

**The Global War on [?]:
Crafting the Legal Definition of “International Terrorism”**

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Spring 2011

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The most accurate definition of terrorism may be the famous Potter Stewart standard of obscenity: "I know it when I see it."

-Michael Kinsley, journalist¹

I. INTRODUCTION

On September 11, 2001, nineteen members of al-Qaeda launched a coordinated series of attacks while aboard four United States [U.S.] commercial jet airliners. In doing so, these nineteen men hijacked their respective aircrafts and attempted to divert the flights to hit four high-profile targets on U.S. soil. Three groups of hijackers were successful, hitting the North and South Towers of the World Trade Center and the western face of the Pentagon within just thirty-four minutes of each other. The fourth plane was unsuccessful, and failed to reach its target of either the U.S. Capitol or the White House after a group of passengers instead forced the plane to crash in a field in southern Pennsylvania. A total of 2,981 people were killed during the attacks, surpassing the number of victims killed at Pearl Harbor in December 1941.²

Then-President George W. Bush was swift to condemn the attacks, and on the evening of September 11th delivered a public address which opened with: "Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts."³ This reference to terrorism would prove a key theme in President Bush's address that night, appearing five times in a speech totaling just over four minutes. The theme of terrorism would also become a staple of President Bush's rhetoric in the years that followed, thereby

¹ Michael Kinsley, *Defining Terrorism*, SLATE, Oct. 5, 2001, available at <http://www.slate.com/id/116697/>.

² NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: EXECUTIVE SUMMARY 1-2 (2004) ("More than 2,600 people died at the World Trade Center; 125 died at the Pentagon; 256 died on the four planes. The death toll surpassed that at Pearl Harbor in December 1941."), available at <http://www.gpoaccess.gov/911/pdf/execsummary.pdf>.

³ President George W. Bush, Address to the Nation on September 11, 2001 (Sept. 11, 2001).

facilitating his commencement of a global “war on terror”⁴ and his solicitation of international support for this cause.

Yet what exactly does a “global war on terror” entail? In the near decade that has passed since the September 11th attacks it seems that no one, not even President Bush himself, has been able to devise a satisfactory answer to that question. This is unsurprising, given that no universally accepted definition of the underlying crime of “terrorism” currently exists.⁵ However, the fact that no such definition exists *is* surprising, as “[v]iolence aimed at inspiring fear and intimidating populations is not a new phenomenon.”⁶

Indeed, the word “terror” was first used to describe the Jacobin “Reign of Terror” following the French Revolution at the end of the 18th Century.⁷ Since that time, the global community has come to regard acts of terrorism as international crimes. Yet any such harmony in the global community ends there, as it has also failed to assign a uniform definition to acts constituting international terrorism. As such, the assignment of this label carries little legal weight, particularly in establishing methods of both prevention and response. Instead states frequently seek refuge in the term’s ambiguity, and “terrorism easily falls prey to change that suits the interests of particular states at particular times.”⁸

⁴ President George W. Bush, Congressional Address on September 11, 2001 (Sept. 11, 2001) (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).

⁵ See Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT’L & COMP. L. 357, 358 (2003) (“It is hard to believe that a word like ‘terrorism,’ which is used so frequently these days in different contexts and in casual, colloquial, political, and legal discourses, does not have a universally-accepted definition.”).

⁶ Ben Golder & George Williams, *What is “Terrorism”? Problems of Legal Definition*, 27 U. NEW S. WALES L. J. 270, 270 (2004).

⁷ *Id.*, referencing John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISRAEL Y.B. HUM. RTS. 13, 14 (1990).

⁸ Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT’L L.J. 491, 492 (2004).

This assertion is certainly indicative of the U.S.’ response to September 11th. Many believed that the attacks were of such “a murderous scale that [it] makes quibbling over definitions seem absurd.”⁹ Yet President Bush posed the initiative that followed not as an effort targeting al Qaeda, but as a strike against all international terrorism. This was a clever tactic—because the international community had not yet defined the act of “terrorism,” it had also failed to assign definitive legal principles to govern a state’s response to such acts. This granted terrifying leeway to the Bush administration, which manipulated the term to allow for such “counterterrorism” methods as torture and denial of due process rights.¹⁰

The impact of such indeterminacy in the law, “brought about by a vague or nonexistent definition of terrorism, can [thus] result in the multiplicity of interpretation and the instability of the legal system.”¹¹ For while the U.S.’ cause may have been noble, its methods were not. This not only harmed the credibility of the U.S. in the international community, but also the legitimacy and enforceability of international legal standards as well. Such an impact has revealed the urgent need for a uniform definition of international terrorism, as states cannot expect to successfully fight a war on terror without first knowing what that fight entails.

II. PRIOR EFFORTS TO DEFINE INTERNATIONAL TERRORISM

Its global condemnation has existed for as long as acts of terrorism have been committed. This had led some to assign the prohibition of international terrorism as a category of customary

⁹ Kinsley, *supra* note 1.

¹⁰ See AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE “WAR ON TERROR” (2004) (arguing that the U.S. was more concerned with usurping its international obligations than protecting human rights during the War on Terror), available at <http://www.amnesty.org/en/library/asset/AMR51/145/2004/en/af8e133e-d570-11dd-bb24-1fb85fe8fa05/amr511452004en.pdf>.

¹¹ Tiefenbrun, *supra* note 5, at 386.

international law.¹² However, this designation is insufficient for the international community to exercise legitimate and enforceable power to prevent and punish such crimes: “Despite the seeming universal disapproval of terrorist actions, custom will not provide a mechanism through which the problem could be eradicated.”¹³ Given this reality, the global community has dedicated significant time and energy to creating such a definition. Although such efforts have as of yet failed, there exist two conventions whose drafting processes continue to dominate discussions of a legal definition of international terrorism.

A. The League of Nations’ Convention for the Prevention and Punishment of Terrorism

The first significant effort to define international terrorism was undertaken by the League of Nations between 1934 and 1937.¹⁴ Its efforts were spurred by the high-profile political assassination of King Alexander I of Yugoslavia, who was killed by Croatian separatists while on an official visit to France in October 1934.¹⁵ Although the alleged perpetrators fled to Italy, the French government requested their extradition under a treaty dating back to 1870.¹⁶ However, this treaty excluded political crimes as extraditable offenses, and the Italian courts thus refused to transfer the suspects.¹⁷

This initiated a strong public reaction, and the international community looked to the League of Nations to intervene. However, its member states found that the League of Nations

¹² See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 994 (2001) (“[I]t may safely be contended that . . . at least trans-national . . . terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.”).

