

**TERRORISM AS A VIOLATION OF THE “LAW OF
NATIONS:” *FINALLY OVERCOMING THE DEFINITIONAL
PROBLEM***

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ABSTRACT

Despite historic controversy over the definition of terrorism, international consensus has gradually emerged condemning terrorist acts as a violation of the “law of nations.” Until recently, there has been uncertainty over whether terrorism can be considered a violation of customary international law. While there has generally been widespread condemnation of the concept of terrorism, international agreements to punish it have not been extensively adhered to principally because of an inability to agree on a definition of the offense. This historic and persistent problem has unnecessarily prevented the recognition of an international proscription on terrorism. However, international law evolves over time. In the 1990s, the international community’s condemnation of terrorism finally became unequivocal and an international norm prohibiting terrorism has crystallized since September 11th. This article highlights recent developments under U.S. and international law which indicate the establishment of a fundamental world consensus that terrorism, however defined, violates the “law of nations.”

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I. INTRODUCTION

Despite historic controversy over the definition of terrorism, international consensus has gradually emerged condemning terrorist acts as a violation of the “law of nations.” Until recently, there was uncertainty over whether terrorism could be considered a violation of customary international law. The Third Restatement of the Law of Foreign Relations only says that “perhaps” certain acts of terrorism are recognized by the community of nations as universal offenses.¹ Several articles over the last two decades have grappled with this issue and advocated for the recognition of terrorism as a violation of the law of nations.² While there has generally been widespread condemnation of the

¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

² See, e.g., Michael J. Bazylar, *Capturing Terrorists in the ‘Wild Blue Yonder’: International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 687–88 (1986) (“[I]nternational law already prohibits nearly all acts of terrorism Moreover, terrorist acts are invariably violations of the international law of human rights . . . [which makes] terrorist activities violations of international law.”); Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169, 205 nn.116–17 & 207 (1987) (advocating for federal common law recognition of terrorism as an international crime defined by modern customary international law and noting “emerging international norms against terrorism”); Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 TOURO J. TRANSNAT’L L. 67, 68 (1991) (“[A]ny violent act against civilians is illegal according to both customary and codified international law.”); Michael Rosetti, Note, *Terrorism as a Violation of the Law of Nations after Kadic v.*

concept of terrorism, international agreements to punish terrorism have not been extensively adhered to, principally because of an inability to agree on a definition of the offense.³ However, international law evolves over time. In the 1990s, the international community's condemnation of terrorism finally became unequivocal and an international norm prohibiting terrorism has crystallized since September 11th.⁴ This article will highlight recent developments under U.S. and international law which indicate a fundamental consensus that terrorism, however defined, violates the "law of nations." Finally recognizing this principle is crucial for fostering the international cooperation necessary to prevent and combat transnational terrorism.

II. THE "LAW OF NATIONS"

International law is comprised of treaties, "custom, as evidence of general practice accepted as law," "general principles of the law recognized by civilized nations," and "judicial decisions and the teachings of the most highly qualified publicists of the various nations."⁵ Customary international law is established by consensus when state practice evinces a belief that certain norms are legally obligatory (*Opinio juris*).⁶ The United States calls customary international law the "law of nations" and U.S. courts have incorporated it into the federal domestic

Karadzic, 12 ST. JOHN'S J. LEGAL COMMENT. 565, 566–67 (1997) (arguing that since war crimes were considered a violation of the law of nations under *Kadic*, by analogy terrorism, which can be considered a war crime, should also be considered a violation of the law of nations); Eileen Rose Pollock, Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 247 (1982) (arguing that since general human rights conventions implicitly condemn terrorist methods, terrorism should be considered a violation of the law of nations).

³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a. (1987).

⁴ ANDREAS LAURSEN, CHANGING INTERNATIONAL LAW TO MEET NEW CHALLENGES: INTERPRETATION, MODIFICATION AND THE USE OF FORCE 132 (2006) ("[A]ll – or almost all – have come to an agreement as to the unconditional illegality of terrorism under international law"); Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 468 (2008) ("[T]he international community has reached a consensus that specific manifestations of terrorism are unlawful regardless of the political context in which they are committed."); *Id.* at 410 ("This trajectory predated, but was expedited by, the attacks of September 11th.").

⁵ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 [hereinafter I.C.J. Statute].

⁶ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4–5 (7th ed. 2008). The term "state practice" is used throughout the article to refer to the conduct of countries in international affairs.

system as common law.⁷ International law was traditionally thought to only govern state conduct, but it has recently expanded to regulate the conduct of individuals under human rights law.⁸

Specifically, the Alien Tort Claims Act (“ATCA”) establishes federal jurisdiction over torts “committed in violation of the law of nations.”⁹ While the ATCA provides jurisdiction, the substantive rules of the law of nations are drawn from customary international law and treaties.¹⁰ ATCA litigation provides a helpful source for the concrete recognition of the development of customary international law,¹¹ and this article will focus on recent cases that illustrate a shift in the status of terrorism under international law. The ATCA has forced U.S. courts to grapple with and identify the outlines of international law as global rules of conduct develop and become more important in our interconnected world.¹² More specifically, the ATCA has allowed federal courts to reaffirm and enforce international norms and evolving world consensus against terrorism.¹³

The U.S. Supreme Court, however, has required “great caution” when recognizing international norms.¹⁴ New private causes of action under the ATCA must be “accepted by the civilized world and defined with a sufficient degree of specificity.”¹⁵ When inquiring about the development of new international norms, U.S. courts are directed to observe current international law,¹⁶ based on international conventions,

⁷ See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[I]nternational law is part of our law . . .”). This article will use the terms “law of nations” and “customary international law” interchangeably.

