serious levels of intimidation and compulsion.

While the drafting of the 1997 Terrorism Bombing Convention, a proposal to consider attacks against private property as terrorism was declined, worrying that such inclusion will criminalise acts which are already governed by national laws;⁹⁴ the EU Framework Decision included the protection of private property, due to purposes of covering urban violence.⁹⁵ Thus, violent demonstrators can be prosecuted for terrorism under this definition.

1.2.7 Organisation of American States (OAS): 1971 and 2002 Conventions

In the 1970’s, Central and South American States began facing the commission of widespread acts of kidnapping and extortion, which have aimed to fund the guerrilla movements that were active in that particular region.⁹⁶

In response, the Organization of American States adopted the 1971 convention, with Article 1 requiring States to “prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the State has the duty according to international law to give special protection, as well as extortion in connection with those crimes”, further, Article 2 described these offences as ‘common crimes of international significance, regardless of motives’.

Thus, the provisions did not define terrorism, they have simply provided examples of acts of terrorism, in addition, the Convention has limited the target to protected persons as specified in the 1973 Protected Persons Convention, despite that the latter Convention have not mentioned the term ‘terrorism’.

⁹⁴ UN General Assembly, Fifty-second Session, Sixth Committee, Report of the Working Group (10 October 1997), (UN Doc A/C.6/52/L.3), p. 19 (Germany); Ad Hoc Committee Report (1997), *op. cit.*, p. 13, pp. 50-52 (Rapporteur).

⁹⁵ EU Commission Proposal for a Council Framework Decision on Combatting Terrorism, Brussels, 19 September 2001, Com. (2001) 521 Final, 2001/0217 (CNS), p. 9.

⁹⁶ E. McWhinney. *Aerial Piracy and International Terrorism*. Dordrecht: Martinus Nijhoff 1987, p. 144.

After demands by American States to define terrorism in a Convention, the Organization's Secretariat of Legal Affairs proposed a draft convention in 1995, which defined terrorism as 'violence intended to generate widespread fear, intimidation, or alarm'.⁹⁷

Following the terrorist attacks of 11 September 2001, a declaration by the OAS, the 'Declaration of Solidarity' condemned the attacks and described terrorism as 'the targeting of innocent persons to promote ideological objectives'.⁹⁸ However, there were arguments by Canada and the United States for approaching a 'complementary' new instrument.⁹⁹

The United States further argued, that a general definition would contradict the already reached agreement by the sectoral treaties.¹⁰⁰ In reality however, this approach was intended to eliminate any referrals to an ideological motives in purpose to avoid the debate on national liberation struggles, by focusing on the acts rather than the definition.¹⁰¹

Therefore, the 2002 Inter-American Convention does not provide any definitions of terrorism, despite that Article 1 requires States to "prevent, punish, and eliminate terrorism'. Instead, the Convention's main purpose is to implement the sectoral treaties, and to 'adopt the necessary measures and to strengthen co-operation among them.'¹⁰² However, the Convention excluded the political offence exception in the sectoral treaties,¹⁰³ and prevented the suspected terrorists from enjoying a refugee status.¹⁰⁴

⁹⁷ Doc OEA/Sec.General. DDI/Doc.12/01 (26 Sept 2001).

⁹⁸ OAS, Declaration of Solidarity from the House of the Americas, 18 Oct 2001, OAS Doc OEA/Sec. Foreign Affairs/11.23/RC.23/DEC.1/010 rev.1, corr.1, para 3.

⁹⁹ E. Lagos, T. Rudy. Preventing, Punishing, and Eliminating Terrorism in the Western Hemisphere; A Post-9/11 Inter-American Treaty. Volume 26, Fordham International Law Journal 2003, pp. 1619, 1628.

¹⁰⁰ Ibid., p. 1629.

¹⁰¹ OAS, Legal Aspects of Terrorism (21 Feb 1996), OAS Doc OAS/Sec. General/CP/CAJP-1069/96, p. 11.

¹⁰² 2002 Inter-American Convention Against Terrorism, Art 1.

¹⁰³ Ibid, Art 11.

¹⁰⁴ Ibid, Articles 12-13

1.2.8 South Asian Association for Regional Cooperation: 1987 Convention and 2004 Protocol

The South Asian Association for Regional Co-operation (SAARC), comprising of Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka, adopted its regional Convention on Suppression of Terrorism in 1987, which included the offences specified in the 1970 Hauge Convention, 1971 Montreal Convention and 1973 Protected Persons Convention, in addition to offences specified in Article 1(e) and described as ‘terroristic’:

“Murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property”.

By regarding the offences as terroristic, the Convention separates the offences it covers, from political violence for extradition purposes.¹⁰⁵ Furthermore, the Convention required that the violence to be indiscriminate, drawing the definition closer to the concept of terrorism, which is also unusual for definitions drafted by States, as this requirement excludes attacks directed against designated targets, such as assassinations.

However, and without a requirement of a political motive or, an objective of spreading extreme fear; this definition is broad enough to regard ordinary crimes, such as mass murders or serial killing and rape as terrorist acts.

In purpose to comply with Security Council Resolution 1373 after 2001, and with the Terrorist Financing Convention of 1999, SAARC adopted the additional 2004 Protocol to the Convention,¹⁰⁶ which defined terrorism for the purposes of this Protocol, in Article 4(1) as “any other act intended to cause death or serious bodily injury to a civilian, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government...”.

¹⁰⁵ 1987 SAARC Regional Convention on Suppression of Terrorism, Article 1.

¹⁰⁶ SAARC Standing Committee, 28th Session, Kathmandu, (19-20 Aug 2002), SAARC Council of Ministers, 23rd Session, Kathmandu, (21-22 Aug 2002).

Therefore, resulted in the adoption of two different definitions in one convention, confirming the idea that terrorism must not be defined in the favour of certain purposes, but in the sole purpose of defining terrorism to reflect the actual concept of terrorism, and the common public understanding of the term.

Moreover, despite the geopolitics of the region, the Convention did not address the subject of self-determination movements, due to the increasing tensions between Pakistan and India.¹⁰⁷

1.3 TERRORISM IN CUSTOMARY INTERNATIONAL LAW

According to the Statute of the International Court of Justice, Customary International Law is a general practice accepted as law,¹⁰⁸ thus, in order to consider a certain rule as a customary international rule, it is required to be reflected in the general practice of States as a widespread repetition of similar conduct and, over a good period of time, and that this practice must be pursuant to the *opinio juris*, occurring from the State as an obligation.¹⁰⁹

According to the UN International Law Commission, the evidence of States' practice can be found in "treaties, decisions of national courts and international tribunals, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations".¹¹⁰

In 2011, the appeals Chamber of the Special Tribunal for Lebanon decided that a customary rule of international law regarding the international crime of terrorism has emerged, at least in time of peace.¹¹¹ The Chamber based its decision on the existence of an evidence of such

¹⁰⁷ R. Perera. Suppression of Terrorism: Regional Approaches to Meet the Challenges. The Sri Lanka Journal of International Law Vol. 19 (2004), p. 24.

¹⁰⁸ Statute of the International Court of Justice, Art. 38(1)(b).

¹⁰⁹ S. Rosenne. Practice and Methods of International Law 55 (1984). In: 'Duke Law: Customary International Law: Research Guides & Background Information'. – www.law.duke.edu/ilrt/cust_law_2.htm (17.04.2020).

¹¹⁰ Report of the International Law Commission to the General Assembly (Part II): Ways and Means of Making the Evidence of Customary International Law More Readily Available. (1950, 2 Yearbook of International Law Commission 367, ILC Doc. A/1316).

¹¹¹ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011 Decision, para. 85.

customary rule on the UN General Assembly's Resolutions, UN Security Council's Resolutions, treaties and States practice.¹¹²

The definition of terrorism according to the Chamber is the commission or the threatening to commit a criminal act, with the intention of spreading fear among the population or, of coercing a State or an international organization to act or to refrain from acting, and a transnational character of the criminal act committed.¹¹³

1.3.1 UN General Assembly Resolutions

The resolutions of the General Assembly typically lack of a binding effect upon member States,¹¹⁴ and it is commonly known that they are unable to produce instant customs,¹¹⁵ however, a consequent number of resolutions, depending on the consistency of their content and the circumstances of their adoption process, can be considered as evidence of emerging customs and *opinio juris*.¹¹⁶

Furthermore, the voting process is highly relevant in this regard and entails analysis of each vote and the reasons behind it, considering that the voting system in the General Assembly, is subject to lobbying, compromises, politics and imposing pressure upon member States.¹¹⁷ Therefore, it is a mistake to consider resolutions in general or in isolation of their details, for example, comparing the practice of States to their votes in certain resolutions, can be helpful in this regard.¹¹⁸

The General Assembly's efforts to define terrorism in the 1970's have all failed due to disagreements over essential matters such as self-determination movements and State terrorism, however, the Assembly have reached a working definition in the 1994 Declaration on Measures to Eliminate International Terrorism, which defined terrorism as "criminal acts

¹¹² Ibid., paras. 85,88 and 89.

¹¹³ Ibid., para 111.

¹¹⁴ The Charter of the United Nations, Articles 10-11.

¹¹⁵ H. Thirlway. *International Customary Law and Codification*. A. W. Sijthoff 1972, pp. 72-77.

¹¹⁶ R. Higgins. *The Development of International Law through the Political Organs of the United Nations*. Oxford University Press 1963, p. 5 - Military and Paramilitary Activities (Nicaragua vs US). 1986, ICJ Reports, para. 188.

¹¹⁷ M. N. Shaw. *International Law*. Columbia University Press 2003, pp. 71-75.

¹¹⁸ R. Higgins. *op. cit*, p. 26.

intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."¹¹⁹

This definition differs from the definition suggested by the Chamber in that it requires a political purpose, a requirement which the definition of the Chamber does not include, further, the definition suggested by the Chamber requires an intent to coerce a State or an international organization, a requirement which is not included in the 1994 General Assembly's working definition.