¹³ Gabriel Soll, *Terrorism: The Known Element No One Can Define*, 11 WILLAMETTE J. INT’L L. & DIS. RES. 123, 131 (2004).

¹⁴ Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. INT’L CRIM. JUST. 78, 79 (2006) (“The most significant early modern attempt to define terrorism as an international crime was undertaken by the League of Nations between 1934 and 1937.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

was incredibly limited in its capacity to respond, as the crime was deemed an act of terrorism for which no definition existed. Thus with the goal of creating a convention that defined acts of terrorism, the League of Nations passed a resolution in December 1934 acknowledging that “the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation.”¹⁸ The League of Nations then designated a Committee for the International Repression of Terrorism¹⁹ to draft a preliminary definition of the crime. Representatives from eleven states were elected to the Committee, which hosted three annual sessions between April 1935 and April 1937.²⁰

The Committee’s efforts produced the 1937 Convention for the Prevention and Punishment of Terrorism.²¹ The definition of terrorism was included in Article 1, which stated:

1. The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.
2. In the present Convention, the expression “acts of terrorism” means 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.²²

¹⁸ Proceedings of the International Conference on the Repression of Terrorism, League of Nations Doc. C.94.M.47.1938.V (1938.V3).

¹⁹ Saul, *supra* note 14, at 80.

²⁰ The states chairing the Committee were Belgium, Chile, France, Hungary, Italy, Poland, Romania, Spain, Switzerland, the Soviet Union, and the United Kingdom. *Id.* n. 11.

²¹ League of Nations, Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 League of Nations O.J. 23 (1938), Doc. C.546(I).M.383(I).1937.V, *unofficial copy available at*

<http://www.jur.uib.no/Ansatte/joreh/temasider/internasjonalisering/Convention%20on%20terrorism%201937.pdf>.

²² *Id.*

As such, the Convention extended only to acts of terrorism possessing an international character.

The Convention was incredibly detailed, to the extent that the Committee seemingly

anticipated most of the legal issues which [have plagued] the international community's response to terrorism in the following . . . decades: the political and technical difficulties of definition; the problem of 'freedom fighters' and self-determination; 'state terrorism' and the duty of non-intervention; state criminality and applicability to armed forces; the scope of the political offence exception to extradition; the impact on freedom of expression; and the relationship between terrorism and asylum.²³

Yet the Committee's willingness to confront such issues was to no avail—although the

Convention was adopted in 1937, it was only ever ratified by India and thus never entered into force.²⁴

2. The United Nations' Comprehensive Convention on International Terrorism²⁵ and Surrounding Efforts

Several decades passed before the international community again undertook to define international terrorism. This time it was the United Nations [U.N.] that initiated the process, beginning in 1994²⁶ with the General Assembly's adoption of Resolution 49/60.²⁷ With this

²³ Saul, *supra* note 14, at 79.

²⁴ MYRA WILLIAMSON, *TERRORISM, WAR, AND INTERNATIONAL LAW* 27 (MPG Books Ltd. 2009).

²⁵ Given the scope of the U.N.'s efforts to combat terrorism during the time period discussed, only those efforts relevant to defining terrorism are included here.

²⁶ By this time the U.N. had already adopted ten multilateral treaties against terrorism. However, all of these treaties dealt only with one specific aspect of international terrorism, and not the crime as a whole. *See*

(1) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219;

(2) Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105;

(3) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177;

(4) Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167;

Resolution the General Assembly encouraged states to review the scope of their existing legal doctrine regarding the prevention, repression, and elimination of terrorism “with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter.”²⁸

Resolution 49/60 further asserted the General Assembly’s adoption of the Declaration on Measures to Eliminate International Terrorism, which defined such acts as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.²⁹

The U.N. then affirmed its commitment to implementing a universal definition of international terrorism in 1996 with the General Assembly’s adoption of Resolution 51/210.³⁰

This Resolution served as a supplement to Resolution 49/60, and was of particular importance in that it established an Ad Hoc Committee to “further develop[] a comprehensive legal framework of conventions dealing with international terrorism.”³¹ Since its creation, the Committee has negotiated the adoption of three treaties addressing acts of terrorism: the

(5) International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205;

(6) Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 101;

(7) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 473;

(8) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221;

(9) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; and

(10) Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991).

²⁷ G.A. Res. 49/60, U.N. Doc. A/49/743 (Dec. 9, 1994).

²⁸ *Id.* at § II, ¶ 7.

²⁹ *Id.* at § I, ¶ 3.

³⁰ G.A. Res. 51/210, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

³¹ *Id.* at § III, ¶ 9.

International Convention for the Suppression of Terrorist Bombings,³² the International Convention for the Suppression of the Financing of Terrorism,³³ and the International Convention for the Suppression of Acts of Nuclear Terrorism.³⁴ However, the Committee has failed in its efforts to draft a comprehensive convention that defines the broader category of international terrorism.

Yet this failure was certainly not caused by lack of effort. The Committee's attempt to draft such a convention began in earnest in 1998, when India submitted its own draft for consideration.³⁵ The text of this draft held in relevant part:

The Contracting States shall ensure that their national laws recognize 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 under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.³⁶

It was this draft text that set the baseline for the Committee's efforts in subsequent years.

While the text of India's submission provided a basis for the Committee's work, its initial review in 1999 also revealed a fundamental discord amongst Committee members regarding the need to define international terrorism. Some members argued "the need to distinguish between terrorism and the legitimate struggle . . . for self-determination and independence, and called for the formulation of a universal legal definition of terrorism."³⁷ Other states designated the challenge of defining international terrorism as insurmountable, noting that in the past "the

³² G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997).

³³ G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

³⁴ G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005).

³⁵ Draft International Convention on the Suppression of Terrorism, U.N. GAOR, 51st Sess., U.N. Doc. A/C.6/51/6 (Nov. 11, 1996).

³⁶ *Id.* art. 2.

³⁷ CENTER FOR NONPROLIFERATION STUD., DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM (2010), available at <http://cns.miis.edu/inventory/pdfs/intlterr.pdf> [hereinafter "DRAFT CONVENTION REPORT"].