⁸ Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. Sept.–Oct. 2000, at 102, 102.

⁹ 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

¹⁰ William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 640 (2006).

¹¹ I.C.J. Statute, *supra* note 5, at 1060 (“[J]udicial decisions . . . of the various nations” are “subsidiary means” of international law).

¹² Slaughter & Bosco, *supra* note 8, at 102.

¹³ See, e.g., *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007); Koh, *supra* note 2, at 185, 207 n.125.

¹⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 728–29 (2004). The Supreme Court’s amenability to the recognition of new norms of international law may become more prominent given Justice Kennedy’s affinity for international law and his increasingly influential position as a swing vote.

¹⁵ See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005; *Alvarez-Machain*, 542 U.S. at 725.

¹⁶ *Id.* at 733.

United Nations Security Council resolutions, state practice, commentary by prominent jurists, and other sources for evidence of world consensus.¹⁷

The law of nations evolves as new international norms ripen when state practice changes over time.¹⁸ Traditional violations of the law of nations include: piracy, contravention of safe conducts, and infringement of the rights of ambassadors.¹⁹ However, this list of actionable violations of customary international law has expanded to include: torture,²⁰ genocide, war crimes, and crimes against humanity.²¹ Until recently, it was unclear whether acts of terrorism could be considered crimes or torts in violation of the law of nations.²² However, as opinions about terrorism have changed,²³ a recent ground breaking ATCA decision has finally acknowledged that international condemnation of terrorism is specific enough to recognize terrorism as a violation of the law of nations.²⁴

III. DEFINING TERRORISM

A. HISTORICAL PROBLEM

In the past, an unnecessary focus on definitively defining terrorism has unfortunately precluded the categorization of terrorist acts as a violation of international law. Many scholars argued that an inability to reach consensus on a consistent definition prevented the development

¹⁷ *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174–75 (2d Cir. 2009) (describing the requirements for recognition of a cause of action under the ATCA); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820) (outlining sources for the recognition of the “law of nations”).

¹⁸ *See Alvarez-Machain*, 542 U.S. at 728; *Filartiga v. Pena-Irala*, 630 F.2d 876, 881, 888 (2d Cir. 1980) (“[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”); LAURSEN, *supra* note 4, at 10; *see, e.g., Filartiga*, 630 F.2d at 881–84 (acknowledging that torture has come to be regarded as a violation of the law of nations).

¹⁹ *Alvarez-Machain*, 542 U.S. at 724.

²⁰ *Filartiga*, 630 F.2d at 884–85.

²¹ *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995).

²² John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 317 (2008).

²³ *See, e.g., Jerome J. Shestack, Of Private and State Terror – Some Preliminary Observations*, 13 RUTGERS L.J. 453, 463 (1982) (“[T]he body of international law has grown considerably in recent years, as terrorist outrages have made more states appreciate that self-interest, if nothing else, requires adoption of international legal measures in efforts to control terrorism.”).

²⁴ *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007).

of an intelligible international norm.²⁵ Indeed, it has been difficult to establish an authoritative definition of terrorism.²⁶ Part of the problem is that the meaning of “terrorism” has changed over time,²⁷ and many attempts to reach consensus over a definition of the word have failed. For example, the League of Nations drafted a “Convention for the Prevention and Punishment of Terrorism,” in 1937, following a string of assassinations by separatist movements. However, the treaty never took hold.²⁸

This definitional problem is more than just semantic. The real stumbling block is political, with non-Western countries arguing that national liberation movements’ use of terrorist tactics, in a struggle for self-determination, should be exempt from condemnation and prohibition.²⁹ Throughout the 1970s and 80’s, the United Nations General Assembly (“UN GA”) emphasized this motive-based exemption in its terrorism resolutions.³⁰ All references to terrorism included a standard qualification that “[t]he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with principles of international law.”³¹ Similar efforts to

²⁵ BRUCE HOFFMAN, *INSIDE TERRORISM* 28 (Columbia Univ. Press 1998) (1998).

²⁶ Murphy, *supra* note 2, at 71 (there is an “absence of a uniform international definition of terrorism . . .”).

²⁷ HOFFMAN, *supra* note 25, at 15–28 (highlighting the history of the development of the term terrorism).

²⁸ Convention for the Prevention and Punishment of Terrorism, Nov. 16 1937, 19 LEAGUE OF NATIONS O.J. 233, League of Nations Doc. C.546(I).M.383 1937 V (1938). Only India ratified the Convention, and it was ignored after World War II. *See id.* at 1126; Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT’L L. 69, 69–70 (1974).