Moreover, the General Assembly's definition differs from the definition which was suggested by the Security Council Resolution 1566, which limits the definition to the offences provided by the sectoral treaties.¹²⁰ It also differs from the 1999 International Convention for the Suppression of the Financing of Terrorism definitions, which do not require any purpose of intimidating the population or coercing the government.¹²¹

The declaration itself expressly stated that there is still a need to define terrorism and to codify it,¹²² as did a number of States during the 14th and 15th meetings.¹²³ Further, in the following years many States expressed the absence of an international definition of terrorism and demanded the need to define it, namely, the Non-Aligned Movement representing 118 member States,¹²⁴ and the Organisation of Islamic Cooperation representing 56 member States.

¹¹⁹ 1994 United Nations Declaration on Measures to Eliminate International Terrorism, annex to UN General Assembly resolution 49/60, (December 9, 1994), UN Doc. A/Res/60/49.

¹²⁰ UN Security Council Resolution 1566 (October 8, 2004).

¹²¹ B. Saul. *Civilizing the Exception: Universally Defining Terrorism*, 2012, p. 4. - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145097 (17.04.2020).

¹²² UN General Assembly Resolution 49/60, (9 December 1994), para. 12.

¹²³ UN General Assembly Official Records, 49th Session, 6th Committee, 14th meeting, (20 October 1994), paras. 5, 13, 27, 71; 15th meeting, (21 October 1994), paras. 4, 9, 18.

¹²⁴ Non-Aligned Movement, XIV Ministerial Conference, Durban, (17-19 August 2004), paras. 98-99, 101-102.

At the most, the General Assembly's resolutions and declaration, can be an evidence of a general prohibition on terrorism, but does not however, qualify as a customary rule of an international crime.¹²⁵

1.3.2 Treaties

As for the treaties on terrorism, many attempts by the international community to define terrorism in a treaty since the 1920's have failed due to the wide and complex disagreements among States over which acts constitute terrorism, reflecting variable understandings of the concept.

The sectoral treaties, as were discussed in this paper, oblige States to criminalise specific offences of terrorism, however, none of them suggest the international criminalisation of a 'transnational' crime of terrorism, as was suggested by the Chamber, instead, they have sought for a 'universal jurisdiction' over the crime by establishing international co-operation, furthermore, none of the treaties provide a comprehensive definition.¹²⁶ Further, where some offences contain specific definitional elements, they differ from one offence to another in their definitional elements.

Consequently, regional treaties on terrorism reflect even a clearer variation of approaches to terrorism, some regional treaties took the sectoral treaties approach of providing for specific offences, rather than defining terrorism, such as the 1971 and the 2002 Conventions of the Organisation of American States.

On the other hand, other regional treaties, with a number of mutual member States, provide overly broad definitions with slight differences in between each treaty, such as the Arab League's Convention, the Organisation of Islamic Cooperation's Convention and the

¹²⁵ K. Ambos, A. Timmermann. Terrorism and customary international law Terrorism and customary international law, (2014), p. 28. - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400446 (18.04.2020).

¹²⁶ Report of the Special Rapporteur Martin Scheinin, UN Doc. E/CN.4/2006/98, (28 December 2005), para. 28.

Organisation of African Unity's Convention. Or as in the case of the Council of Europe's 2005 Convention.

Moreover, terrorism was defined for the sole purpose of criminalising certain related ancillary conducts or, for the purposes of extradition and co-operation, such as in the case of the Council of Europe's 1977 Convention, the SAARC's 1987 Convention and the Commonwealth of Independent States 1999 Treaty.¹²⁷

1.3.3 UN Security Council Resolutions

The Security Council had been avoiding to use the term terrorism in the prior period to the year 1985, after then, the resolutions were comprised of condemnations of specific incidents, which were already covered by the sectoral treaties, such as situations of hostages-taking, assassinations of State officials and attacks directed against civilians, property and military buildings.¹²⁸

These continuous condemnations and regarding terrorism as a threat to international peace and security can be considered as an evidence of the international prohibition on terrorism but, not an evidence of an emerging universal jurisdiction over terrorism, due to the recency of such resolutions and due to the practice of States which lacks conformity of such resolutions.¹²⁹

Resolution 1566 (2004) is the first resolution to provide a definition, which is similar to the definition suggested by the Chamber, however, it was a working definition for the purpose of criminalising terrorism domestically, the resolution was passed by the General Assembly without a vote, and it does not require States to conform their terrorism laws with the proposed

¹²⁷ B. Saul. *op. cit.*, p. 4.

¹²⁸ UN Security Council Resolutions: 748 (1992), Preamble; 1044 (1996), Preamble; 1267 (1999), Preamble; 1373 (2001), Preamble; 1390 (2002), Preamble; 1526 (2004), Preamble.

¹²⁹ R. Kolb. *Universal Criminal Jurisdiction in Matters of International Terrorism*. *Revue Hellenique Droit International* 42 (1997). p. 77.

definition. Furthermore, the definition was widely criticised and the Security council was accused of failing to define terrorism,¹³⁰ therefore, it lacks the needed consensus.

Despite the undeniable global condemnation of terrorism and regarding it as an indeed threat to international peace and security, it is prematurely to consider an existence of a customary international rule which regards terrorism as an international crime; with a wide international disagreement over the definition and, a long list of failed international attempts to define it in treaty law, as the only agreed definitional element up to this point, is the violence element.

¹³⁰ W. D. Kassa. Rethinking the No Definition Consensus and the Would Have Been Binding Assumption Pertaining to Security Council Resolution 1373. *Flinders Law Journal* (2015), p. 129. - <http://www.austlii.edu.au/au/journals/FlinLawJl/2015/4.pdf> (18.04.2020).

CHAPTER 2. THE NEED FOR A UNIVERSAL DEFINITION OF TERRORISM

“When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its enemy, in the same way that one can misuse peace, justice, progress and civilization”.¹³¹ A few words by Carl Schmitt, that reflect the most important reason for universally defining terrorism, and at the same time, it is the same reason for which States have been disagreeing.

The crime of terrorism might be the most politicised crime in history, and definitely the most crime used by governments and politicians in describing their political enemies/opponents or their national security’s threats.

The reason which has led to such reality, is the wide diversity of definitions that States adopt in their national laws; typically States adopt broad definitions which allow them to include variable activities and actors. Some States even do not need their definitions to be covering the activities or the subjects to label them as terrorists; because they do not need a parliament approval of a military intervention. In similar cases, the non-existence of a universally agreed definition, allows for States to act unaccountably in this regard.

A study Published by Oxford University Press on behalf of the International Studies Association, using data on international military interventions for 125 to 182 countries, during the period from 1970 to 2005, demonstrated that “states experience more terrorism after they engage in military interventions. In particular, politico-strategic use of military force abroad—for example, interference in another country's domestic disputes, territorial interventions, or interventions to affect local politics and policy—leads to increased subsequent transnational terrorist attacks for the intervener”.¹³²

¹³¹ C. Schmitt. *The Concept of the Political*. Chicago: University of Chicago Press 1996, p. 54.

¹³² J. A. Piazza, S. Choi. *International Military Interventions and Transnational Terrorist Backlash*. *International Studies Quarterly*, Volume 62, Issue 3 (September 2018), Abstract.

The Maldives authorities accused an opposition activist of terrorism and sentenced him for 10 years, because he peacefully protested against violations of the government.¹³³ In Uzbekistan, fifteen activists were sentenced for terrorism, because they organized public demonstrations, which in these demonstrations, law enforcement opened fire on the demonstrators.¹³⁴

Moreover, according to Human Rights Watch and UN reports, between July 7 2014 and July 14 2014, Israel, by using 500 tons of explosives, killed 178 people and wounded 1361, including 635 women and children, 77 percent of those were civilians, Israel justified it publicly as ‘counter-terrorism’, in a response to Hamas injuring 5 civilians by launching 1500 inaccurate missiles, which were a response to Israel assassinating Hamas leaders, leaving many civilian ‘casualties’ behind.¹³⁵

By defining terrorism universally, it would become finally possible to legitimately condemn and prosecute terrorist activities; to counter false terrorism allegations, without a debate. Moreover, what is more important than agreeing on a universal definition, is to define it in a way that reflects the common understanding of the crime; in a way that prevents any attempts to misuse it. In this regard, Saul believes that “while the law must keep pace with public expectations and social change, gratifying public passion or vengeance is not a good reason for criminalization”.¹³⁶

Terrorism is very ugly, to the extent that, any person who receives an allegation or even a suspicion of terrorism, it most likely means the end of his/her career and social life. In the United States, Sixty percent (1048 cases) of domestic and international terrorism referrals to US federal prosecutors were declined, Thirty percent of additional anti-terrorism referrals (506 cases) were declined.

Thirty-Five percent of all referrals declined, were for the reasons of lack of evidence of intent or the existence of a crime; Fifteen percent were declined for weak or insufficient admissible

¹³³ ICJ, ‘Maldives: Human rights defender Jennifer Latheef should be released immediately and unconditionally’, Press Release, Geneva, (18 October 2005).

¹³⁴ ‘Uzbekistan, UN rights experts concerned about rights of defendants’, UN News Centre, (26 October 2005).

¹³⁵ Human Rights Watch, ‘Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians’, (15 July 2014). - <https://www.hrw.org/news/2014/07/15/israel/palestine-unlawful-israeli-airstrikes-kill-civilians> (15.03.2020).