United Nations had been more successful when focusing on treaties that criminalized specific manifestations of terrorism.”³⁸ While the Committee was unable to resolve this conflict, the General Assembly’s adoption of Resolution 54/110³⁹ that year suggested progress had been made. Although no explicit definition of international terrorism was offered in this Resolution, its text did note 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, ethnic, religious or other nature that may be invoked to justify them.⁴⁰

This Resolution further empowered the Committee to “address means of further developing a comprehensive legal framework of conventions dealing with international terrorism and begin consideration with a view to elaborate a Comprehensive Convention on international terrorism.”⁴¹

As the author of the original draft text, India returned in 2000 with an updated version of the convention that was meant to better encompass the Committee’s concerns from the prior year. As such, Article 2 of the updated draft held that:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss;

³⁸ *Id.*

³⁹ G.A. Res. 54/110, U.N. Doc. A/RES/54/110 (Dec. 9, 1999).

⁴⁰ *Id.* at ¶ 2. This same definition appeared in Resolution 55/158, adopted by the General Assembly in 2000, which extended the mandate of the Ad Hoc Committee to consider a draft convention. *See* G.A. Res. 55/158, U.N. Doc. A/RES/55/158 (Dec. 12, 2000).

⁴¹ DRAFT CONVENTION REPORT, *supra* note 37.

when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.⁴²

Despite India's efforts to add detail and thus clarity to the definition of international terrorism, state delegates continued to emphasize the draft text's deficiencies. Some states expressed concern that the above definition did not fully embody the range of potential vehicles for terrorism in the modern era, as "globalization had given rise to new forms of terrorism, such as cyber-terrorism."⁴³ Others requested that greater attention be given to the intersection of counterterrorism methods and relevant norms and principles of international law, including international human rights law and international humanitarian law.⁴⁴ Thus by the end of 2000, the Committee had once again agreed only to continue its efforts.

When the Committee reconvened in 2001, it shifted its efforts to focus primarily on identifying the qualifying element of international terrorism. Several states named the actor's intent "to produce fear in the population or to force a Government or international organization to take or refrain from taking some action"⁴⁵ as this element. In acknowledging that such intent is often fueled by an actor's underlying political motivations, these states also called for language that differentiated between terrorist acts and "the legitimate struggle against foreign occupation, aggression, colonialism, and hegemony aimed at liberation, self-determination, and independence in accordance with international law"⁴⁶ Such discussions thus prioritized the

⁴² Draft International Convention on the Suppression of Terrorism art. 2(1), U.N. GAOR, 55th Sess., U.N. Doc. A/C.6/55/1 (Aug. 28, 2000).

⁴³ DRAFT CONVENTION REPORT, *supra* note 37.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

actor's intent as the primary characteristic of the crime over such other factors as the "scale or damage"⁴⁷ of the act.

Perhaps surprisingly, the attacks of September 11th had little impact on the Committee's discussions. While the U.N. certainly responded to the attacks, none of the documents flowing directly from these responses made any effort to define international terrorism.⁴⁸ It was several years later, in 2004, before another U.N. body offered any insight into the definition of this crime. That year the Security Council adopted Resolution 1566,⁴⁹ which read in part:

[The Security Council] [r]ecalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.⁵⁰

This definition drew several parallels to the Committee's prior efforts, particularly in its emphasis of an actor's intent to cause terror as the defining element of the crime. However, this text also made an important distinction that did not yet exist in the Committee's drafts: that civilians often constitute the victims of such acts.

This Resolution served as the basis for yet another U.N.-based definition of international terrorism, as provided by the High-level Panel on Threats, Challenges and Change in 2004. The Panel had three functions: (1) to assess current threats to international peace and security; (2) to

⁴⁷ *Id.*

⁴⁸ See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling on states to prevent the financing of terrorism); G.A. Res. 56/1, U.N. Doc. A/RES/56/1 (Sept. 18, 2001) (condemning the attacks of September 11); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning the attacks of September 11).

⁴⁹ S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (calling on states to take action to combat terrorism).

⁵⁰ *Id.* at ¶ 3.

evaluate the success of existing policies and institutions in addressing those threats; and (3) to issue recommendations for strengthening the U.N. response to collective security.⁵¹ In its execution of these tasks, the Panel issued a report entitled “A More Secure World: Our Shared Responsibility” to the General Assembly in December 2004. In this report, the Panel defined international terrorism as:

any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁵²

Interestingly, the Panel declined to characterize this language as a definition of terrorism, choosing instead to qualify the text as a mere “description”⁵³ of the crime.

In spite of the Panel’s hesitance, the U.N. regarded the text as a definition of international terrorism and in 2005 former Secretary General Kofi Annan made this appeal to the international community:

It is time to set aside debates on so-called “State terrorism”. The use of force by States is already thoroughly regulated under international law. And the right to resist occupation must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. I endorse fully the High-level Panel's call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act. I believe this proposal has clear moral force, and I strongly urge world leaders to

⁵¹ A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, Note by the Secretary General, U.N. GAOR, 59th Sess., U.N. Doc. A/59/565 (Dec. 2, 2004).

⁵² *Id.* at § VI, ¶ 164(d).

⁵³ *Id.*

unite behind it and to conclude a comprehensive convention on terrorism before the end of the sixtieth session of the General Assembly.⁵⁴

Yet Annan's appeal went unheeded, positioning the international community for further debate regarding the definition of international terrorism. Such debate transpired the following year at the 2005 World Summit, during which representatives of the existing 191 U.N. member states gathered to discuss relevant issues pertaining to development, human rights, international security, and U.N. reform.⁵⁵ Although the Summit was scheduled to discuss the implementation of an international convention on terrorism,⁵⁶ no innovative or definitive assertions were made on the matter.⁵⁷

The Committee has since continued its annual deliberations, during which time the General Assembly has continued to apply its standard definition of international terrorism.⁵⁸ Yet the Committee has made little progress, and by the conclusion of its fourteenth session in 2010 it

⁵⁴ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 91, U.N. Doc. A/59/2005 (Mar. 21, 2005).

⁵⁵ Note: there are now 192 U.N. member states. See Backgrounder, United Nations General Assembly Opens on 13 September 2005 (Sept. 13, 2005), available at <http://www.un.org/summit2005/presskit/ga.pdf>.

⁵⁶ *Id.*

⁵⁷ However, it is alleged that an imperfect definition of terrorism was discussed during the Summit, reading as follows: "We [the heads of state or government participating in the summit] affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance, and we declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to carry out or to abstain from any act cannot be justified on any grounds and constitutes an act of terrorism." However, this definition does not appear in any publicly available documents from the Summit. Instead it was made available by the following source: Roberto Lavalle, *A Politicized and Poorly Conceived Notion Crying Out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism*, 67 HEIDELBERG J. INT'L L. 89, 105-106 (2007).