²⁹ *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970); G.A. Res. 3314 (XXIX), Annex, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 143–44 (Dec. 14, 1974) (defining aggression, but noting that nothing in the definition of aggression “could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end . . .”).

³⁰ *See, e.g.*, G.A. Res. 2625, *supra* note 29; G.A. Res. 3314, *supra* note 29, at 143–44 (defining “aggression,” but noting that nothing in the definition of “aggression” “could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end . . .”); G.A. Res. 40/61, U.N. GAOR, 40th Sess., U.N. Doc. A/40/61 (Dec. 9, 1985).

³¹ Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103 (XXVIII), U.N. GAOR, 28th Sess., Supp. No.

legitimize and exempt national liberation movements from being considered terrorists were included in the 1977 Geneva Convention Protocol.³²

This position is closely associated with the frequently cited maxim that “one man’s terrorist is another man’s freedom fighter.”³³ This belief has been adopted by many Third World countries to avoid the negative stigma associated with terrorism.³⁴ The developing world argues that labels only depend on perspective and that certain causes justify the use of any type of violence.³⁵ The problem, however, with exempting *all* use of force in pursuit of self-determination or purported justice is that it legitimizes “certain groups nearly universally recognized as terrorists, including the Irish Republican Army, Hezbollah, and Hamas.”³⁶ Proponents of this relativist adage overlook an important moral distinction, that deliberate attacks on innocent civilians can never be considered a legitimate method of freedom fighting, regardless of the motive or underlying justification.³⁷ Moreover, the motive-based approach lacks legal foundation because “the legal evaluation of the conduct of hostilities [*jus in bello*] is an inquiry entirely independent of the legal evaluation of the lawfulness of the resort to armed force [*jus ad*

30, U.N. Doc. A/9030, at 142 (Dec. 12, 1973); G.A. Res 3103, U.N. GAOR, 28th Sess., U.N. Doc. A/9102, at 512 (1973).

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(3)–(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (extending the status of international armed conflict to include: “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”).

³³ See Pollock, *supra* note 2, at 238; Van Schaack, *supra* note 4, at 407 (“[I]nternational instruments condemning terrorism have at times carved out exceptions for putatively legitimate struggles—such as those waged by national liberation movements and groups asserting the right of self-determination—perpetuating the now trite adage that ‘one man’s terrorist is another man’s freedom fighter.’”).

³⁴ HOFFMAN, *supra* note 25, at 26.

³⁵ See e.g., Yasser Arafat, Chairman, Palestine Liberation Org., Speech at the United Nations General Assembly (Nov. 13, 1974) (“The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists, cannot possibly be called a terrorist . . .”).

³⁶ United States v. Yousef, 327 F.3d 56, 107 n.42 (2d Cir. 2003) (per curiam).

³⁷ PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 18 (2003) (“[T]he distinction between terrorism against civilians and warfare (including guerrilla warfare) against an army entails an important moral difference” and “terrorist techniques, in any context, are unacceptable.”); PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY 80 (2003) (“The case will have to be made that no one’s terrorists are ‘freedom fighters’” and that “terrorism [is wrong] wherever it takes place and whomever it targets.”).

bellum].”³⁸ Prohibition of intentional attacks on civilians is a fundamental principle of international law for the use of force.³⁹ Terrorist conduct cannot be excused by invoking opposition to a colonial, racist, alien, occupying, or oppressive regime, and self-determination cannot be used to justify outlawed methods of violence.⁴⁰

At the very least, there is consensus that the label “terrorist” is negative and this has driven convoluted semantic obfuscation to evade pejorative connotations.⁴¹ Terrorist sympathizers not only attempt to avoid the label by exempting national liberation movements, but they also try to recast the problem by projecting the label of terrorism onto their state opponents.⁴² But this distinction ignores the applicability of International Humanitarian Law (“IHL”) to state action and the intentions of parties when civilians are harmed.⁴³ While terrorists deliberately attack civilians, states try to avoid collateral damage to non-combatants and are subject to war crimes violations for inadequate

³⁸ Van Schaack, *supra* note 4, at 465.

³⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 138 [hereinafter Common Article III].

⁴⁰ BENJAMIN NETANYAHU, *FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT THE INTERNATIONAL TERRORIST NETWORK* xxi (2d ed. 2001).

⁴¹ HOFFMAN, *supra* note 25, at 29–30 (“The terrorist . . . will *never* acknowledge that he is a terrorist and moreover will go to great lengths to evade and obscure any such inference or connection.”).