¹³⁶ B. Saul. *Defining Terrorism in International Law*. New York: Oxford University Press 2010, p. 25.

evidence.¹³⁷ In the UK, between the years 2001 and 2005, 895 persons were arrested under the Terrorism Act of the UK 2000, only Twenty-Six percent of them were charged.¹³⁸

Excessive enforcement is usually a result of demands by politicians and the public to take more action against terrorism, increasing the moralisation attached to terrorism, however, this must become a reason to define the term, instead of avoiding it and using it to employ excessive procedural and investigative powers.¹³⁹

In 28 September 2001, following the 11 September terrorist attacks on the US, the UN Security Council adopted Resolution 1373 under its Chapter VII of the UN Charter, compelling all States to adopt counter-terrorism measures, including the obligation of criminalising terrorism in national laws, however, without defining terrorism, neither in this resolution nor later. The lack of definition was intended, as the acceptance of the Resolution was depending on avoiding a definition.¹⁴⁰ However, since that the Security Council acknowledges, member States would not comply nor accept the resolution if it contained a certain definition, then there has to be another reason which led the Security Council to adopt a resolution which obliges States to criminalise terrorism, yet, knowing the wide diversity of possible definition that States could adopt, thus, it was more of a statement or, a declaration, rather than an obligation.

Since then, the UN Security Council have been listing hundreds of entities and individuals in its 'terrorism list', imposing sanctions and legitimizing the international community to unilaterally target them in military operations.¹⁴¹ Two characteristics exist in all of these entities and individuals; they are Islamic, and listed in the United States' list of terrorism.¹⁴²

Despite the fact that some of the groups are indeed terrorist, and that some other groups do not target non-combatants; the absence of a universal definition has allowed the United Nations to

¹³⁷ Transactional Records Access Clearinghouse (TRAC), Criminal Terrorism Enforcement, Special Report (8 December 2003).

¹³⁸ UK Home Office, 'Arrest and charges made under the Terrorism Act 2000', (20 December 2005).

¹³⁹ B. Saul. *op. cit.*, p. 21.

¹⁴⁰ L. Bondi. Legitimacy and Legality: Key Issues in the Fight against Terrorism. Washington, DC: Fund for Peace 2002. p, 25.

¹⁴¹ US Congress, Authorization for Use of Military Force, Publication 107-40, 115 Stat 224 (19 September 2001).

¹⁴² United Nations, 'Narrative Summaries of Reasons for Listing'. - <https://www.un.org/securitycouncil/sanctions/narrative-summaries> (16.04.2020) - Timetable: Organisations currently officially designated as terrorist by United Nations and various governments. - https://en.wikipedia.org/wiki/List_of_designated_terrorist_groups#cite_note-un-qd-list-4 (16.03.2020).

be selective in its fight against terrorism, which resulted in the stereotyping of terrorism and thus, produced more of it.

Judge Kooijmans in his opinion on the ICJ's Israel Wall advisory opinion, and during the commentary regarding the determination of terrorism by the Security Council without a universal definition, he argued for the limiting of mandatory measures by the Council.¹⁴³

2.1 Terrorism as an International Crime

Activities of physical violence which, alongside with other elements, comprise terrorist crimes, are mostly criminalised and punishable by national laws and international treaties, some of these activities are recognised as international crimes such as crimes against humanity and war crimes. Thus, what is the technical or, practical reason behind the long lasting and continuous approaches for separating terrorism and recognise it as an independent international crime.

Terrorism, likewise other international crimes, has its own characteristics and elements, thus, when attempting to cover terrorist acts by including it under other offences, these acts become dependent on the compliance with the elements of the generic offence, thus, terrorism loses its own characteristics.

For example, when most definitions of terrorism exclude situations of armed conflicts, and justify it by the claim that targeting civilians during peace time is already covered by crimes against humanity; the punishment of terrorist violence becomes dependant on the condition of 'widespread or systematic attacks' which while it exists in crimes against humanity, it does not exist in terrorism.

Another claimed justification for including terrorism under other generic categories of crimes is that, separating terrorism as a different crime might result in cases of overlapping offences and prosecutions based on the same conduct.¹⁴⁴ However, a recent jurisprudence by international tribunals addressed this issue, the ICTY stated that cumulative convictions for the same conduct may be possible when "each statutory provision involved has a materially distinct

¹⁴³ ICJ, Israel Wall Advisory Opinion (9 July 2004), para. 35 (Judge Kooijmans).

¹⁴⁴ A. Cassese. International Criminal Law. Oxford: Oxford University Press 2003, pp. 212-218.

element not contained in the other.”¹⁴⁵ If the offences did not require a “proof of a fact not contained in the other...a conviction should be entered only under the more specific provision...with the additional element”.¹⁴⁶

As for the sectoral anti-terrorism treaties, such as the Terrorist Bombing Convention 1997 and the Terrorist Financing Convention 1999, the applicability of these treaties is dependent on the existence of an international element to the crime, thus, not applicable when; the crime is committed in one single State, with the perpetrator inside that State and, no other State has jurisdiction.¹⁴⁷ A similar issue with the Draft Comprehensive Convention; that it requires the victims to be of another nationality than the nationality of the State where the crime is committed.¹⁴⁸

Therefore, the need for a universal agreed definition of terrorism is still being recognised and pursued by many States, despite the adoption of the sectoral treaties, and despite the attempt to cover terrorism by other international crimes.

2.1.1 Terrorism as a Violation of Human Rights

Human rights are ‘one source of principles for criminalisation’.¹⁴⁹ International criminal law in particular, typically requires for criminalisation of a certain conduct, to be considered as a serious human rights violation. In regards to terrorism, although that it has been recognised internationally as a major threat to human rights, it is still uncertain which human rights exactly, that terrorism is violating.

¹⁴⁵ Celebici (Appeal) ICTY-96-21-A (20 February 2001), para. 412; Galic ICTY-98-29-T (5 December 2003), para. 158.

¹⁴⁶ Ibid., paras. 412-413; Kupreskic ICTY-95-16 (14 January 2000), paras. 683-684; Galic *ibid.*, para. 158.

¹⁴⁷ 1997 Terrorist Bombing Convention, Art 3; 1999 Terrorist Financing Convention, Art 3.

¹⁴⁸ Draft Comprehensive Convention, Art 3.

¹⁴⁹ A. Ashworth. *Principles of Criminal Law*. London: Butterworths 10th edn 2002, p. 41.

Many resolutions of the United Nations General Assembly since the 1970s,¹⁵⁰ also further resolutions of the Commission on Human Rights since the 1990s,¹⁵¹ stated that terrorism is destroying the basic human rights and freedoms, in particular life, liberty, security, civil and political, economic, social and cultural rights.

The Draft Comprehensive Convention's preamble,¹⁵² in addition to the preambles of many regional anti-terrorism instruments such as the EU Framework Decision, Arab Convention, 1999 OIC Convention, 1971 OAS Convention, OAU Convention, Council of Europe and the European Parliament Resolution A5-0050/2000, have all stated that terrorism is a grave violation to human rights.

A UN Special Rapporteur expressed that “there is probably not a single human right exempt from the impact of terrorism.”¹⁵³ To be more specific however, as the main character of terrorism is terrorising populations; the right to live free from fear would be the main human right which is targeted by terrorism, although that there is no explicit human right to freedom from fear, numerous resolutions of the UN General Assembly and the Commission on Human Rights have stated that terrorism is a violation to the right to live free from fear.¹⁵⁴

Furthermore, a human right to freedom from fear can be implied from the preambles of international instruments, such as the Universal Declaration of Human Rights stating that “freedom from fear is part of the highest aspiration of the common people”, in addition to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights stating that “the ideal of free human beings enjoying freedom from fear”, further, the United Nations Development Programme has addressed the

¹⁵⁰ UN General Assembly Resolutions: 3034 (1972), para. 1; 32/147 (1977), para. 1; 34/145 (1979), para. 3; 38/130 (1983), para. 1; 40/61 (1985), preamble, paras. 2-3; 42/159 (1987), preamble, paras. 2-3; 44/29 (1989), preamble, para. 2; 46/51 (1991), preamble, para. 2; 48/122 (1993), preamble, para. 1; 49/60 (1994), preamble, para. 1; 50/186 (1995), preamble, para. 2; 1996 Declaration, preamble; 52/133 (1997) preamble, paras. 2-3.

¹⁵¹ UN.Com.HR Resolutions: 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 1999/30; 2000/30; 2001/37; 2002/35; 2003/37.

¹⁵² UN General Assembly Official Records, (57th Session), Ad Hoc Committee Report (2002), Supp. 37 (A/57/37), Annex I (bureau paper).

¹⁵³ UN.Sub.Com.HR, (53rd Session), Report by Special Rapporteur K. Koufa (27 June 2001), p. 28.

¹⁵⁴ UN General Assembly Resolutions: 50/186 (1995), preamble; 52/133 (1997), preamble, para. 2; 54/164 (2000), para. 2; 56/160 (2002), preamble; 58/174 (2004), preamble; 59/195 (2005), preamble; UN.Com.HR Resolutions: 1996/47, preamble; 1997/42, preamble; 1998/37, preamble, para. 2; 1999/27, preamble, para. 2; 2000/30, preamble, para. 2; 2001/37, preamble, para. 2.

right to freedom from fear as an international value which deserves protection.¹⁵⁵ All of the previously mentioned can be a solid basis for recognising the freedom of fear as a fundamental human right, and that terrorism is a direct threat to it.

Another human right that is violated by terrorism, is the right to liberty and security of a person, that can be found in Article 9(1) of the ICCPR and Article 3 of the UDHR. Violating a person's liberty by terrorism is clearly understood as acts of kidnapping or sieging buildings or taking over houses and neighbourhoods -falling under the definition of terrorism-, are directly violating the right to liberty. However, the second part of the human right, which is the right to security is unclear due to the non-existence of an interpretation.¹⁵⁶

However, after some States had expressed their concerns about the lack of an interpretation,¹⁵⁷ the US interpreted the 'security' as 'physical integrity',¹⁵⁸ and this interpretation was satisfying to some States,¹⁵⁹ some States suggested to add a reference to 'moral integrity'.¹⁶⁰

Either way, physical or moral integrity, terrorism gravely violate all the meanings of integrity and security. The Organization of the Islamic Conference's 1999 Convention stated in its preamble that terrorism is a "gross violation of human rights, in particular the right to security".¹⁶¹

2.1.2 Terrorism as a Threat to International Peace and Security

The evolution of terrorism and its impact as a threat to international peace and security, is reflected in the UN General Assembly and Security Council's language in addressing terrorism in their relevant resolutions. Until early 2000's, the General Assembly was recalling the "role

¹⁵⁵ UN Development Programme, 1994 Human Development Report. New York: Oxford University Press 1994, p. 23.