⁵⁸ See G.A. Res. 64/118, ¶ 4, U.N. Doc. A/RES/64/118 (Dec. 16, 2009) (reiterating 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, ethnic, religious or other nature that may be invoked to justify them.").

had not yet crafted a finalized draft convention on international terrorism. As such, the general provisions of earlier definitions have remained intact, and perpetrators of international terrorism are defined as such:

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁵⁹

Although the Committee last met in April 2011, its subsequent reports have not yet been published.⁶⁰

III. THE RECOMMENDED DEFINITION OF INTERNATIONAL TERRORISM

Those attempting to define the act of international terrorism face an admittedly daunting task. They are left to analyze a vast body of legal rhetoric so as to compose a definition that is precise, objective, and certain, as “[a]n objective meaning is one that is generally shared in the international community, a meaning or content that can be evidenced in several ways.”⁶¹ Yet the

⁵⁹ Working Group of the Sixth Committee, *Measures to Eliminate International Terrorism* art. 2, U.N. Doc. A/C.6/65/L.10 (Nov. 3, 2010).

⁶⁰ There now exist sixteen international instruments prohibiting acts of terrorism. The first ten may be found in footnote 26. The final instruments include the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; Amendment to the Convention on the Physical Protection of Nuclear Material; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; and International Convention for the Suppression of Acts of Nuclear Terrorism.

⁶¹ Jordan J. Paust, *Terrorism’s Proscription and Core Elements of an Objective Definition*, 8 SANTA CLARA J. INT’L L. 51, 57 (2010).

chosen language must also strike the delicate balance of capturing the evolving nature of the crime without infringing upon states' determined rights.

A review of such previous efforts to define international terrorism suggests that this has become too political a process, during which states are granted gratuitous deference to manipulate the language to suit their own needs. Yet there exists a common set of elements that have consistently appeared in international laws and principles over time, and which can be used to craft a proper definition that precisely captures the unique essence of the act. Reference to these elements maintains the integrity of international law while satisfying the moral and legal imperative of finally criminalizing the act, as “[t]he need for precision in terminology is nowhere more apparent than in . . . international law, particularly with reference to terror[ism].”⁶²

A. Common Elements

In attempting to circumvent the need for an actual definition of international terrorism, many academics cite to U.S. Supreme Court Justice Potter Stewart's “standard” regarding pornography: “I know it when I see it.”⁶³ Yet such a standard is illogical, as individuals only know an act of terrorism “when they see it” because the act possesses the same qualities deemed characteristic of such attacks. Thus Justice Stewart's benchmark is not only insufficient to serve as a legitimate standard of international law, particularly with regards to a crime as grave as terrorism, but it is also needlessly apathetic. Instead, a viable definition can easily be crafted around those elements most frequently thought to signal acts of terrorism.

⁶² Soll, *supra* note 13, at 138, *citing* TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 77 (Robert Friedlander ed., 1979).

⁶³ See Kinsley, *supra* note 1 (“The most accurate definition of terrorism may be the famous Potter Stewart standard of obscenity: ‘I know it when I see it.’”), *citing* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, P., concurring); Tiefenbrun, *supra* note 5, at 358 (“It is not enough to say [of terrorism], as United States Supreme Court Justice Potter Stewart once said of pornography, ‘we know it when we see it.’”).

1. International Element

For conduct to qualify as an act of international terrorism, it must possess an international element. The field of international law extends only to those crimes consisting of a transnational character, such that the prohibited conduct has an actual or potential impact on the international community. As such, the definition of international terrorism must retain this limitation: “For a terrorist act to be deemed ‘international,’ the act . . . must also contain an international element, be directed against an internationally protected target or violate an international norm.”⁶⁴ Accordingly, any adopted definition must maintain the flexibility to apply to such acts while strictly prohibiting any potentially unlawful interference with states’ right to self-determination under the justification of counterterrorism.

2. Mens Rea

A perpetrator has not committed an act of international terrorism unless he or she intended to incite actual terror with his or her conduct:

[A]ctual terrorisation of the civilian populations is not an element of the crime. The mens rea of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, . . . the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.⁶⁵

The mens rea standard here is incredibly specific, as an act does not rise to the status of terrorism unless the actor sought specifically to incite terror: “Objectively, terrorism must necessarily

⁶⁴ Tiefenbrun, *supra* note 5, at 382, *referencing* M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937-2001) 14, n. 48 (Transnational Publishers, Inc. 2001).

⁶⁵ Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 104, (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

involve the creation of terror.”⁶⁶ Thus the language chosen to craft this element of international terrorism must precisely capture the actor’s premeditated intent to inspire terror with his or her actions.⁶⁷

3. Class of Motivations

The definition of international terrorism must also capture the nuance between an actor’s primary intent (to induce terror) and the actor’s underlying political, ideological, racial, ethnic, or religious motivations. While the concepts of an actor’s intent and motivations are certainly related, they also constitute two distinct elements of the crime. As such, a perpetrator will use the intentional incitement of terror as a vehicle for his or her political message; “[t]hat is, terrorists want to reach some political objective and the imposition of terror on the population is the means of accomplishing their purpose.”⁶⁸ Thus the definition of international terrorism must make clear that “there is a message behind the act,”⁶⁹ which is of a political, ideological, racial, ethnic, or religious⁷⁰ nature.

4. Actus Reus

An actor’s conduct will not rise to the status of international terrorism unless the requisite actus reus component is also satisfied, in that the actor evoked a sense of terror through the use of independently criminally proscribed methods. Such methods include “acts or threats of violence,” as “the crime of acts or threats of violence the primary purpose of which is to spread

⁶⁶ Paust, *supra* note 61, at 58.

⁶⁷ Tiefenbrun, *supra* note 5, at 380 (“Moreover, the term ‘designed to inspire terror’ [used by M. Cherif Bassiouni in defining terrorism] evokes the pre-meditated intent of the actor.”).

⁶⁸ George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT’L CRIM. JUST. 894, 902 (2006).

⁶⁹ Soll, *supra* note 13, at 137.

