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Defining International Terrorism in Light of Liberation Movements

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Introduction

The adoption of a comprehensive agreement to define and outlaw international terrorism has been on the agenda of the international community for over sixty years. [1] The main obstacles in the way of a definition of international terrorism are disagreements on the content of international terrorism, on whether wars of self-determination constitute terrorism, the politics of the cold war epoch, and the tension between combating terrorism and human rights. This paper will argue that:

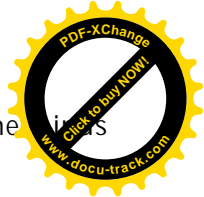
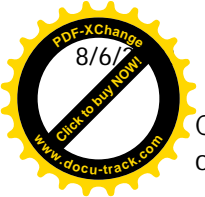
(1) In the United Nations context, (a) state parties failed to adopt the general definition in the 1937 Convention for the Prevention and Punishment of Terrorism because of the outbreak of World War 2; (b) thereafter, until 1990, cold war politics caused states to disagree on the content of international terrorism (especially on whether or not liberation wars constitute terrorism), producing a stalemate in which they agreed to deal with terrorist attacks without defining terrorism; and (c) after 1990 the Israeli occupation of Palestine has caused divisions on whether those fighting foreign domination can be deemed terrorists.

(2) Despite numerous attempts by the United Nations Security Council, the African Union, the European Union, the Organization of American States and national legislation to define international terrorism in different ways, there still exists no comprehensive definition for international terrorism.

1936 to 1990

Between 1936 and 1970, the international community could not define international terrorism because state parties could not agree on the content of the definition of terrorism. Consequently, the international community resorted to avoiding a general definition but responded to terrorist attacks and focused on the causes of terrorism and the motives of the terrorist. Thus the international community merely defined species of terrorism rather than terrorism itself as demonstrated by the following 3 incidents:

(1) The assassination of King Alexander I of Yugoslavia by Croatian terrorists in 1936 contributed to the drafting of the 1937 Convention for the Prevention and Punishment of Terrorism. This Convention defined acts of terrorism as:



Criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

It can be noted from this definition that the essential elements of terrorism are:

- (a) Criminal acts directed against a state; and,
- (b) Intention to create a state of terror in the minds of particular persons, or a group of persons or the general public.

It is clear from this definition that the issues of liberation wars or wars for self-determination were not considered in the definition because they were not part of the agenda of the international community at that time. The outbreak of World War Two prevented states from signing and ratifying the Convention. Only India ratified the convention, and the convention never came into effect.

(2) The late 1960s and early 1970s saw the Palestinian Liberation Organization (PLO) hijacking aircraft. This again contributed to the drafting and adoption of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. These Conventions did not give a comprehensive definition of terrorism but only dealt with seizure of an aircraft, which they defined as:

- (a) Unlawfully, by force or threat thereof, or by any other form of intimidation, seiz(ing), or exercis(ing) control of, that aircraft, or attempt(ing) to perform any such act [\[2\]](#); and,
- (b) Performing an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or destroying an aircraft in service or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight... [\[3\]](#)

The conventions gave jurisdiction to the state where the aircraft is registered and where the aircraft is seized to either try or extradite. Both conventions neither referred to terrorism as a political offence nor addressed the question of whether liberation wars constitute terrorism.

(3) In 1972, the PLO terrorists held the Israeli Olympic team hostage and eventually killed them. Later, Japanese terrorists killed people at Tel Aviv. This was followed by a series of diplomatic bombings. There was an outcry which gave birth to the 1974 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. This convention criminalized acts of terrorism against diplomats but did not define terrorism.