¹⁵⁶ C. Ovey, R. White. European Convention on Human Rights. Oxford: Oxford University Press 3rd edn 2002, p. 103.

¹⁵⁷ UN General Assembly Official Records, (Third Session), Third Committee, Summary Records of Meetings, (21 September-8 December 1948), p. 143 (Panama), p. 189 (Guatemala), p. 190 (Cuba and Uruguay), p. 192 (Cuba).

¹⁵⁸ Ibid., p. 190 (US).

¹⁵⁹ Ibid., p. 190 (US, France), p. 157 (Netherlands), p. 189 (Haiti), p. 191 (China), p. 192 (Guatemala), p. 194 (Philippines).

¹⁶⁰ Ibid., p. 189 (Haiti), p. 192 (Chile), p. 193 (Venezuela), p. 158 (Yugoslavia).

¹⁶¹ 1999 OIC Convention, preamble.

of the Security Council in combatting international terrorism *whenever* it poses a threat to international peace and security”.¹⁶²

The Security Council was referring to international terrorism in its resolutions as “may constitute a threat to international peace and security”.¹⁶³ Since 2003 however, the Security Council went from ‘may’ and ‘whenever’, to ‘all acts’ and ‘any act’, and from international terrorism to “in all of its forms and manifestations, constituted one of the most serious threats to peace and security”.¹⁶⁴

It is not uncommon for terrorist groups to spread and promote their ideologies and causes to both of the local and international communities. In fact, it is an essential element to terrorist groups for their own existence and growth, they promote their ideologies in purpose to gain the public’s sympathy and support, also in purpose to recruit new individuals.

The reasons for considering terrorism as a threat to international peace and security are numerous and increasing by the day; the foreign terrorist fighters whom return to their countries or, relocate to other countries, the use of bitcoin, the use of drones, disseminating propaganda and recruiting foreign members through social media, interventions and financing, and even going back to the reasons that lead the international community to start discussing terrorism; extradition disputes, which still exist and frequently escalate into tensions in international relations. A recent example is the Russian-German exchange of allegations and the mutual diplomatic expulsions following the murder of the Georgian man in Germany, after Germany had refused to extradite him to Russia.

¹⁶² UN General Assembly Resolution 50/53 (1995), para. 7.

¹⁶³ Preambles of UNSC Resolutions: 748 (1992), 748 (1992), 1044 (1996), 1189 (1998), 1267 (1999), 1333 (1999), 1363 (2001), 1390 (2002).

¹⁶⁴ UN Security Council Resolutions: 1516 (2003), para. 1; 1530 (2004), para. 1; 1515 (2003), preamble; 2420 (2018), para. 4.

2.2 State Terrorism

While most legal studies and definitions do not include or even discuss State terrorism -by requiring the coercion element to be applied on governments and international organizations excluding non-State actors-, numbers of civilian victims due to State terrorism are far greater than victims of non-State terrorism.¹⁶⁵ Instead, States preferred to include it generally under State violence, war crimes or crimes against humanity, because ‘terrorism’ is their exclusive ‘toy’ to play with.

As one of the reasons to universally define terrorism is to end the selectivity of using the term, and according to a statement in the preamble of the Draft Comprehensive Convention ‘all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed’; any universally agreed definition of terrorism in future must include all acts which reflect terrorism as a crime of instrumentalising civilians by harming one part of them, and terrorising the other part, in order to coerce a third party, regardless of the actor.

In many situations where, the government directs its violence against its citizens in order to suppress opposition movements from organising demonstrations, in addition to situations where a government directs its attacks, during peacetime, against the citizens of another State in order to suppress the State or a non-State armed groups, by turning the supporters of these States or groups against them out of fear of further attacks; are examples of what is meant by State terrorism in this paper.

Scholars whom argue against including State terrorism in the definition of terrorism, base their arguments on nature the actor, instead of the nature of the act. Walter Laqueur argues that “there are basic differences in motives, function and effect between oppression by the State and political terrorism. To equate them, to obliterate them is to spread confusion”.¹⁶⁶

¹⁶⁵ E. Herman, G. O’Sullivan. *The ‘Terrorism’ Industry: The Experts and Institutions That Shape Our View of Terror*. New York: Pantheon 1989, chapters 2–3.

¹⁶⁶ W. Laqueur, R. Breitman. *Breaking the Silence*. New York: Simon and Schuster 1986, p. 89.

The differences only exist in terms of the identities of the actor and the final target whom are sought to be coerced, and the scale of act and its impact. However, the motives, aims and the characteristics of terrorism however, still exist the same in both cases.

For example, in World War II, the allies bombed civilians in cities of Germany in purpose to turn the public against Hitler and his actions, aiming to suppress Hitler from attacking further, similarly, Israel regularly bombs civilians in Gaza in order to turn the public against Hamas and to stop Hamas from retaliating the Israeli assassinations of their leaders, which usually take the same form of directing attacks against civilians.

Laqueur further justifies the differentiation between terrorism and State violence by the fact that ‘the very existence of a state is based on its monopoly of power’.¹⁶⁷ Bruce Hoffman shares this view by explaining that terrorists, unlike States, have violated those “rules and accepted norms of behaviour that prohibit the use of certain types of weapons...and various tactics and outlaw attacks on specific categories of targets”.¹⁶⁸

The general and absolute prohibition on targeting civilians is one of the oldest fundamental principles of customary law and it is binding on all parties to a conflict, whether it is an international or non-international armed conflict.¹⁶⁹

Furthermore, this prohibition was codified in Protocol I article 51(2) which states that “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited”.

While Laqueur believes that the inclusion of State terrorism, will make the ‘study of terrorism impossible’,¹⁷⁰ due to the ‘confusion’ it brings as he argued. The key difference between State violence and State terrorism would be the unlawful attacks directed at persons whom the State

¹⁶⁷ W. Laqueur. *No End to War: Terrorism in the Twenty-First Century*. Continuum 2003, p. 237.

¹⁶⁸ B. Hoffman. *Inside Terrorism*. New York: Columbia University Press 1998, p. 34.

¹⁶⁹ D. Fleck. *The Handbook of Humanitarian Law in Armed Conflict*. Oxford: Oxford University Press 1995, p. 120.

¹⁷⁰ W. Laqueur. *op. cit*, p. 140.

has a duty to protect, with an intention to coerce a third party, by spreading fear beyond the direct victims.¹⁷¹

Like in the case of the disagreement over a universal definition of terrorism, it is the same reasons that have been preventing the inclusion of State terrorism in the proposed definitions, which are States unwillingness to do so, thus, the issue is not technical or philosophical as claimed.

The demands of including State terrorism in the future universal definition of terrorism had strong and persistent presence in the General Assembly and in the 1970's Ad Hoc Committee meetings in particular. State terrorism was described as the most harmful, dangerous and cruel form of terrorism.¹⁷² The demands and arguments to include State terrorism in the definition had continued until the adoption of Resolution 39/159 in 1984, which was titled: "Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States".¹⁷³

States whom have objected to the inclusion of State terrorism, such as the UK and Sweden, argued that it is already governed by other existing norms and institutions such as the UN Charter and the Security Council.¹⁷⁴

2.3 State-sponsored Terrorism

Considering the risks of nuclear wars and the high costs of traditional warfare, with the purpose of avoiding State responsibility, States took advantage of the lack of a universal agreed definition of terrorism, and acted freely since the mid-20th century in adopting the new method

¹⁷¹ R. Blakeley. State Violence as State Terrorism (2012), p. 5. - https://www.researchgate.net/publication/264715825_State_Violence_as_State_Terrorism (01.04.2020).

¹⁷² UN General Assembly Official Records, (28th Session), Ad Hoc Committee Report (1973), Supp. 28 (UN Doc A/9028), p. 8, para. 24; p. 18, para. 62; Ad Hoc Committee Report (1977), p. 14, para. 11; Ad Hoc Committee Report (1979), p. 8, para 26.

¹⁷³ UN General Assembly Resolution 39/159 (1984).

¹⁷⁴ Ad Hoc Committee Report (1977), p. 4, para. 2; p. 34, para. 29; Ad Hoc Committee Report (1979), p. 8, para. 27; p. 29, paras. 108-109.

of supporting, financing and even creating terrorist groups, in order to achieve their political ends and economic interests abroad via what is known as war-by-proxy.

In the absence of a universal agreed definition of terrorism, States in some occasions rely on this method publicly, insisting that the group they are supporting is not terrorist, but it is the other group or government they are fighting is terrorist, and that they are only supporting the certain group out of their humanitarian duty to maintain global peace, and in support of the group's just cause.

For example, the United States,¹⁷⁵ and Saudi Arabia,¹⁷⁶ as strategic allies, have been side-to-side and publicly, funding and supporting groups such as Al-Qaeda, before their mutual interests had changed and crossed paths. While the US is arming and training the People's Protection Units (YPG),¹⁷⁷ a Kurds group operating in Syria, which is considered by Turkey as a terrorist group, which is also a sister-organization of Kurdistan Workers Party (PKK),¹⁷⁸ the PKK is listed as a terrorist group by the US for directing its operations directly against Turkey, unlike the YPG which operates only in Syria, however, they are both operating with the same purposes.

Ahrar al-Sham, the official 'Syrian' branch of al-Qaeda until 2016,¹⁷⁹ was working alongside with ISIS, until disputes over interests had occurred, and began working with al-Nusra Front, capturing oil fields from the Syrian government.¹⁸⁰ Ahrar al-Sham and al-Nusra Front were

¹⁷⁵ N. Dixon. "How the CIA created Osama bin Laden" 2012. - <https://www.greenleft.org.au/content/how-cia-created-osama-bin-laden> (03.04.2020); Cooperative Research History Commons, "1986–1992: CIA and British Recruit and Train Militants Worldwide to Help Fight Afghan War". - <https://web.archive.org/web/20110810221655/http://www.historycommons.org/context.jsp?item=a86operationcyclone> (03.04.2020).