⁷⁰ See Golder & Williams, *supra* note 6, at 289 (noting that terrorists “have committed that act in furtherance of a political, religious or ideological cause”); Paust, *supra* note 61, at 59 (“Some definitions contain a political purpose element, which could be expanded to include an ideological, religious, ethnic, or race-based purpose.”); Tiefenbrun, *supra* note 5, at 383 (asserting that international terrorism consists of “the intentional use or threat of violence for political, religious or ideological purposes”).

terror among the civilian population falls within . . . general prohibition[s]”⁷¹ Traditionally, such acts result in either “harm to a person or damage to a property.”⁷² As such, the action or threat of action used to incite terror must be itself a punishable offense under international criminal law.

5. Possible Targets

The above interpretation of the actus reus element of international terrorism identifies two potential classes of “victims” or targets: civilians and property. Although conventional definitions of the crime generally emphasize harm to civilians, more modern texts acknowledge that acts of terrorism can also damage property: “Terrorism . . . is expressed through the employment of various criminal acts calculated to harm human life [or] property”⁷³ Thus a complete definition of the crime must reference both potential classes of targets, as the act intended to be criminalized “includes [those] causing death or serious bodily injury to any person or serious damage to public or private property, including a place of public use [or] a state or government facility”⁷⁴

6. Lack of Legal Justification

There is considerable debate amongst legal scholars regarding the context in which acts of terrorism may occur. However, terrorism “may be committed in war as easily as it may be committed in the context of peaceful relations.”⁷⁵ This issue is relevant because separate bodies of law apply at different times; international humanitarian law governs armed conflicts, and international human rights law applies during peacetime. As such, the definition of international terrorism should extend to acts committed during both war and peacetime. Courts will then be left to determine the context in which an alleged act of terrorism took place. Once that assertion

⁷¹ *Galić*, Case No. IT-98-29-A, at ¶ 102.

⁷² Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT’L CRIM. JUST. 1137, 1145 (2006).

⁷³ JOHN NORTON MOORE & ROBERT F. TURNER, 72 READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW, 1978-1994 406 (1995).

⁷⁴ Marco Sassòli, *Terrorism and War*, 4 J. INT’L CRIM. JUST. 959, 978 (2006).

⁷⁵ Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 592 (1989).

is made, the court can apply the relevant body of law and thus determine whether any appropriate justifications for the act existed at the time of its occurrence. This approach ensures that the definition of international terrorism does not impose any overly broad restrictions on the context in which the act may occur, while still acknowledging that the context of armed conflict may provide a legal justification for the act that does not otherwise exist during peacetime.⁷⁶

B. Excluded Elements

Collectively, the above elements create a comprehensive definition of international terrorism. Admittedly these elements deviate slightly from the full catalog of standards commonly associated with such acts, as several frequently cited elements have intentionally been excluded. However, this was a strategic move designed to eliminate any such elements that, while often included in the description of international terrorism, ultimately detract from the effectiveness of any final definition.

1. Distinction Between State and Non-State Actors

The international community generally hesitates to acknowledge the possibility that state actors may perpetrate acts of terrorism; as such, many legal scholars have recommended that the definition of international terrorism specifically identify non-state actors as the sole category of possible perpetrators. However, such a definition would convey a reckless disregard for the capacity of states to commit acts of terrorism, as seen in such incidents as Libya's state-sponsored bombing of Pan American Flight 103 over Lockerbie in 1988.⁷⁷ As a result, "there can be no exclusion of perpetrators from an objective definition on the basis of the status of the

⁷⁶ For example, the principles regarding self-defense vary according to context. Thus an act that may be considered unlawful during peacetime may be justified during an armed conflict.

⁷⁷ On December 21, 1988, Pan American Flight 103 exploded mid-air above Lockerbie, Scotland. The explosion killed all 256 people onboard, and a further 11 victims who were on the ground when the aircraft crashed. It was later revealed that the bombing was ordered by Muammar al-Qaddafi, who was the leader of Libya at the time. *See Libya's Ex-Minister Reportedly Claims Qaddafi Ordered Lockerbie Bombing*, FOX NEWS, Feb. 23, 2011, available at <http://www.foxnews.com/world/2011/02/23/libyas-ex-minister-reportedly-claims-qaddafi-ordered-lockerbie-bombing/> ("Libya's ex-justice minister claims the country's leader, Muammar al-Qaddafi, ordered the Lockerbie bombing that killed 270 people . . .").

perpetrator. Any definition that attempts to limit terrorism to private actors, governmental actors, insurgents, or those who otherwise oppose the state would be incomplete and not objective.”⁷⁸ This assertion has gained support in recent years, and “the possibility that State agents may directly or indirectly support or perpetrate acts of terrorism is something a number of States feel has to be included in a Comprehensive Convention.”⁷⁹ Accordingly, the definition of international terrorism must not limit the potential class of perpetrators to only non-state actors.

2. Just Cause

Despite the many definitions that have been proffered over the years, the concept of international terrorism has always consisted of one particular element: the actor’s political, ideological, racial, ethnic, or religious motivations. The specificity of these terms may be misleading, as the definition requires only that, for example, a religious motivation exists; it does not seek to regulate what that religious motivation must be. Some argue that the final definition of the crime must go further in making such observations, such that the international community can then determine whether the actor possessed “just cause” for his or her act. But to include such a consideration in the definition of international terrorism would serve little purpose other than to offer a vague and subjective defense to those actors seeking to justify their acts. After all, “[t]hose who opt for terror always believe their cause is just.”⁸⁰ To allow perpetrators to indulge in this discussion at all would thus “legitimize terrorist acts by [implying] that the ends justify the means.”⁸¹ As such, the definition should “eliminate[] [any potential] consideration of the worthiness of the goals or the claimed justifications for terrorist acts.”⁸²

3. Magnitude of Harm

Upon acknowledging that no universal definition of terrorism currently exists, several academic scholars have sought to identify those existing categories of international crime that

⁷⁸ Paust, *supra* note 61, at 58.

⁷⁹ Bruce Broomhall, *State Actors in an International Definition of Terrorism from a Human Rights Perspective*, 36 CASE W. RES. J. INT’L L. 421, 430 (2004).

⁸⁰ Fletcher, *supra* note 68, at 906.

⁸¹ Tiefenbrun, *supra* note 5, at 389.