⁴² See, e.g., Report of the Ad Hoc Committee on International Terrorism, U.N. GAOR, 28th Sess., Supp. No. 28, U.N. Doc. A/9028, at 21 (1973) (Terrorist acts are: “(1) [a]cts of violence and other repressive acts by colonial racist and alien regime against people struggling for their liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms; . . . (3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent lives or jeopardize fundamental freedoms. *This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular of national liberations movements*”) (emphasis added); Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT’L L. & POL’Y 653, 656 (2009) (recognizing the “tactical use of characterizing another party as a terrorist . . . [Where] each side labels the other a terrorist, each seeking to justify its own violence while condemning the other’s violence.”); *Id.* at 678 (“[W]eak or failed states and stateless actors view terror as a justified response to a history of terrorism (a series of events resulting in victimization by domination, colonization, hegemonization, and the silencing of dissent). This side, then, views terrorism as perhaps the only available tool against the so-called civilized and powerful nations.”); Lama Abu-Odeh, *A Radical Rejection of Universal Jurisdiction*, 116 YALE L.J. POCKET PART 393, 393–94 (2007) (equating “Palestinian terrorism” with “Israeli terrorism”); HOFFMAN, *supra* note 25, at 30 (“The terrorist will always argue that it is society or the government or the socio-economic ‘system’ and its laws that are the *real* ‘terrorists,’ and moreover that if it were not for this oppression, he would have not felt the need to defend either himself or the population he claims to represent.”).

⁴³ LAURSEN, *supra* note 4, at 112.

discrimination.⁴⁴ There is a fundamental difference between the two types of violence; when states violate IHL they are held accountable, on the other hand, terrorists do not face sanction because they are non-state actors who refuse to be bound by IHL.⁴⁵

This semantic quagmire has been exacerbated “not only by indiscriminate application of the term terrorism but also by politically inspired efforts *not* to apply it.”⁴⁶ The media, recognizing the negative connotations of terrorism, has taken to using other labels to avoid the perception of judgment.⁴⁷ This “slavish devotion to terminological neutrality” and “proclivity towards equivocation” has perpetuated the ambiguity.⁴⁸

Unsurprisingly, the Arab-Israeli conflict has been the invisible motivation behind much of these semantic gymnastics. Arab countries recognize that terrorism carries negative connotation and therefore desire to define terrorism in a way that exempts Palestinian acts of hijacking, hostage taking and suicide bombing against civilians as legitimate “resistance.”⁴⁹ Arab countries label Israel a “colonialist” and “racist regime,”⁵⁰ and argue that the Palestinians have no other means for redress available.⁵¹ For example, in response to the 1972 massacre of Israeli

⁴⁴ U.S. DEP’T OF THE ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE ¶¶ 40–41, 502 (1956).

⁴⁵ HOFFMAN, *supra* note 25, at 34–35; *See also* A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, ¶ 160, U.N. Doc A/59/565 (Dec. 2, 2004), *available at* www.un.org/secureworld (“The search for an agreed definition usually stumbles on two issues. The first is the argument that any definition should include States’ use of armed forces against civilians. We believe that the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling.”).

⁴⁶ PILLAR, *supra* note 37, at 12.

⁴⁷ *See, e.g.*, Michael S. Schmidt, *Iraq Militants Say Violence is to Avenge Bin Laden*, N.Y. TIMES, Aug. 21, 2011, at A11 (using words such as insurgents, fighters and militants to describe the terrorist group Al Qaeda in Mesopotamia).

⁴⁸ HOFFMAN, *supra* note 25, at 37.

⁴⁹ Murphy, *supra* note 22, at 324; *See, e.g.*, International Convention against the Taking of Hostages art. 12, Dec. 17, 1979, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 39, U.N. Doc A/34/136, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205, at 247 [hereinafter Hostage Convention] (exempting “peoples . . . fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”).

⁵⁰ G.A. Res. 3379 (XXX), U.N. GAOR, 13th Sess. (Nov. 10, 1975) (“Zionism is a form of racism”). This is the only UN resolution to ever be revoked. G.A. Res. 46/86, U.N. Doc. A/RES/46/86 (Dec. 16, 1991).

⁵¹ *Cf.* Abu-Odeh, *supra* note 42, at 394–95; Report of the Ad Hoc Committee on International Terrorism, ¶ 24, U.N. Doc. A/9028; GAOR, 28th Sess., Supp. No. 28 (1973) (“[A]s long as governments were free to inflict terror, the only retaliation available to victims would be counter-

athletes at the Munich Olympics, Arab states in the UN GA argued that “people who struggle to liberate themselves from foreign oppression and exploitation have the right to use all methods at their disposal.”⁵² More generally, these countries have attempted to exempt the use of terrorist tactics from outright prohibition because acts of terror are a powerful proxy tool for foreign policy.⁵³ Terrorism offers weaker states the ability to covertly confront more powerful rivals without the risk of retribution.⁵⁴ Terrorist organizations often function as surrogates for patron countries, via receipt of state funding and operational assistance.⁵⁵

The legitimization of international terrorism, and its definitional ambiguity, has been identified by U.S. courts addressing the fallout of terrorism. The Court of Appeals for the District of Columbia relied on this perceived lack of consensus in *Tel-Oren v. Libyan Arab Republic*, to reject the argument that terrorism was a violation of the law of nations.⁵⁶ In the first U.S. case to address civil liability for acts of international terrorism, victims of a Palestinian Liberation Organization attack on a civilian bus in Israel sued under the ATCA for violations of the law of nations.⁵⁷ In a fractured and confusing opinion, the D.C. Circuit dismissed the suit for lack of subject matter jurisdiction.⁵⁸ Judge Edwards famously said:

While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.⁵⁹

terror.”). Terrorists often justify their tactics by arguing that they face a powerful State and lack the resources to fight by the rules. HOFFMAN, *supra* note 25, at 33–34.