Attempts to promulgate a comprehensive terrorism convention in the 1970s and 1980s were derailed by cold war politics that saw disagreements on whether wars of liberation prevalent in Africa at that time constituted terrorism. The United States condemned liberation wars as terrorism but the Soviet Bloc and developing countries supported liberation wars and did not regard them as terrorism, arguing that all methods employed to overthrow racist or alien regimes were permissible. [\[4\]](#) This created a situation where one's terrorist was another's freedom fighter. [\[5\]](#) In this climate states sought to reach consensus on narrowly defined species of terrorism rather than terrorism itself. They adopted the 1979 Convention against the Taking of Hostages and the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation that both avoided a general definition of international terrorism while criminalizing the hijacking of aircraft and ships and the taking of hostages, all while extending the crime of hijacking to ships beyond the outer limits of the territorial sea. [\[6\]](#) Ben Saul convincingly argues that "the lack of a definition was legally inconsequential, since no international rights or duties hinged on the term 'terrorism'" [\[7\]](#)

Post Cold War

The obstacle to defining terrorism during this period arose out of a disagreement on whether wars of self-determination constitute terrorism, as shown below. The peace that prevailed owing to the independence of most developing countries and the 1994 Oslo declaration, coupled with a desire by the international community to devise effective ways to deal with terrorism, fostered a conducive environment for the drafting of a comprehensive convention on terrorism. [\[8\]](#) Basically, three sets of treaties and declarations were drafted and/or adopted, namely:

(1) Those that define species of terrorism - for instance, the 1997 International Convention for the Suppression of Terrorist Bombings makes it an offence for any person to unlawfully and intentionally place or detonate an explosive device in a place of public use, state or government facility, or transportation system with intent to cause serious bodily injury or extensive destruction. Terrorism is not regarded as a political offence for purposes of extradition and the convention confirms the *aut dedere aut judicare* principle. The 2000 International Convention for the Financing of Terrorism makes it an offence to fund terrorist offences as defined in the conventions discussed above. The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism makes it an offence to possess a nuclear device with intent to cause death, bodily injury, or damage to the environment.

(2) Those that do not define terrorism at all – despite proposals for the 1998 Rome Statute to deal with terrorism, it confines the International Criminal Court's jurisdiction to genocide, war crimes, crimes against humanity and aggression.

(3) Those that attempt to comprehensively define international terrorism – for instance the 1994 General Assembly Declaration on Measures to Eliminate International Terrorism, which condemned all acts of terrorism irrespective of whomever and wherever committed, while stating that:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnical, religious or any other nature that may be invoked to justify them. [\[9\]](#)

It is worth noting that this was merely a declaration with no binding force on any state, all while leaving the question of whether liberation wars constitute terrorism unanswered.

General Assembly Resolution 51/210 of 17 December 1996 established an ad hoc committee that came up with a draft comprehensive treaty on terrorism. The preamble acknowledges that the existing conventions only deal with various aspects of international terrorism, affirming in the process that what follows is a comprehensive convention on international terrorism. Article 2 defines terrorism as:

...Unlawfully and intentionally causing (a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment or (c) damage to property, places, facilities, or systems...resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act...

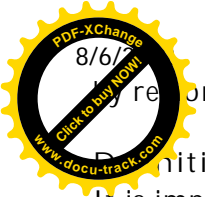
The draft convention reiterates the *aut dedere aut judicare* principle and does not view terrorism as a political offence. However, the problematic clause is article 18(2), which provides that:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

The 2000 outbreak of violence in the Middle East in the PLO's fight for liberation from foreign domination again sparked debate on whether wars of liberation constitute terrorism. Member states of the Organization of the Islamic Conference proposed the following clause:

The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

The Organization of the Islamic Conference avers that in the case of foreign occupation like Western Sahara and Palestine, the activities should be governed by humanitarian law and not acts of terrorism; the United States is opposed to this proposal. Because of this lack of consensus on whether liberation wars constitute terrorism, the draft convention was not adopted and has not come into force. This debate has been pursued



... regional instruments, as elaborated below.

Definition of international terrorism by regional instruments

It is important to note that Africa's colonial history and the occupation of Palestine by Israel has influenced the African Union and the Organization of the Islamic Conference not to regard wars for self-determination as constituting terrorism. [\[10\]](#) Article 3 categorically states that "...the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts."

It merits mentioning that the 1999 Organization of African Unity Convention of the Prevention and Combating of Terrorism adds the following to the definition of terrorism in the 1937 Convention:

...any act which is a violation of the criminal laws of a state party and which may endanger ...cultural heritage and is calculated and intended to...create general insurrection in a state.