⁸² *Id.* at 380.

extend to acts of terrorism. Often these scholars conclude that acts of international terrorism may fall under the purview of crimes against humanity, which are acts committed as part of a widespread or systematic attack directed against a civilian population, as “the nature of terrorist acts is such that they can be included in this category.”⁸³ Yet this is an incredibly dangerous assertion, as it seemingly highlights the scope or magnitude of harm as a relevant consideration in elevating an act to that of international terrorism. To integrate such an insinuation into the definition of the crime could have grave consequences, as technicalities regarding such factors as the number of victims could excuse an attack from being deemed an act of terrorism. As such, the definition of international terrorism should avoid setting any such baseline for harm.

4. Requirement of “Violence”

Many scholars assert that acts of international terrorism possess an element of violence: “Terrorism is premised on the violent attack on life and security”⁸⁴ Traditionally this was often true, and more modern attacks such as those of September 11th have perpetuated this understanding of the crime. However, to require that acts of terrorism possess an element of violence would severely limit the potential scope of the prohibition, and potentially exempt such acts committed “through [the] use of chemical, bacteriological or biological weapons.”⁸⁵ Thus the definition of international terrorism should not be crafted around traditional notions of violence, and should instead emphasize more relevant elements such as the actor’s motivations.

5. Inclusion of Underlying Acts

In defining this crime, M. Cherif Bassiouni first crafted a general chapeau element and then included a list of the following fourteen underlying acts: aggression; war crimes; crimes against humanity; genocide; apartheid; unlawful human experimentation; torture; slavery and slave-related crimes; piracy and other unlawful acts against the safety of maritime navigation; the kidnapping of internationally protected persons including diplomats; the taking of civilian

⁸³ Zeidan, *supra* note 8, at 493.

⁸⁴ Fletcher, *supra* note 68, at 901.

⁸⁵ Paust, *supra* note 61, at 65.

hostages; serious environmental damage; or a serious violation of fundamental human rights.⁸⁶ Many scholars share Bassiouni's inclination to be as specific as possible when defining this crime. However, the inclusion of such a list in the definition of international terrorism would place an unnecessary limitation on the conduct qualifying as acts of terrorism. This would be of particular consequence with regards to this category of crimes, as the means of committing acts of terrorism are continually evolving: "New forms of terrorist acts that develop with the advancement of technology, such as computer hacking, are not specifically included and may fall afoul of the definition."⁸⁷ This would place an enormous burden on the international community:

On a practical level, this means that [the international community would] have to continually revisit the issue of what constitutes terrorism in order to [accommodate] fast-developing instances of bio-terrorism, cyber-terrorism, and the like . . . enforcement agencies need to be able to respond quickly and with certainty to terrorist threats in the knowledge that the scenario they are faced with falls within a general category of 'terrorist acts.'⁸⁸

Thus rather than attaching a list of underlying acts to the crime, the definition of international terrorism should establish only those general elements indicative of terrorism.

C. Recommended Definition

While the specific language departs from more traditional definitions of international terrorism, the text below combines the necessary elements as enunciated by the global community with the practical demands of imposing such a definition. As such, the recommended definition of international terrorism is as follows:

"Conduct consisting of an international element, which is intended by the actor to induce terror, as a means of communicating a political, ideological, racial,

⁸⁶ Tiefenbrum, *supra* note 5, at 382, referencing Bassiouni, *supra* note 64, at 18.

⁸⁷ Tiefenbrun, *supra* note 5, at 382.

⁸⁸ Golder & Williams, *supra* note 6, at 293.

ethnic, or religious message, through the targeting and injury of people including civilians or of property, and where no valid legal justification for the act exists.”

This language serves as a precise classification of the crime but also possesses sufficient fluidity to extend to potential methods of terrorism as yet unseen by the global community.

IV. THE NEED TO DEFINE INTERNATIONAL TERRORISM

In debating whether a definition for international terrorism is truly necessary, the U.S. response to September 11th serves as the ideal case study. In the months that followed, there was a general consensus amongst the global community that the attacks of September 11th constituted acts of international terrorism. Yet any such consensus stopped there, as the global community could not reach any similar agreement as to how the U.S. should respond to the attacks. Given the lack of definitive standards governing state responses to acts of international terrorism, and the nonexistence of an international body to fully govern such matters, the U.S. was left to design its own counterterrorism policies. Such policies enabled an environment of what appeared to be state-sponsored vigilante justice, where the U.S. rejected the application of international human rights standards to be inapplicable and ineffective in its fight in the so-called War on Terror. Instead the U.S. gave itself almost limitless power to severely punish suspects, guided only by whatever brand of justice it was following at the time.

This U.S. response has left the global community with a tragic legacy that it must now address. This responsibility is appropriately vested in the global community, which represents the only entity possessing the authority to assign a universal definition to a crime and to assert and enforce the applicable legal standards attached to such a designation. And this is as it should be, as acts of international terrorism are truly of a global concern and must be monitored by the global community as such. The universality of this crime has only been substantiated in recent

years, as modern terrorist networks continue expanding beyond state borders and utilize methods of brutality that frequently transcend individual state interests. Such developments have necessitated a coordinated international counterterrorism effort, where states have all agreed upon the definition of the crime they seek to combat and the appropriate methods for doing so. A universal definition of the crime facilitates the harmonization of domestic and international laws, and strengthens the collective efforts to prevent and punish acts of terrorism.⁸⁹ As such, the implementation of a universal definition of international terrorism would impact global efforts to combat the crime in three specific spheres: prevention, response, and punishment.

With regards to prevention, “[t]he idea . . . is to refuse to be bullied, while at the same time declining to become a bully.”⁹⁰ Defining the crime of international terrorism clarifies the vision of a legitimate threat upon which the standards of state preventative measures may be based. Such standards would dictate both when and how a state may engage in preventative measures, while providing for the full integration of international safeguards in such measures and determining when the principles of international human rights law and international humanitarian law apply. Thus the custom of allowing preventative action when there exists a “clear appearance of a manifest threat of an attack in the immediate future”⁹¹ would become an actual legal threshold for state action, and states would be more limited in the nature of their

⁸⁹ Soll, *supra* note 13, at 133 (“The major purposes of such a definition would be prevention and punishment, as those are the methods law uses to right wrongs that have occurred, or have yet to occur.”).

⁹⁰ IAN SHAPIRO, *CONTAINMENT: REBUILDING A STRATEGY AGAINST GLOBAL TERROR* 37 (Princeton Univ. Press 2007).