⁵² HOFFMAN, *supra* note 26, at 31; Similarly, Syria said “the international community is under legal and moral obligation to promote the struggle for liberation and to resist any attempt to depict this struggle as synonymous with terrorism and illegitimate violence.” *Id.* at 32.

⁵³ John Dugard, *Towards the Definition of International Terrorism*, 67 AM. J. INT’L L. 94, 96–97 (1973).

⁵⁴ HOFFMAN, *supra* note 26, at 27; REZA KAHLILI, A TIME TO BETRAY: THE ASTONISHING DOUBLE LIFE OF A CIA AGENT INSIDE THE REVOLUTIONARY GUARDS OF IRAN 247 (2010).

⁵⁵ NETANYAHU, *supra* note 40, at xiii; KAHLILI, *supra* note 54, at 247.

⁵⁶ 726 F.2d 774, 795 (D.C. Cir. 1984).

⁵⁷ *Id.* at 776 (Edwards, J., concurring).

⁵⁸ See *id.* at 775–98; *id.* at 798–823 (Bork, J., concurring); *id.* at 823–27 (Robb, J., concurring); Koh, *supra* note 2, at 180 n.44; for a thorough review of the three judges differing opinions see Van Schaack, *supra* note 4, at 386–87.

⁵⁹ *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring).

In concurrence, Judge Bork held that the ATCA was merely a grant of jurisdiction which did not create any causes of action, but went on to say that the attacks cannot be considered a violation of the law of nations because “there is little or no consensus . . . on how properly to define ‘terrorism’ generally” due to disagreements over “politically sensitive issues.”⁶⁰ Judge Robb preferred to avoid the issue as a nonjusticiable political question.⁶¹ The *Tel-Oren* court ultimately concluded that terrorist attacks could not be considered a violation of current international law due to a lack of international consensus.⁶²

Unfortunately, *Tel-Oren* focused on efforts to legitimize the use of terrorism by national liberation movements and ignored the emerging position of unequivocal condemnation.⁶³ For many years *Tel-Oren* prevented terrorism victims from litigating under the ATCA⁶⁴ and inhibited the development of an international norm against terrorism.⁶⁵ Even today the motive-based exemption continues to plague efforts to define terrorism and condemn recourse to certain tactics, like intentional attacks on civilians, as unacceptable regardless of circumstance.

B. PROBLEM PERSISTS

Scholars still emphasize that there is no internationally accepted definition of terrorism.⁶⁶ This is mainly due to lingering normative

⁶⁰ *Id.* at 806–08 (Bork, J., concurring).

⁶¹ *Id.* at 823 (Robb, J., concurring) (“[I]nternational ‘law’, or the absence thereof, renders even the search for the least common denominators of civilized conduct in this area [defining and punishing acts of terrorism] an impossible-to-accomplish judicial task. Courts ought not to engage in it when that search takes us towards a consideration of terrorism’s place in the international order. Indeed, when such a review forces us to dignify by judicial notice the most outrageous of the diplomatic charades that attempt to dignify the violence of terrorist atrocities, we corrupt our own understanding of evil.”).

⁶² *Id.* at 795 (Edwards, J., concurring).

⁶³ For example, New Zealand argued that “no cause, however just, and no end, however worthy, can justify the terrorist in taking or risking the lives of innocent and unsuspecting people.” U.N. Secretary-General, *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVI)*, ¶ 15, U.N. Doc. A/AC.160/2 (June 22, 1973).

⁶⁴ Van Schaack, *supra* note 4, at 387; Koh, *supra* note 2, at 208.

⁶⁵ Koh, *supra* note 2, at 208–09 (“[*Tel-Oren*] retarded the development of a transnational norm recognizing an individual human right to live free from terrorism” and prevented “transnational public law litigation from playing a substantial role in encouraging the development of domestic and international norms against terrorism.”).