¹⁷⁶ E. Clifford. "Financing Terrorism: Saudi Arabia and Its Foreign Affairs" 2014. - <http://brownpoliticalreview.org/2014/12/financing-terrorism-saudi-arabia-and-its-foreign-affairs/> (03.04.2020); Y. Butt. "How Saudi Wahhabism Is the Fountainhead of Islamist Terrorism" 2015. - https://www.huffpost.com/entry/saudi-wahhabism-islam-terrorism_b_6501916 (03.04.2020); D. Walsh "WikiLeaks cables portray Saudi Arabia as a cash machine for terrorists" 2010. - <https://www.theguardian.com/world/2010/dec/05/wikileaks-cables-saudi-terrorist-funding> (03.04.2020).

¹⁷⁷ R. Alaaldin. "What's next for Turkey, the US, and the YPG after the Afrin operation?" 2018. - <https://www.brookings.edu/blog/order-from-chaos/2018/01/26/whats-next-for-turkey-the-us-and-the-ypg-after-the-afrin-operation/> (03.04.2020).

¹⁷⁸ M. Kurpershoek. "The PYD is a branch of the PKK" 2019. - <https://www.nrc.nl/nieuws/2019/10/13/moskou-bepaalt-de-speelruimte-van-erdogan-a3976577> (03.04.2020).

¹⁷⁹ BBC, "Syrian Nusra Front announces split from al-Qaeda" 2016. - <https://www.bbc.com/news/world-middle-east-36916606> (03.04.2020).

¹⁸⁰ "Ahrar al-Sham", Mapping Militant Organisations. Stanford University (2016). - <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/523> (03.04.2020).

directly supported from Turkey,¹⁸¹ listed as a terrorist group by Syria, UAE, Russia, Iran and Egypt, however, not by the US.¹⁸² The situation in Syria exposed the double standard selectivity of labelling groups as terrorists by States, depending on whether if it confirms with their policies and interests or not.

Fearing direct military contact and the international community's reaction, States turned to terrorism by proxy rather than wars by proxy, such as the Israeli funding of 'Jundallah',¹⁸³ a 'Sunni' group operating in Iran and commits terrorist acts such as indiscriminate bombings and kidnappings, which is remarkably, funded and listed as a terrorist group at the same time by the United States.¹⁸⁴ While Iran also funds different groups in Gaza which commit similar acts against Israel.

This is only a small example of State terrorism from a very long list,¹⁸⁵ and the list will go on in the absence of a universal definition regulating States' allegations of terrorism.

It is claimed that there is a difficulty to attribute this conduct to a certain State, although in reality however, States often support such groups publicly and defend them, and where it is not published, it is actually not difficult at all to prove the attribution, considering the large attention that terrorism draws, and the common understanding of international politics and interests nowadays. However, there is no reason at all to attribute such conducts to any State whatsoever, considering that there exists no binding and punishable international criminalisation of terrorism and its funding by States.

¹⁸¹ R. Spencer, R. Sanchez. "Turkish government co-operated with al-Qaeda in Syria, says former US ambassador" 2014. - <http://www.telegraph.co.uk/news/worldnews/europe/turkey/11093478/Turkish-government-co-operated-with-al-Qaeda-in-Syria-says-former-US-ambassador.html> (03.04.2020).

¹⁸² "Daily Press Briefing", U.S. Department of State (2016). <https://2009-2017.state.gov/r/pa/prs/dpb/2016/05/257673.htm#SYRIA2> (03.04.2020).

¹⁸³ M. Perry. "False Flag". Foreign Policy 2012. - <https://foreignpolicy.com/2012/01/13/false-flag/> (09.04.2020).

¹⁸⁴ "Jundallah (Iran)". - [https://en.wikipedia.org/wiki/Jundallah_\(Iran\)#United_States_and_Israel](https://en.wikipedia.org/wiki/Jundallah_(Iran)#United_States_and_Israel) (09.04.2020).

¹⁸⁵ See more examples of "State-sponsored terrorism". - https://en.wikipedia.org/wiki/State-sponsored_terrorism#By_country (03.04.2020).

To define terrorism universally and to reaffirm it as an immoral international crime for one more and a final time, it must be applied equally to all actors, as one of the basic principles for the interpretation of moral rules is universality.¹⁸⁶

2.4 Military Responses to Terrorism

In a world which lacks consistency of criminal justice in regards to terrorism, States turn to military solutions in response to terrorist attacks, however, how legitimate are those responses? And are they a better solution than the judicial one?

Terrorism here refers to attacks that may amount to an armed conflict, attacks which have already occurred and a period of time has passed after their occurrence, not attacks which are still being committed at the time.

For example, the whole Israeli policy in dealing with terrorist attacks such as suicide bombings, or to be more precise, the United States missiles and air strikes in response to the 1986 Berlin discotheque bombing and, the 1993 attempt to assassinate the former president George H.W. Bush and, the 1998 attacks on US embassy in East Africa. Although that those military responses were limited to an extent that they have not involved the invasion or occupation of another State's territories, or the change of a government, they are still considered acts of reprisal and retaliation rather than self-defence, which are prohibited under international law.

However, after the 9/11 attacks, the United States has practiced the strategy of military invasion against Iraq and Afghanistan and justified it by the right to self-defence. Furthermore, the theory of 'pre-emptive' self-defence attacks was advanced, and took part of the US policy in responding to terrorism, and became known as the 'Bush Doctrine', or the 'war on terror'.

The UN Charter allows the use of force in situations of self-defence under Article 51, which preserves "the inherent right of individual or collective self-defence if an armed attack occurs... until the Security Council has taken measures necessary to maintain international peace and

¹⁸⁶ D. Rodin. Terrorism without Intention. University of Chicago Press, Ethics Vol. 114, No. 4, Symposium on Terrorism, War, and Justice, 2004, p. 7. - <https://www.jstor.org/stable/10.1086/383442?read-now=1&seq=6> (04.04.2020).

security”. The right to self-defence requires the occurrence of an armed attack, and also requires the self-defence action to be proportionate and necessary.¹⁸⁷

The UN Charter is silent on whether attacks by non-State actors can or cannot, constitute an armed attack; because at the time, armed attacks were only carried out by States. It is also silent on when a certain ‘attack’ may be considered an ‘armed attack’, and triggers the right to self-defence.

The International Court of Justice, while interpreting ‘armed attack’ in cases such as Nicaragua, Oil Platforms and Armed Activities, the Court have taken into consideration the definition of aggression in Resolution 3314, the nearest statement to an interpretation was that an armed attack is “the most grave form of the use of force”.¹⁸⁸ Thus, the threshold of what constitutes an armed attack is still undetermined.

In regards to attacks by non-State actors, the ICJ stated in the Israeli Wall Case that Article 51 recognises “the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”¹⁸⁹ Thus, the Court refused Israel’s claims of the right to self-defence in constructing the wall, because first, Israel did not claim that the attacks were attributed to a foreign State,¹⁹⁰ and second, because the attacks against Israel were originated from within the territory which Israel is exercising control over, via occupation.¹⁹¹

Therefore, after determining if a certain act of violence has constituted an armed attack, and in order to rely on the right to self-defence for the operation of a military response, the armed attack is still required to be attributed to a State.

For example, the United States justification of the right to self-defence for their air strikes against Libya as a response to the 1986 Berlin discotheque bombing,¹⁹² has failed to convince

¹⁸⁷ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits) 1986, para. 176. - <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (10.04.2020).

¹⁸⁸ Ibid., para. 191.

¹⁸⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. (9 July 2004), para. 139. - <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (10.04.2020).

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Letter from the Acting Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council, (14 April 1986), UN SCOR, (41st Session), UN Doc. S/17990.

other States due to the lack of evidence attributing the bombing with Libya, which resulted in a UN General Assembly Resolution condemning the US attacks,¹⁹³ and a disapproval by the UN Security Council was being prepared, before it was vetoed by the US, the UK and France.¹⁹⁴

Furthermore, the ICJ has stated in the Oil Platforms Case that “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible”.¹⁹⁵

In the Armed Activities Case, the ICJ has set Article 3(g) of General Assembly Resolution 3314, which proposes a definition of aggression, as a standard for attributing private violence to a certain State: “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”¹⁹⁶ Acts included attacks, occupation, annexation, bombardment against the territory of a State. Furthermore, in the Nicaragua Case, the ICJ considered the “assistance to rebels in the form of the provision of weapons or logistical or other support” as an armed attack.¹⁹⁷ The ICJ has required the existence of an effective control over the group, in order to be considered attributed to a State.¹⁹⁸

Assuming that an armed attack by a non-State actor had occurred, originated from outside the territory of the victim State, and by the time the victim State decides to respond in self-defence, they have obtained the evidence that the armed attack against them, is attributed to the State

¹⁹³ Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on aerial and naval military attack against the Socialist Peoples’ Libyan Arab Jamahiriya by the Present United States Administration in April 1986, adopted by General Assembly Resolution 41/38.

¹⁹⁴ UN SCOR, (41st Session), 2682d mtg, UN Doc. S/PV.2682 (1986), p. 43.

¹⁹⁵ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), I.C.J. (6 November 2003), para. 55. - <https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf> (11.04.2020).

¹⁹⁶ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. (19 December 2005), para. 146. - <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (11.04.2020).

¹⁹⁷ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits) 1986, para. 195. - <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (11.04.2020).

¹⁹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. (26 February 2007), para. 406: “where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed”.

which will receive the act of self-defence on its territory. Now it is required from the victim State to respond in proportionality and only if it was necessary.