⁹¹ Dr. Terry Gill, Univ. of Amsterdam & Netherlands Def. Acad., Guest Lecture at T.M.C. Asser Institute (June 2, 2010).

response. As such, “it becomes imperative for the worldwide legal community to develop uniform legal standards as the basis of dealing with this problem.”⁹²

Asserting a universal definition of international terrorism would be similarly beneficial when terrorist acts have already occurred and a state is poised not to take preventative action, but responsive action instead. A deeper understanding of the crime enables the global community to craft responsive policies that will be both effective and compliant with a state’s legal and moral responsibilities: “During any permissible use of armed force, there are some tactics and forms of treatment that are criminally proscribed. The same point pertains with respect to antiterrorism efforts of a state.”⁹³ Thus in the aftermath of such attacks, a state can look to the principles of international law for guidance in crafting an appropriate response, while the global community has a basis for supervising such efforts and intervening when necessary.

Such a process also shapes and ensures the response of states other than the direct target: “The fact that states . . . have a universal obligation to respect and observe human rights in all social contexts is important when one considers the legality or illegality of certain responses to terrorism . . . [particularly in light of state action or failure to act].”⁹⁴ History has revealed that while states may be far too enthusiastic in responding to attacks against its own citizens, they are also exceedingly hesitant to engage in the counterterrorism efforts of another government. Yet citing to a recent terrorist attack does nothing to compel foreign cooperation, as “[u]sing ‘terrorism’ to win the support of other nations can backfire unless you have a definition you are willing to apply consistently.”⁹⁵ In defining the crime of international terrorism, states can no longer avoid their obligation to act by simply arguing that an attack was not consistent with their

⁹² Soll, *supra* note 13, at 124.

⁹³ Paust, *supra* note 61, at 60.

⁹⁴ *Id.* at 67.

⁹⁵ Kinsley, *supra* note 1.

understanding of terrorism. If “[w]e cannot agree on the nature of the threat to our security,”⁹⁶ then there is no hope of establishing a system of international cooperation with regards to response efforts; yet the definition of the crime provides a basis for encouraging such cooperation and of again dictating the legal standards of such efforts.

Finally, the international community cannot prosecute the perpetrators of such acts without first establishing terrorism as a definitive crime within its legal system. The challenge in doing so was demonstrated by the Nuremberg trials after World War II:

Just as it existed for the Nazi war criminals, a defense for terrorists is almost obvious. The doctrine of *nullum crimen sine lege* (no crime without law) is the most obvious defense should any terrorist be captured and brought to justice . . . the issue, once a suspect is brought to trial, would be that while we can say that person did something wrong, we cannot adequately define what that wrong was. The solution for Nuremberg was to create the crimes⁹⁷

The international legal system is built upon the principles of legality, which is embodied in two distinct legal tenets: that of *nullum crimen sine lege* (“no crime without a law”), and that of *nulla poena sine lege* (“no penalty without a law”). These principles prohibit the application of ex post facto laws and “require[] that the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offense and distinguishes it from conduct that is either not punishable or is punishable by other penalties.”⁹⁸ As such, the international community has no lawful basis for prosecuting perpetrators of terrorism until the crime itself is defined in precise and unambiguous terms.

The sad truth is that the attacks of September 11th were not the only major acts of terrorism during that decade. This suggests that acts of terrorism will continue to be part of the

⁹⁶ Fletcher, *supra* note 68, at 897.

⁹⁷ Soll, *supra* note 13, at 133.

⁹⁸ Jean-Paul Laborde & Michael DeFeo, *Problems and Prospects of Implementing UN Action Against Terrorism*, 4 J. INT’L CRIM. JUST. 1087, 1089 n. 5 (2006).

landscape of international conflicts, thus revealing why a definition of the crime is so critical: “The events of September 11 and the terrorist attacks in Bali, Madrid and elsewhere, in producing what has been called the ‘Age of Terror’, have rendered moot the debate about whether we should endeavour to legally define the term.”⁹⁹ While the risk of future attacks no longer seems as imminent as in the immediate days following such attacks, now is not the time for the international community to become complicit about defining this crime. As “it is clearly necessary to develop a coherent legal description of terrorism,”¹⁰⁰ the international community must persevere with its efforts to define the crime such that it will be better positioned to govern future methods of prevention and response.

V. IMPLEMENTING A DEFINITION OF INTERNATIONAL TERRORISM

Terrorism is among the oldest categories of crime in international law, dating back to the first century.¹⁰¹ Since then, legal scholars have toiled to create a functional definition of the act. Despite the vast body of resources tracking such efforts, the international community has of yet failed to craft such a definition. While legal scholars persist in their efforts, they have yet to critically examine their methodologies for potential flaws. However, a revision of such methods may foster a more functional process in which a universal definition of international terrorism could more easily be attained. It seems that the international community attaches too many tasks to the creation of a definition of terrorism. As such, scholars often seek not only to define the

⁹⁹ Golder & Williams, *supra* note 6, at 271.

¹⁰⁰ *Id.*

¹⁰¹ See M. Cherif Bassiouni, *Assessing “Terrorism” into the New Millennium*, 12 DEPAUL BUS. L.J. 1, 1 (1999-2000) (“Two thousand years ago, the *Zealots Sicarii* assassinated Roman citizens in Judea, and in particular in Jerusalem, in order to bring an end to their colonial rule.”); Tom Sherman, *Terrorism—A Disease in Search of a Cure*, 8 JAMES COOK U.L. REV. 4, (2001) (“Scholars have identified precursors of modern terrorist groups in the *sicarii*, a religious sect of zealots who fought Roman occupation in Palestine in 66-73 AD and the Assassins, a Muslim sect which operated in the Islamic world between the eleventh and thirteenth centuries.”).

crime of international terrorism, but also to determine the applicable laws and principles to preventing, combating, and punishing such acts.

This is a seemingly overwhelming task, and may elucidate the reasons that all efforts to define terrorism have been unsuccessful; this relates to the aforementioned concept that the international community cannot know how to combat the crime of terrorism until it knows what this crime entails:

[W]ithout a consensus about what terrorism means and without a commonality of values, some states prefer to keep the definition of terrorism in multilateral and domestic legislation as vague and ambiguous as possible. This will not prove to be an effective response to terrorism. Indeterminacy in the law, brought about by a vague or nonexistent definition of terrorism, can result in the multiplicity of interpretation and the instability of the legal system.¹⁰²

Accordingly, the global community should narrow the scope of its efforts to focus solely on defining and implementing a universal definition of this crime.