⁶⁶ Acharya, *supra* note 42, at 657; Douglas R. Burgess, Jr., *Hostis Humani Generis: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293, 330 (2006) (“[N]o universal definition of terrorism can ever be agreed upon; for states and lawyers will battle ceaselessly over what constitutes a ‘legitimate’ insurgency on the one hand, and what is an

ambivalence about the legality of resorting to violent tactics in certain political contexts.⁶⁷ The cliché of “one man’s terrorist is another man’s freedom fight” is still a prevalent retort,⁶⁸ and many argue that this ideological debate continues to thwart recognition of international consensus on terrorism.⁶⁹

Some U.S. courts continue to emphasize the definitional impasse outlined in *Tel-Oren*. For example, in the criminal context, the Second Circuit recently stated that, “customary international law currently does not provide for prosecution of ‘terrorist’ acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism.”⁷⁰ The court noted that “we regrettably are no closer . . . to an international consensus on the definition of terrorism or even its proscription” and there is still “strenuous disagreement among States about what actions do or do not constitute terrorism.”⁷¹ The court concluded that there was an “absence of agreement on basic terms among a large number of States that terrorism violates public international law.”⁷² This perspective has been reiterated in the civil suit context where a district court recently relied heavily on *Tel-Oren* in concluding that “politically motivated terrorism has not reached the status of a violation of the law of nations.”⁷³ Another court noted that “[t]he law is seemingly unsettled with respect to defining terrorism as a violation of the law of nations.”⁷⁴ However, as

‘ordinary’ crime on the other.”); HOFFMAN, *supra* note 26, at 39 (noting that scholars and experts “are equally incapable of reaching a consensus”); John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISR. Y.B. ON HUM. RTS. 13, 16, 20–21, 31 (1990) (focusing on the difficulty of developing a universal definition of terrorism).

⁶⁷ Van Schaack, *supra* note 4, at 407 (highlighting “historically tepid international commitment to condemn all acts of terrorism in all circumstances.”).

⁶⁸ *United States v. Yousef*, 327 F.3d 56, 107 (2d Cir. 2003) (per curiam) (“[N]or have we shaken ourselves free of the cliché that ‘one man’s terrorist is another man’s freedom fighter.’”).

⁶⁹ Burgess, *supra* note 66, at 297 (“The hackneyed adage that ‘one man’s terrorist is another man’s freedom fighter’ renders any attempt at definition virtually impossible, dividing states on ideological lines . . .”).

⁷⁰ *Yousef*, 327 F.3d at 97; *Id.* at 106 (“Unlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now have fairly precise definitions and that have achieved universal condemnation, ‘terrorism’ is a term as loosely deployed as it is powerfully charged.”).

⁷¹ *Id.* at 107.

⁷² *Id.* at 106–07.

⁷³ *Saperstein v. Palestinian Auth.*, No. 1:04-cv-20225-PAS, 2006 WL 3804718, at *7 (S.D. Fla. Dec. 22, 2006).

⁷⁴ *Mwani v. Bin Ladin*, No. CIV A 99-125 CKK, 2006 WL 3422208, at *3 n.2 (D.D.C. Sept. 28, 2006).

international law evolved over time, these courts failed to address significant developments in international norms proscribing terrorism after the *Tel-Oren* decision.⁷⁵ *Tel-Oren* has become obsolete as customary international law changed following widespread terrorist attacks such as the September 11th attack on the World Trade Center.⁷⁶

Despite recent changes in consensus, commentators continue to focus on the absence of an agreed upon definition as the central impediment to creating a coherent international approach for combating terrorism.⁷⁷ Commentators argue that a legitimate and singular definition

⁷⁵ Van Schaack, *supra* note 4, at 399 (“The extensive codification of terrorism crimes since *Tel Oren* at the international and domestic levels” makes *Tel-Oren*’s analysis irrelevant); *Id.* at 410 (“Since the D.C. Circuit rendered the *Tel-Oren* decision in 1984, however, the phenomenon of terrorism and efforts to prohibit it have gained significantly greater prominence in international law.”); *See, e.g., Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (noting that courts must interpret international law “as it has evolved and exists among the nations of the world today.”); *cf. Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1092 (D.C. Cir. 2011) (“The relevant events between 1984 and today not only do not change our decision from the one entered in *Tel-Oren*, but support a continuation of that precedent.”). In *Ali Shafi*, the court noted that, “[i]n 2011 it remains the case that appellants have shown us no consensus” that torture by private actors violates international law. *Id.* at 1096.

⁷⁶ *See* Rosetti, *supra* note 2, at 585, 592 (“Now that terrorism has hit the United States with much greater frequency, a decision like the one in *Tel-Oren* might be decided differently.”); Van Schaack, *supra* note 4, at 468 (“[A] much greater consensus about the contours of the international prohibition against terrorism exists today as compared with the time at which *Tel-Oren* was decided.”); Ralph G. Steinhardt, *Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585, 596 (2004) (“[I]n the twenty years since *Tel-Oren* was decided, and especially in the aftermath of September 11th attacks, the law of nations has developed”); *See, e.g., Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) (recognizing the significant shift in international opinion on terrorism since *Tel-Oren* and concluding that terrorism is now a violation of the law of nations).