The proportionality requirement is commonly known as the use of force in self-defence, which must not be greater than what is required to halt and repel the armed attack.¹⁹⁹ The necessity requirement means that the use of force is needed to halt and repel the armed attack, and that no other options than the use of force are available.²⁰⁰ Necessity is determined first, if it exists, then the proportionality may be measured.²⁰¹

The ICJ has avoided in many cases to clarify or interpret the meanings of necessity and proportionality.²⁰² However, the common understanding of these requirements in regards to self-defence, can be extracted from the plain textual reading of Article 51 itself, where it required that the act of self-defence is permitted when, an armed attack ‘occurs’ and, ‘until the Security Council has taken measures necessary to maintain international peace and security’.

This also entails that the armed attack is still taking place and not completed yet, thus, excludes any wider interpretations of Article 51 suggesting that necessity extends to preventive, pre-emptive and anticipatory actions, which permit self-defence in situations where the armed attack has not started yet. The US has adopted the pre-emptive self-defence in 2002 and justified its invasions of Afghanistan and Iraq by this theory.²⁰³

While all the of the beforementioned theories rely on customary law, only anticipatory and interceptive theories of self-defence might have some acceptance within the international community, which permit a State to use force in order to halt and repel an imminent attack which is about to occur or, an attack which already have begun and, the victim State is waiting for the attack to reach its territory.

¹⁹⁹ M. Shaw. *International Law*, 5th ed. Cambridge University Press 2003, p. 1031.

²⁰⁰ M. N. Schmitt. *Tallinn Manual on the International Law Applicable to Cyber Warfare*. New York: Cambridge University Press 2013, p. 62. - <http://csef.ru/media/articles/3990/3990.pdf> (11.04.2020).

²⁰¹ *Ibid.*

²⁰² See for example: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)* 1986, para. 176. - <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (11.04.2020).

²⁰³ White House, U.S., *National Security Strategy of the United States of America (September 2002)*, p. 15. - <https://2009-2017.state.gov/documents/organization/63562.pdf> (11.4.2020).

However, even anticipatory self-defence is still debated and entail a third ambiguous requirement of imminence -which is also unclear- and, an evidence by the victim State that an armed attack was about to occur, which is almost impossible due to the secrecy of intelligence agencies.

It is safe to say by now, and without going in further details regarding the conditions of the right to self-defence, that the legal basis and the relevant judicial decisions which cover the right to self-defence, remain unclear enough to cover self-defence, even between States, thus, it is certainly unclear to cover military responses to terrorist armed attacks, especially by non-State actors, as many situations of terrorism fall outside the concept of self-defence according to the existing interpretations and ambiguous requirements.

UN Security Council Resolution 1373 required the State to regard “terrorist acts as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”.²⁰⁴

All of the past international and regional treaties, conventions and approaches with the purpose of criminalising terrorism, are a clear evidence that terrorism must be recognised as an international crime rather than an act of aggression or an act of war.

Including terrorism in self-defence laws is consequently recognising terrorism as an ordinary war situation, and further regulating the levels of military responses to terrorism on separate occasions and according to international customary laws, which measures and compares the levels of damage and civilian casualties, is covering terrorism with more ambiguity, and ultimately, the ‘one man’s terrorist is another man’s freedom fighter’ will become more than just a cliché.

However, and whether self-defence rules were sufficient or insufficient to cover the process of counter-terrorism properly; in situations where self-defence against terrorism is permitted by States, it remains problematic to grant States such a right, while terrorism is not universally defined and determinable, as this would only grant some terrorist groups a certain level of legitimacy which qualifies them to become a recognised actor under international laws.

²⁰⁴ UN Security Council Resolution 1373, para. 2(e).

CHAPTER 3. THE DEFINITIONAL ELEMENTS OF TERRORISM

The main reason for the wide disagreements between States throughout all of the defining conferences and conventions is that, States adopt a wide range of different definitions of terrorism. Some States even have not adopted any special terrorism offences and kept on prosecuting terrorism using the ordinary criminal offences.

According to the State reports received by the UN Counter-terrorism Committee by June 2004, on implementing terrorism offences in their national laws following Council Resolution 1373; Saul has sorted States' approaches into two main categories in purpose to show how the modifying and rearranging of the elements, produce a wide range of different definitions of terrorism; the ordinary offences approach and, the generic definitions of terrorism which contains two sub-categories, simple generic terrorism offences and composite generic offences.²⁰⁵

The first category consists of Eighty-six States which prosecute terrorism under ordinary criminal offences such as murder and assault, this approach is preferred by some States, as it allows them to avoid any possibility of regarding terrorists as political offenders during prosecution.²⁰⁶ The few other States which decided to reform their laws, were having difficulties due to parliamentary rejections of the government proposals.

The second category consists of two forms of the definition, the first one is the simple generic offences, which was mainly a result of pressure by the Counter-terrorism Committee on States to implement terrorism offences after 2001.²⁰⁷

Simple generic offences represents terrorism definitions which consist of one main element of violence against the State alone, as ten States defined it,²⁰⁸ which is considered the broadest form of terrorism definition, or, with addition to one more element from the other commonly-

²⁰⁵ B. Saul. *op. cit*, p. 264 (UK).

²⁰⁶ C. Walker. *op. cit*, p. 164.

²⁰⁷ B. Saul. *op. cit*, p. 265.

²⁰⁸ *Ibid.*, p. 266; (Czech Republic, Armenia, Guatemala, Malaysia, Nicaragua, Slovakia, South Africa, Spain, Turkey, Vietnam and Zimbabwe)

known definitional elements of terrorism, such as the element of coercing a State, without requiring a motivation behind the violence. Three States took this approach.²⁰⁹

Eight States required as an additional element, to either put civilians in fear or, coerce the government.²¹⁰ The narrowest ‘simple generic definition’ requires that the acts of violence must be intended to terrorise a population, by imposing a requirement of proving an intention to terrorise, nine States took this approach.²¹¹

Composite generic terrorism offences remain more general in terms of including more or less offences of another nature, than a precise terrorism definition should, however, those definitions are narrower than the simple generic offences because they require the existence of more than one or two elements combined.

For example, some States defined terrorism as the violence of putting civilians in fear in order to disrupt the public order, peace, constitution, the State, or in converse as in violence disrupting the public order in purpose to put civilians in fear.²¹²

Other States defined terrorism as the violence of an ideological or a political motive, with a purpose to either coerce a government, or to intimidate the population.²¹³ Iran defined it as putting civilians in fear in order to coerce the government or an international organization. Uzbekistan defined it as the coercion of the State in the purpose of disturbing international relations, cause a war or destabilise the State.²¹⁴

In conclusion of this categorisation, elements make the definition, however, the question of which elements and the arrangement of these elements, is the cornerstone in this regard.

As Schmid and Jongman have described the existing terrorism definitions until their 1983 study: “Many definitions are enumerations of elements without clear indications which

²⁰⁹ Ibid., p. 266; (Hungary, Latvia and Mongolia)

²¹⁰ Ibid. (Azerbaijan, Belarus, Bolivia, Chile, Lithuania, Mozambique, Thailand and Tonga)

²¹¹ Ibid. (Albania, Algeria, Colombia, Cyprus, Ecuador, El Salvador, Lebanon, Syrian Arab Republic and Tunisia)

²¹² Ibid., p. 267; (Denmark, Djibouti, Macedonia, France, Guinea, Jordan, Morocco, Peru, Qatar, Romania, Senegal, Serbia, Montenegro and Slovenia).

²¹³ Ibid., p. 268; (Australia, Belize, Canada, Pakistan and UK)

²¹⁴ Ibid.

elements must be present for a phenomenon to be qualified as terrorism and which elements are merely regularly accompanying features of the phenomenon”.²¹⁵

3.1 The Element of Violence

Terrorism, as a serious human rights violation, in particular, the right to life; a definition must reflect the seriousness of the conduct and the impact of such a crime. Further, acts of terrorism usually produce the effect of public terror by targeting properties which contain random numbers of persons, regardless of whether a certain property is public or private, such as shopping malls and casinos.²¹⁶

Thus, a definition must also include indiscriminate attacks against properties regardless of whether such attacks resulted in deaths or not, as statistics provide that half of all terrorist attacks are non-lethal.²¹⁷ However, such attacks, even if ‘non-lethal’, are serious enough to produce the sought terror among the population.

Considering the serious impact of terrorism, and consequently the harsh punishment it entails, a definition should exclude trivial infringements and the threats of terrorism from being regarded as terrorism on its own, due to the beforementioned misuse of procedural and investigative powers which derive from the typical broad terrorism definitional laws. In the meanwhile, where certainty in a definition is needed, it can be guaranteed by employing the expression ‘serious violence’, for its ability to cover any new or un-anticipated methods developed by terrorists.²¹⁸

²¹⁵ A. P. Schmid, A. J. Jongman. *op. cit.*, p. 75.

²¹⁶ A. Victor, R. K. Rethemeyer, I. Anderson, A. Stein, J. Rizzo. "The Softest of Targets: A Study on Terrorist Target Selection." *Journal of Applied Security Research* (July 2009), p. 265.

²¹⁷ START, Global Terrorism Database, primary findings. - <https://www.start.umd.edu/research-projects/global-terrorism-database-gtd%20> (27.03.2020).

²¹⁸ B. Saul. *op. cit.*, p. 60.

3.2 The Element of ‘Motive/Purpose/Intent/Aim’

The motive, purpose, intention, aim, are all similar terms which describe an essential element to terrorism in terms of reflecting the public understanding of terrorism and distinguishing it from other similar conduct or from ordinary crimes in general.

Therefore, this particular element must be indivisible from any possible future universal definition of terrorism. However, the terms and expressions used in national definitions to reflect this element vary greatly, resulting in the broadening or narrowing the definition.

3.2.1 Terrorising and Coercing

From terms such as ‘intimidation’, ‘coercion’ and ‘fear’ which imply lesser levels of psychological effect than the common terrorist crimes produce, to terms such as ‘extreme fear’. States and international approaches have employed a wide variety of such terms in their definitions, however, the expression which was used first in the 1973 League of Nations ‘create a state of terror’ remains the closest to the actual psychological and linguistic meaning of the term.