The U.N. has largely monopolized the process of defining this crime in recent years, especially given its efforts to create a comprehensive convention on international terrorism. However, the international community may benefit from moving this process to a new venue designed to better promote voluntary state participation, such as that modeled after the drafting process of the Voluntary Principles on Security and Human Rights [the Voluntary Principles].¹⁰³ The drafting process for the Voluntary Principles began in 2000, when the U.S. and United Kingdom [U.K.] governments identified a deficit in international law of principles addressing the intersection of business and human rights. The U.S. and the U.K. engaged other state

¹⁰² Tiefenbrun, *supra* note 5, at 386.

¹⁰³ The Voluntary Principles on Security and Human Rights (Dec. 20, 2000), *available at* <http://www.voluntaryprinciples.org/principles/introduction>.

governments, non-governmental organizations, and business organizations in a “dialogue on security and human rights,”¹⁰⁴ the content of which was used to draft the Voluntary Principles.

The implementation of these Principles provides valuable guidance for a restructured forum for defining international terrorism. The strength of these Principles is that they are voluntary; parties willing chose to both engage in the drafting process and adopt the final provisions as asserted. While some may argue that a voluntary process cannot encourage broad international participation, the history of the Principles suggests this is not the case: while just two governments initiated the dialogue on this issue, seven states, nine non-governmental organizations, three organizations with observer status, and eighteen companies had voluntarily signed on to the Principles by June 2011.¹⁰⁵ The Principles also establish a baseline for customary practice in this field, thus providing guidance for even non-parties and shaping future business relations in the international realm. Finally, the drafting and implementation of the Principles was an incredibly timely process, as drafting began in March 2000 and the Principles were finalized just nine months later, in December 2000.¹⁰⁶

Assuming a similar process for the adoption of a universal definition of international terrorism might transfer similar benefits, as well. States, operating independently of the U.N.,

¹⁰⁴ *Id.*

¹⁰⁵ State parties include Canada, the Netherlands, Norway, the Republic of Colombia, Switzerland, the U.K., and the U.S.; non-governmental organizations include Amnesty International, The Fund for Peace, Human Rights Watch, Human Rights First, International Alert, IKV Pax Christi, Oxfam, Pact, and Search for Common Ground; organizations with observer status include the International Committee of the Red Cross, the International Council on Mining and Metals, and the International Petroleum Industry Environmental Conservation Association; and business organizations include AngloGold Ashanti, Anglo American, Barrick Gold Corporation, BG Group BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Copper and Gold, Hess Corporation, Marathon Oil, Newmont Mining Corporation, Occidental Petroleum Corporation, Rio Tinto, Shell, Statoil, and Talisman Energy.

Id.
¹⁰⁶ *Id.*

could open a dialogue on the definition of the crime and those general principles related to prevention and response. Once participating states agreed upon a definition, they could sign on to the principles and integrate the definition of terrorism in their domestic systems. This would similarly establish a baseline for the definition and principles related to international terrorism, even for those states that do not participate in the drafting process. This would also serve as a starting point for international bodies such as the U.N. to begin drafting laws related to the finalized definition of the crime. Moving away from the politicization of the U.N. might foster greater state participation in this process, and encourage states to make greater concessions with the definition. If states desire greater formality in the drafting process but prefer operating away from the U.N., “[a] second option is to add another multinational convention to the list that would clearly define the term and apply certain jurisdictional principles to the crime.”¹⁰⁷

Of course, the international community may prefer waiting upon the final Draft Convention of the U.N., which by November 2010 had asserted the following definition of international terrorism:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹⁰⁸

¹⁰⁷ Soll, *supra* note 13, at 168.

¹⁰⁸ Draft International Convention on the Suppression of Terrorism, U.N. GAOR, 65th Sess., U.N. Doc. A/C.6/65/L.10 (Nov. 3, 2010).

There are obvious advantages to keeping this process with the U.N., such as the natural inclusion of a policing body and its apparent dedication to drafting a convention. However, the U.N. should also consider updating its methods to better confront the challenges it has repeatedly encountered. For example, the General Assembly should implement a firm deadline for the creation of the Draft Convention, and require that the Ad Hoc Committee meet more frequently to better accommodate this time constraint. Again, the U.N. should also refocus its attention to the definition of the crime rather than any secondary issues.

Finally, the definition of international terrorism should be brought to International Criminal Court [ICC] for its inclusion in the Rome Statute. While the U.N. has some power to regulate state conduct, it is the ICC that may prosecute individual perpetrators for violations of international criminal law. Yet the international community currently lacks a forum in which perpetrators of this crime may be brought to justice, instead relying on states to engage in such prosecutions and to faithfully apply international law. Instead, the ICC should be granted the capacity to supervise such trials once the definition of the crime has been asserted.

VI. CONCLUSION

Chief among President Bush's strategic responses to September 11th was his decision to frame the incident as an act of international terrorism. In doing so, President Bush struck a different fear in the heart of his nation—one of further imminent, widespread, and violent attacks. As a result President Bush ensured both domestic and international support for his so-called "counterterrorism" tactics, even those that blatantly disregarded such basic international obligations as the prohibition of torture and the protection of due process rights. Such tactics had immensely negative effects that "crippled American military readiness; exposed vulnerabilities in training, equipment and force structure; and accelerated terrorist recruitment. In short,

although the United States has not been directly hit since 9/11, we are less safe as a result of the Bush administration's rhetoric, conduct and strategy."¹⁰⁹

There is little question that the attacks of September 11th constituted acts of terrorism. But the U.S. response to these attacks reveals the inherent challenges stemming from the application of this label. This is an area of international law that is plagued by uncertainty: uncertainty regarding the meaning of "terrorism," uncertainty regarding the appropriate methods of prevention and response, and uncertainty regarding if and how the perpetrators of such acts may be prosecuted. The dilemma here lays in the fact that "defining terrorism [entails the] risk . . . of taking positions."¹¹⁰

Yet that is the role of the international community; it is meant to take such positions to ensure that states' and individuals' fundamental rights remain intact. Here the global community has failed in its duty, thus enabling a dangerous ambiguity with regards to one of the world's most devastating crimes. The remedy is clear: the global community must look to those commonly cited elements to implement a universal definition of international terrorism. For until such action has been taken, there can be no hope of successfully combating a crime without a name.

¹⁰⁹ Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, available at <http://www.nytimes.com/2007/07/29/books/review/Power-t.html>.

¹¹⁰ Zeidan, *supra* note 8, at 491.