⁷⁷ Nathan A. Canestaro, “*Small Wars*” and the Law: Options for Prosecuting Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 117 (2004) (“Terrorism, like insurgency, is beset by problems of political subjectivity. Although these issues have done little to impede individual nations from prosecuting those individuals they regard as terrorists, it has effectively prevented international law from playing any major role.”); Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 DENV. J. INT’L L. & POL’Y 221, 246 (2008); Murphy, *supra* note 2, at 78–79 (“The lack of any international agreement on a definition of terrorism makes it difficult, if not impossible, to obtain consistent, and therefore, deterrent judgments in extradition proceedings.”); Jordan J. Paust, *Terrorism: A Definitional Focus*, in TERRORISM: INTERDISCIPLINARY PERSPECTIVES 18 (1977) (noting that definitional problems have precluded international condemnation); Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FISA and the Act of State Doctrine*, 23 VA. J. INT’L L. 191, 193–94 (1983) (“[T]he efforts of the international community to control terrorism can be hampered by inadequate definitional frameworks.”); Rosetti, *supra* note 2, at 586–87 (arguing that defining terrorism is necessary to establish norm of international law); Van Schaack, *supra* note 4, at 407 (“A primary hurdle to invoking the ATS in the terrorism context remains the problem of definition.”).

of terrorism is necessary to establish a comprehensive prohibition.⁷⁸ Indeed, there is still some uncertainty over what the precise definition of terrorism should be.⁷⁹ For example, drafters of the International Criminal Court (“ICC”) statute did not include the crime of terrorism in the treaty due to a perceived lack of consensus for a clear definition and the inability to discern a clear rule of customary international law to make terrorism a universal crime.⁸⁰

As late as 1991, the UN GA terrorism resolutions reiterated the legitimacy of national liberation movements.⁸¹ Furthermore, African,⁸² Arab,⁸³ and Islamic⁸⁴ countries continue to advocate for an exemption of

⁷⁸ Joseph Isanga, *Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary International Law from U.N. Resolutions*, 37 DENV. J. INT’L L. & POL’Y 233, 233 (2009) (“The effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. However, the absence of such agreement to date has, *inter alia*, thwarted efforts aimed at adopting comprehensive international, legally-binding instrument regarding international terrorism.”).

⁷⁹ For a collection of various definitions of terrorism see *United States v. Yousef*, 327 F.3d 56, 107 n.42 (2d Cir. 2003) (per curiam); Murphy, *supra* note 2, at 83 n.49; HOFFMAN, *supra* note 26, at 38–39; The U.S., for example, has many definitions for terrorism. Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249–70 (2004).

⁸⁰ Van Schaack, *supra* note 4, at 422–23; see also Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 31 (1999) (discussing a lack of agreement among states in defining crimes of terrorism); While the International Criminal Court (“ICC”) declined to officially recognize the crime of terrorism in 1998, this decision is up for review. Van Schaack, *supra* note 4, at 425. Notably, in light of a dramatic shift in consensus, terrorism may be included in the court’s jurisdiction as a crime of serious international concern. *Id.* at 426; Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 FORDHAM INT’L L.J. 750, 761 (2002) (arguing that terrorist attacks can, and should, be includable as an international crime under the ICC’s jurisdiction).

⁸¹ G.A. Res. 46/51, at 284–85, U.N. Doc. A/RES/46/51 (Dec. 9, 1991) (“[Reaffirming] the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle legitimately to this end and to seek and receive support in accordance with the principles of the Charter . . .”); Canestaro, *supra* note 77, at 118 n.268.

⁸² Organization of African Unity, *Convention on the Prevention and Combating of Terrorism* art. 3(1) (July 14, 1999), available at <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf> [hereinafter OAU Convention] (proclaiming that the struggle for “liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.”).

⁸³ Arab Convention on the Suppression of Terrorism art. 2(a), Apr. 22, 1998, available at <http://treaties.un.org/doc/db/Terrorism/OAU-english.pdf> [hereinafter Arab Convention] (“Any act committed in a situation of a struggle by any means, including the armed struggle against foreign occupation and aggression, for liberation and self-determination, according to the principles of international law is not to be considered a crime. Those acts taken in defense of the soil unity of any Arab state are also not to be considered crimes.”); *Yousef*, 327 F.3d at 107 n.42 (noting that the Arab Convention craftily does not exempt the armed struggle of national liberation movements directed at the territorial integrity of an Arab State).

all violence in pursuit of self-determination. In our post-colonial world, the apparent focus of this gridlock continues to be the Arab-Israeli conflict.⁸⁵ While the foreign ministers at the Islamic Conference on Terrorism condemned acts of international terrorism, they rejected “any attempt to link terrorism to the struggle of the Palestinian people.”⁸⁶ These states continue to refuse to outright condemn indiscriminate attacks on civilians, so long as the state agrees with the underlying political agenda.⁸⁷ Unfortunately, the motive-based exception continues to perpetuate considerable confusion in establishing a definitive definition of terrorism.⁸⁸

IV. A COMPREHENSIVE DEFINITION OF TERRORISM IS UNNECESSARY

While many scholars continue to argue that defining the word terrorism is required for the establishment of a norm of international law, the definitional debate is purely academic and political. For too long the argument has obscured widespread agreement over fundamental norms.⁸⁹ The minutiae of addressing outlying difficult cases should not prevent the recognition of core offenses, upon which the international community

⁸⁴ Organisation of the Islamic Conference Convention on Combating International Terrorism art. 2(a), July 1, 1999, *available at* <http://www.oicun.org/7/38/> [hereinafter Islamic Convention] (“Peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.”).