The Organization of American States, Council of Europe, European Union and Organization for Security and Co-operation in Europe are silent on whether wars of liberation or self-determination constitute international terrorism, and both do not view terrorism as a political offence for purposes of extradition. [\[11\]](#) It can be inferred that these organizations condemn wars for self-determination as terrorist acts.

The 2002 European Union Council Framework Decision on Combating Terrorism adds the following elements to the 1937 definition of international terrorism:

...manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of ... biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; ... release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; ...and interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.

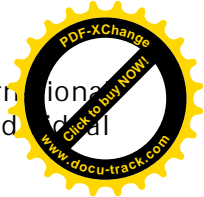
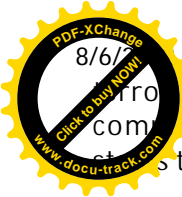
United Nations Security Council's attempts to define international terrorism

It is interesting to note that owing to the 11 September 2001 attacks, the United Nations Security Council has attempted to define international terrorism in abstract terms in its attempt to combat terrorism in resolutions 1368, 1373 and 1566. Resolutions 1368 and 1373 do not specifically define terrorism. Ben Saul argues that the lack of definition was deliberate, since consensus on Resolution 1373 depended on avoiding definition. [\[12\]](#) The United Nations Counter-Terrorism Committee established by the Security Council has also decided not to define terrorism because it did not want to interfere in the competence of other United Nations bodies by doing so. [\[13\]](#) The committee allows states to define terrorism unilaterally while advocating that domestic terrorism laws should be jurisprudentially widened to cover international terrorism.

However, article 3 of the 1566 resolution attempts to define terrorism in a similar fashion to the 1937 Convention. It:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punishable by penalties consistent with their grave nature.

This definition is broader than that given by the conventions and the draft comprehensive convention. The United Nations Security Council goes a step further by listing some organizations as terrorist organizations and taking action against them. The Security Council also encourages individual states to enact its own anti-terrorism laws. It appears that the Security Council resolutions view wars of liberation as international



ism. It can be argued that the Security Council has confused attempts on the part of the international community to come up with a comprehensive definition by offering a broad definition and giving individual states the latitude to define terrorism in their domestic law.

The open ended discretion given by the Security Council's to individual states has contributed significantly to states defining terrorism in different ways. For instance, in the United Kingdom, the Terrorist Act of 2000 defines terrorism as:

...the use or threat of action . . . designed to influence the government or to intimidate the public or a section of the public . . . for the purpose of advancing a political, religious or ideological cause.

The legal system and code of law of the United Kingdom has influenced those of the United States, Canada, and Israel. The United States federal statute defines terrorism as:

...violent acts or acts dangerous to human life that . . . appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. [\[14\]](#)

Again, Canada's Anti-terrorism Act [\[15\]](#) designates "terrorist activity" as:

...an act or omission . . . that is committed in whole or in part for a political, religious or ideological purpose, objective or cause and in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside Canada . . .

Israeli law does not address terrorism specifically. But in the Prevention of Terrorism Ordinance No. 33, it defines a terrorist organization as "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence."

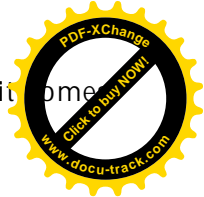
Saul convincingly argues that some states have inevitably taken this opportunity to enact laws that repress or delegitimize its political opponents as terrorists. [\[16\]](#) For instance, China bluntly characterized Uighur separatists in Xinjiang as terrorists. Russia asserts that Chechen rebels are terrorists. India seldom distinguishes militants from terrorists in Kashmir. Indonesia's insurgencies in Aceh and West Papua, a Maoist insurgency in Nepal and an Islamist movement in Morocco have been described and combated as terrorism while Israel has identified Palestinians with Al-Qaeda, with Ariel Sharon calling Arafat 'our Bin Laden.' One of the challenges posed by the definition of terrorism by states is the propensity of national legislation to violate human rights. The definition of terrorism by states should not violate human rights.