Choosing the most precise terms to express this element determines the level of seriousness this crime imply and avoids comparing it to other offences such as threats and extortion. Further, regarding an offender as a terrorist, must be reserved for persons whom have actually caused such level of psychological harm.²¹⁹

A related issue regarding this element, is the attachment or detachment of ‘terrorising’ to other possible purposes or motives of the crime. As we examined in the previous approaches to define terrorism, some States defined it, for example, as acts of violence intended to terrorise the public in purpose to..., while other States defined it as acts of violence in purpose to coerce a government or to terrorise the public.

²¹⁹ Ibid., 63.

A small difference in wordings, yet large in the capacity of the definition; as the sole reason of terrorising the population by terrorist attacks, is to impose pressure on the government or the international organisation to achieve certain goals or demands.

Furthermore, it is unimaginable that a government can be coerced to act or to abstain from acting, in the absence of a large-scale systematic or widespread military operation directed against its territory, interests or population, or a by an international sanctions regime similar to the ones imposed by the Security Council or the largest economic powers such as the United States.

Moreover, definitions which make of terrorising a population and coercing or compelling a government, two separate purposes of terrorism, overly broadens the definition's capacity to include mere attacks by individuals -comparing to the severity of military operations- against the State's interests, and regard it as terrorist attacks, which un-limits the procedural and investigative powers in dealing with the perpetrators, further, this in some States, may even transfer the competence from law enforcement and courts to the State's military, which can ultimately lead to interventions and pre-emptive or retaliation attacks against the perpetrators' country of origin.

3.2.2 Achieving a Certain Goal

Since the beginning of the attempts to define terrorism, the majority of States have avoided requiring an evidence of a political motive in their definitions of terrorism; as in their own thinking, giving terrorism a political character or labelling the offender as political, might 'legitimise' terrorist acts in a certain way, making the offender a 'martyr of a cause' rather than a terrorist.²²⁰

In reality however, if a terrorism definition would focus on the protection of civilians as it should, rather than the protection of the State's interests, there will be no such fears. States have been hiding the real political intentions behind the detachment of a political motive to terrorism, by claiming the need to exclude terrorism from the political exemption from

²²⁰ B. Saul. *op. cit.*, p. 39.

extradition laws, an issue which cannot be solved in the absence of specifying extradition treaties between States, and a universal definition of terrorism.

Objectors to the inclusion of a political motive also claimed that by such a step, they are giving terrorists a chance to amplify and argue for their ideology in the courtroom,²²¹ despite that terrorists in now days tend to promote their ideologies through the internet and the media with easy access to such platforms. Thus, terrorists' arguments and attempts to justify their acts by invoking political or other ideological reasons, will only give the chance to the court -rather than to the terrorists- to confront such misleading arguments and prove it wrong publicly.

Although that motive in criminal law is usually relevant for evidence purposes, rather than for criminal liability,²²² however, the international community has showed in recent years the willingness to differentiate between types of violence based on their motivation, self-defence and the idea of just war for instance.²²³

Furthermore, the United Nations required in its definition of transnational organised crime, a motivation element comprised of financial or other material benefit.²²⁴ Moreover, through the drafting of the 2002 EU Framework Decision on Combating Terrorism, the need for distinguishing terrorism by employing a motive element, was recognised by stating that "the motivation of the offender is different, and consequently, other legal rights are also affected", further, terrorism was described as "ordinary offences which become terrorist because of the motivations of the offender".²²⁵

In more depth of the idea of requiring a political or any other motive of an ideological nature, it would be more precise to require a political motive, as religion or ethnicity can play as a motive in the establishing of a certain terrorist group, or to be adopted as the main principles of the group, however, terrorist activities typically direct their demands and statements to a political body, which is usually a government, a political party or an international organisation.

²²¹ Ibid.

²²² J. C. Smith, B. Hogan. *Criminal Law*. London: Butterworths, 10th Edn, 2002, p. 96.

²²³ B. Saul. *op. cit*, p. 39.

²²⁴ 2000 UN Convention Against Transnational Organised Crime, Articles 2, 5.

²²⁵ European Commission, Proposal for a Council Framework Decision on Combating Terrorism, (19 September 2001), COM (2001) 521 Final, 2001/0217 (CNS), pp. 6-7.

In either way, the motive element plays the largest role among the other elements of terrorism in terms of distinguishing it from ordinary crimes, which may share with terrorism the impact of spreading fear, such as mass murders, armed robberies and serial rape.

3.3 The Element of Subject/Victims/Targets

The attacks which are directed against State officials in order to coerce a government, should it be considered as an act of terrorism, or should it be left to the existing national laws as a political crime against the State? Consequently, should an attack or a threat against a State's official or facility, coerce a government to do or to abstain from doing a certain act?

Focused and indiscriminate attacks are two terms used to categorise acts of violence, in regards to terrorism however, the meaning goes beyond the theoretical categorisation of violence, and extends to the targets or, the direct victims of terrorism. Terrorism as a legal term, was originated with the purpose of criminalising assassinations of State officials and political violence in general.²²⁶

Definitions rarely refer to focused or indiscriminate attacks for this purpose, however, the common public understanding of terrorism in modern days presupposes indiscriminate attacks directed against random persons, whom happen to be in the wrong place at the wrong time, which gave modern terrorism its power of instilling serious fear in civilians, the fear of 'it could have been me'.²²⁷

The first explicit elaboration of a legal understanding of terrorism in the International Court of Justice, was by Judge Kooijmans, in his separate opinion on the Israel Wall advisory opinion, he stated that "deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the

²²⁶ A. Schmid. *Magnitudes and Focus of Terrorist Victimization*. IOS Press 2006, p. 3.

²²⁷ *Ibid.*, p. 7.

international community regardless of the motives”, which are “considered to be international crimes”.²²⁸

Therefore, terrorism must be distinguished legally and morally from political offences or attacks directed against the State, regardless of sharing the element of coercing a government for a political motive or other aims, that is if the coercing of a government was even possible by attacking State officials, which can only happen for governments which are ran by authoritarian regimes. Therefore, any future universal definition of terrorism must reflect the actual ugly face of terrorism, which rely on murdering random numbers of civilians and terrorising a population in order to achieve a ‘public’ demand.²²⁹

The political aim requirement is sufficient enough to safeguard the State, by regarding it as the secondary or final target of terrorism. However, in order to reflect the society’s condemnation of the immoral reality of terrorism, and to guarantee the functionality of the indiscriminate violence requirement, a definition should expressly require the targeting of non-combatants, as defined in the International Humanitarian Law.²³⁰

Further, to use the term civilians instead of non-combatants, can be tricky or ambiguous in certain situations, where persons such as military chaplains and combat medics are neither combatants, nor civilians.

3.3 During Peacetime or Armed Conflicts?

One of the arguments to exclude situations of armed conflicts from the application of a crime of terrorism, is the claim that it is covered by International Humanitarian Law. Articles 51(2) and 13(2) of 1977 Protocols I and II identically prohibit “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”, where Protocol I apply to international armed conflicts, and Protocol II applies to non-international armed conflicts.

²²⁸ ICJ, Israel Wall Advisory Opinion, paras. 4-5 (Judge Kooijmans).

²²⁹ Z. P. Šeparović. *International Terrorism: Large-Scale Victimization*. IOS Press 2006, p. 20.

²³⁰ Article 51.3 of Protocol I to the Geneva Conventions states: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities".

It remains uncertain however, what are the lines that a non-State violence has to cross in order to determine whether an armed conflict exists and thereby triggers the application of either Protocols.²³¹

Further, while the purpose of the provisions is to impose prohibitions on attacks, which aim to terrorise civilians during wars, without requiring a result of the sought terror, or any other motives behind the attacks, and while acknowledging that the main purpose of an armed conflict is to either surrender or to ‘finish’ the other opponent, it becomes almost impossible to prove, or even to distinguish such a purpose from the original purpose of ‘winning’ an armed conflict, especially when also acknowledging the fact that all violence during armed conflict “always give rise to some degree of terror among the population and sometimes also among the armed forces”, as noted by the ICRC Commentary on Article 51(2).²³²

Article 4(2)(d) of Protocol II prohibits ‘acts of terrorism’ in non-international armed conflicts, without “specifying what is covered by this notion...they -the draftsmen- either deliberately or unwittingly were referring to a general notion”.²³³

Considering the lack of sufficient judicial decisions which interpreted the provisions, it is left to the ordinary textual meaning according to the Vienna Convention’s rules of treaty interpretation, as the term ‘terrorism’ would be a “policy intended to strike with terror those against whom it is adopted; or the employment of methods of intimidation”.²³⁴

Considering the enforcement mechanisms of the International Humanitarian Law, and the labelling of terrorism as ‘prohibitions and breaches’ of IHL rather than a crime, and the need to depoliticise and demilitarise the term terrorism; we can only take from the IHL in this regard, the confirmation that a definition of terrorism must include situations of armed conflicts.

²³¹ UN.Sub.Com.HR (53rd Session), Progress Report by Special Rapporteur K. Koufa, (27 June 2001), UN Doc E/CN.4/Sub.2/2001/31, pp. 19-22.

²³² Y. Sandoz, et al (eds). Commentary on the 1977 Protocols. Geneva: ICRC 1987, para 1940.

²³³ A. Cassese. International Criminal Law. Oxford: Oxford University Press 2003, p. 121.

²³⁴ Oxford English Dictionary, definition of terrorism, quoted in B. Saul. Defining Terrorism in International Law. New York: Oxford University Press 2010, p. 297.

3.5 Self-determination and National Liberation Movements

In 1972, the General Assembly requested a study on ‘the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair’, and reaffirmed that:

“the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements in accordance with the principles and purposes of the Charter and the relevant resolutions of the organs of the United Nations”.²³⁵

Many causes of terrorism were presented to the General Assembly such as capitalism, racism, aggression, foreign occupation, oppression, intervention and political destabilization.²³⁶ Some States suggested that State terrorism is the main cause of non-State terrorism.²³⁷

Other States such as India, Algeria, Iran, Panama, Syria, Venezuela and Yugoslavia thought of the list as a partial and subjective prejudgment of the causes.²³⁸ Italy and the US stated that the causes were already addressed by UN organs and suggested that addressing terrorism should not depend on resolving all underlying injustices.²³⁹

Of course, the debate whether self-determination and national liberation movements should be regarded as just/legitimate struggles or not, was present as usual.²⁴⁰ Until the adoption of the 1977 Protocols, which recognised the struggles of self-determination movements as an international armed conflict in Protocol I.²⁴¹ Which means that national liberation movements have a duty to observe and limit their means of warfare in compliance with the International

²³⁵ UN General Assembly Resolutions: 3034 (XXVII) (1972), para. 3; 31/102 (1976), para. 2; 32/147 (1977), para. 3; 34/145 (1979), preamble.

²³⁶ UN General Assembly Official Records (28th Session), Ad Hoc Committee Report (1973), Supp. 28, UN Doc A/9028, p. 8, para. 26.

²³⁷ Ad Hoc Committee Report (1973), *op. cit.*, p. 15, para. 49.

²³⁸ Ad Hoc Committee Report (1979), *op. cit.*, para. 71.

²³⁹ Ad Hoc Committee Report (1977), *op. cit.*, p. 22, para. 16 (Italy); p. 24, para. 23 (US).

²⁴⁰ Ad Hoc Committee Report (1973), *op. cit.*, p. 7, para. 22; p. 8, para. 24; p. 14, para. 45; p. 15, para. 49.

²⁴¹ Protocol I, Article 1(4).

Humanitarian Law, thus, any violations will be regarded breaches of IHL rather than terrorist activities.²⁴²

Since the final report in 1979, and until 1991, there were many UN resolutions issued to urge States to eliminate the underlying causes of international terrorism such as racism, colonialism and foreign occupation.²⁴³

Some of those resolutions reaffirmed that “nothing in this resolution could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor the right of these people to struggle legitimately to this end and to seek and receive support”.²⁴⁴

Although that the term ‘struggle’ taken alone is ambiguous, the condition of struggling ‘legitimately’, implies the use of force; as the other peaceful means to fight against occupation or denial of self-determination under the UN Charter, are already legitimate.

However, Protocol I remains incomplete in terms of excluding national liberation movements during international armed conflicts from being regarded as terrorism; as States not party to Protocol I may consider armed conflicts with such movements as non-international, such as in the case of Israel,²⁴⁵ which continues to label attacks directed against their combatants as terrorist attacks.

Moreover, even States Parties are able to do the same in cases where the State does not recognise the movement; due to a view which believes that interpreting Article 1(4) lies within the subjective discretion of the State.²⁴⁶ Though Article 1(4) refers to the right ‘as enshrined’ in the UN Charter, which does not grant the State an option to whether give recognition or not.

²⁴² Ad Hoc Committee Report (1979), *op. cit.*, p. 10, para. 30.

²⁴³ UN General Assembly Resolutions: 40/61 (1985), para. 9; 42/159 (1987), para. 8; 44/29 (1989), para. 6; 46/51 (1991), para. 6.

²⁴⁴ UN General Assembly Resolutions: 42/159 (1987), para. 14; 44/29 (1989), para. 17; 46/51 (1991), para. 15.

²⁴⁵ L. Green. *The Contemporary Law of Armed Conflict*. Manchester: Manchester University Press, 2nd edn 2000, p. 64.

²⁴⁶ *Ibid.*

Criminal justice in general, and the capacity of national liberation movements to enter into agreements and, to be held responsible for violations of IHL and human rights in particular, entails the qualification of such groups to be also included as a secondary target of coercion - as it is included as a perpetrator- of any future universal definition of terrorism, due to the existence of many examples and impacts of State terrorism in this regard. However, until a universal application of the Protocol I, liberation movements will remain to be treated differentially, which results in the inconsistency of IHL application and unequal prosecutions for international terrorism.

Furthermore, as long as the labelling of terrorism continue to be depending on the nature or the legal character of the actor, the term will continue to be used in a political, selective way which will produce furthermore terrorism. Instead, a definition must focus on the nature of the act as a crime of violence and terror against non-combatants, with the purpose of coercing a State or, an international organization or, a non-State actor.

CONCLUSION

As a general rule, the more methods are employed in combatting a certain threat; the closer to a positive result it gets. In the particular case of terrorism however, the more methods being involved, the more complexity and ambiguity to the term and to the counter-terrorism process, is added.

The large diversity of terrorism definitions which are being used in national laws of States, while other States decided to prosecute terrorists using ordinary crimes laws instead. Furthermore, the adoption of a military solution as a policy to deal with terrorism, with the large number of un-defining international and regional conventions and summits on terrorism, which have been held for almost a hundred years now; it has all contributed to the current situation of ambiguity of the term 'terrorism'.

As a result of this practice, it has become commonly-claimed that the legal status of terrorism is too contested to be universally defined. The wide diversity of adopted methods made it seem like terrorism can be dealt with, in the absence of a universal definition. The results and statistics however, show the opposite, and the study of the alleged difficulties that are standing between the international community and the adoption of an agreed definition, are in fact the results of the absence of a definition, rather than the reasons.

The reasons behind the absence of a universal definition are completely political, rather than technical or philosophical, for example, in objections to the inclusion of a political or ideological motive in the definition -which is essential to differentiate terrorism from other ordinary crimes-, it has been claimed that such requirement would result in ideological or religious profiling. While this can be true in some situations; the error however, lies in the law enforcement rather than in the definition, consequently in such situations when they occur, if the Court did not recognize this mistake and ruled it out, an error will be in the Court itself also.

Therefore, and in general, the process of defining terrorism, and in order to result in a neutral, effective and precise definition; must not be dependent or even affected by any factors other than the inclusion of only terrorist activities. Other factors such as governments' foreign policies and interests and national security policies or, very specific situations of terrorist

attacks, as this policy would only proceed towards more disagreements and more diversity of definitions.

For example, while some States are seeking to exclude the acts of national liberation movements from the definition, other States are seeking to exclude the acts of their military forces, either directly or, indirectly and partially by excluding situations of armed conflicts, all by modifying and re-arranging the elements of the definition, providing irrelevant justifications and arguments to the definition itself, such as the existing of other provisions of international law covering the certain actor or act itself.

While this is in theory true, however, other provisions of international criminal law and international humanitarian law are in fact, capable of covering a large part of terrorist acts, however, the reliance on IHL in regards to terrorism, would only fragmentise terrorism between crimes and acts of war. Furthermore, the aim of criminalising terrorism is irrelevant to this debate; the sought aim is to attach the special, ugly label of terrorism to where it actually belongs, to expose any and every perpetrator of such acts, by reflecting the society's condemnation and contemptuous for such people, rather than hearing the term every two or three days on the media being thrown by someone to another, which is making the term ordinary to the listeners and, difficult to realise who is actually the actual terrorist.

Overall, by covering all types of actors, without exclusions and exemptions for 'special' situations and actors, it becomes clearer to spot and expose terrorists. Furthermore, attempting to exclude the acts of national liberation movements for example, only contributes to the presumption of that such movements, are all practicing terrorist strategies, which is not true and unfair, and only results in more terrorism. On the other hand, definitions which apply only to non-State actors or, to situations outside of an armed attack, would only contribute to the elimination of any 'forbidden lines' for national liberation movements.

Furthermore, each need for a universal definition, actually contains a deeper wisdom which would be essential in the process of combatting terrorism, for example, the precise differentiation between terrorism and other crime, and between terrorism and national liberation movements, consequently results in the stripping of terrorist groups from the public support of the population, which is an essential factor that terrorist groups rely on for its own survival and further growth.

Further, exposing and labelling terrorist groups by a universal, uncontested definition; is the only way for combatting State-sponsored terrorism. Up until now, the common international practice regarding State-terrorism, when a State starts to support one terrorist group, another State shows up to support an enemy of the other terrorist group, which typically would be another terrorist group.

Terrorism thus, as described by Ben Saul, is a conceptual minefield, what is more important than universally defining terrorism, is to carefully and precisely define it, in a way that does not include and exclude acts other than terrorism as commonly known by the public, in particular, as known by persons whom have experienced what is it like to be terrorised. Otherwise, broad definitions would result in jeopardising protected human rights, due to the procedural and investigative powers that terrorism laws entail, further, it would undermine democracy when it is drafted to shield authoritarian governments and State officials.

For an eight years old child, who once have looked out of his window, to see a tank firing in his direction but, he is not certain if it is aimed at his home or not, and when he was looking at the rest of his family wondering, how is it going to feel and look like, when the tank shell hits them, wondering, what has he done to deserve it, then after he realises that he has not done anything, he wondered, why is the tank doing this. All of these questions and related ones, must be answered and reflected in any future universal definition of terrorism.

Multiple conclusions can be derived from this paper; the insufficiency of current counter-terrorism methods, the need for a universal definition, the importance of precision in defining terrorism, however, the most remarkable yet, the most confusing one would be, that the process of drafting and enforcing the definition of terrorism, must not be up to States.

In the light of the unreality of this suggestion however, the closest to this approach until now would be the inclusion of terrorism under the jurisdiction of the International Criminal Court. While it would be still up to the States to agree on it, at least it would be drafted by the International Law Commission, instead by the governments and, it would be enforced properly, again, at least to the 123 States parties to the Rome Statute.

Ultimately, and after the examining and concluding from this study in general, and from Chapter 3 in particular, the author proposes the following definition of terrorism:

The deliberate use of indiscriminate violence, against non-combatants or, a public or private property, by whomever, with the purpose of instilling terror in the general public, in order to coerce a State or, an international organisation or, a non-State actor, to do or abstain from doing any act.

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