It is clear from the above that conventions do not yet offer a generally accepted comprehensive definition of international terrorism; instead, they merely define aspects of it. A general convention has not yet been adopted. The United Nations Security Council has confused the attempts to come up with a comprehensive definition by offering a broad definition and giving individual states the latitude to unilaterally define terrorism. However, it is trite for the international community to comprehensively define terrorism for the purpose of legal certainty. Precision in definition is necessary if terrorist offences are not to infringe on freedom from retroactive criminal punishment. [\[17\]](#) This point was underscored in the European Court of Human Rights case of *Kokkinakis v Greece* where the Court held that:

...an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, from the court's interpretation of it, what acts and omission will make him liable. [\[18\]](#)

In *Castillo Petruzzi et al v Peru*, the Inter-American Court was even more pronounced:

...crimes must be classified and described in precise and unambiguous language...thus giving full meaning to the principle of nullum crimen nulla poena sine lege praevia in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors...Ambiguity in



describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals... [\[19\]](#)

Conclusion

That there currently is no agreed comprehensive definition of international terrorism is a fact that cannot be gainsaid. The main obstacle to a definition of international terrorism borders on the question of whether national liberation movements or wars of self-determination constitute terrorism. I agree with Saul when he contends that this disagreement is fundamentally political. However, it is imperative to note that despite the divergent opinions on a comprehensive definition of terrorism, no technical impossibility exists in extrapolating the essential elements of terrorism. Put differently, it is difficult to resist the conclusion that terrorism is today a crime under customary international law [\[20\]](#), under which the following constitute its essential elements:

- (a) A threat or act of violence against a person or property;
- (b) Intention or motive to intimidate a population;
- (c) It must create a state of terror among the population;
- (d) It must threaten international security.

The only question yet to be resolve is whether liberation movements or wars of self-determination constitute terrorism. Once this obstacle is addressed, the international community will give effect to the comprehensive definition in the 1996 Draft Convention.

[\[1\]](#) J. Dugard 'International Law: A South African Perspective' 3rd Edition (2005). J. Dugard 'Terrorism and International Law, Consensus at Last?' In E. Yakpo and T. Moumedra Liber Amicorum Mahammed Bedjaoui (1999) 159.

[\[2\]](#) Article 1(a) of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.

[\[3\]](#) Article 1(a) and (b) of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

[\[4\]](#) J. Dugard International Law: A South African Perspective 166

[\[5\]](#) J. Dugard International Terrorism and the Just War (1977) is Stanford Journal of International Studies 21

[\[6\]](#) Dugard n4 above 165.

[\[7\]](#) Defining Terrorism in International Law, 48.

[\[8\]](#) Dugard n4 above 166-7.

[\[9\]](#) Dugard n4 above 167

[\[10\]](#) Article 3 of the 1999 Organization of African Unity Convention of the Prevention and Combating of Terrorism and article 18 of the 1997 draft comprehensive convention.

[\[11\]](#) See the 2003 Inter-American Convention against Terrorism and the European Convention on the Suppression of Terrorism

[\[12\]](#) Defining Terrorism in International Law, 48.

[\[13\]](#) N10 page 48-9. See also the CTC Chair (Ambassador Greenstock), Presentation to Symposium: 'Combating International Terrorism: The Contribution of the United Nations,' Vienna 3-4 June 2002; see also W. Lacquer, 'We Can't Define "Terrorism" but We Can Fight It.' Wall Street Journal, 12 July 2002, A12.

[\[14\]](#) This definition appears in United States Code, Title 18, Section 2331 (18 USC 2331). See also South Africa's Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004

[\[15\]](#) (Bill C-36)

[\[16\]](#) Saul B n10 above 50.

[\[17\]](#) Article 15(1) of the International Covenant on Civil and Political Rights says "No one shall be held guilty of any criminal offence on account of any act or omission which do not constitute a criminal offence, under national or international law, at the time when it was committed,"

[\[18\]](#) ECHR Series A No 260-A (25 May 1993) para 52

[\[19\]](#) [1999] IACHR 6 (30 May 1999) para 121.

[\[20\]](#) A. Cassese International Criminal Law (2003) 120.