⁸⁵ Van Schaack, *supra* note 4, at 464 n.349 (“Given the demise of most relationships of colonialism and the practice of apartheid, the occupation of the Palestinian Territories by Israel presents the primary concern in this regard.”).

⁸⁶ Kuala Lumpur Declaration on International Terrorism art. 7, Apr. 3, 2002, *available at* www.oic-oci.org/english/conf/fm/11_extraordinary/declaration.htm; *Yousef*, 327 F.3d at 106 n.41.

⁸⁷ Van Schaack, *supra* note 4, at 464 n.349 (“[C]ertain segments of the international community are unwilling to entirely condemn the resort to armed force in the face of putatively unjust situations of foreign domination.”); *Id.* at 465 (“Nonetheless, states in these regional treaties continue to justify the actions of unprivileged belligerents that might otherwise be deemed to be war crimes or acts of terrorism with reference to the justness of the cause on behalf of which they are committed. Indeed, there remains a deep-seated unwillingness within segments of the international community to fully relinquish the idea that certain forms of otherwise prohibited violence are legitimate if they are employed in opposition to a colonial, racist, alien, occupying, or oppressive regime by a group seeking independence or self-determination.”).

⁸⁸ *See Yousef*, 327 F.3d at 107 n.42.

⁸⁹ Mark A. Drumbl, *Transnational Terrorist Financing: Criminal and Civil Perspectives*, 9 GER. L.J. 933, 934 (2008) (noting that the debate over national liberation movements is just “a possible *exception* to the criminalization of terrorism, rather than a disagreement regarding terrorism’s core proscription.”).

has already agreed. An unnecessary focus on the semantics of the label “terrorism” should no longer preclude acknowledgement by the international community that certain methods of expressing political aspirations are unacceptable, regardless of the purported righteousness of the cause.⁹⁰

Despite the fact that this definitional impediment still lingers today, developments in the international community indicate a gradual formation of consensus for a definitive prohibition of terrorism.⁹¹ Moreover, lack of agreement on a precise definition need not preclude the acknowledgement that the general concept of terrorism is a violation of the law of nations.⁹² At the very least, there is a collective abhorrence against specific acts, such as deliberate attacks on innocent civilians, hostage taking and aircraft hijacking.⁹³ While there may be uncertainty at the margins, there is sufficient international agreement suggesting the existence of a specific, identifiable, uncontroversial and universal prohibition on terrorism.⁹⁴

A. CONSENSUS HAS EMERGED FOR A BASIC DEFINITION OF TERRORISM

While there may never be a comprehensive definition of terrorism, there is widespread agreement on a core definition.⁹⁵ Terrorism

⁹⁰ PILLAR, *supra* note 37, at 18 (arguing that international law is “an effort to civilize the manner in which political contest is waged.”).

⁹¹ Van Schaack, *supra* note 4, at 385; LAURSEN, *supra* note 4, at 130 (“[B]road consensus today exists concerning what qualifies as a terrorist act and that the once formidable problem of NLOs has passed away.”).

⁹² See Murphy, *supra* note 22, at 324 (“The failure of the world community to agree on a definition of international terrorism for purposes of a comprehensive convention on the subject should not be a bar” to suits under the ATCA for violations of the law of nations.); Pollock, *supra* note 2, at 259–60 (“The lack of a universal definition of terrorism does not bar a conclusion that terrorism is a violation of the law of nations because there exists a consensus among nations that terrorism is an offense that must be prevented and punished.”).

⁹³ Koh, *supra* note 2, at 205 n.116 (“[E]ven assuming no international consensus condemning ‘terrorism,’ as that term is broadly defined, does an international consensus nevertheless condemn an organized and deliberate attack upon innocent civilians without a collateral military target . . . ?”).

⁹⁴ Van Schaack, *supra* note 4, at 408; *Id.* at 478 (“Doctrinal fuzziness at the margins . . . should not bar the recognition of a universal prohibition against most manifestations of terrorism in the majority of circumstances.”).

⁹⁵ See, e.g., PILLAR, *supra* note 37, at 15 (“[D]espite . . . collective definitional angst” there is a “mainstream” “modest international consensus” which “has evolved on the subject, at least the further one gets from large multi-lateral debating halls and the closer to rooms where practical cooperation takes place.”); Drumbl, *supra* note 89, at 933–34; Reuven Young, *Defining*

can be characterized by two basic elements: 1) the use of illegitimate means, such as deliberate targeting of innocent civilians; 2) for a political purpose.⁹⁶ Most importantly, the legitimacy of the underlying motive is irrelevant to the core definition.⁹⁷

In fact, the UN has essentially adopted this general understanding for a definition of terrorism in recent conventions.⁹⁸ For example, the International Convention for the Suppression of the Financing of Terrorism (“Financing Convention”) definition incorporates specific offenses already outlined in other treaties, such as hijacking and hostage taking, but more importantly it includes a catch-all broad definition of terrorism:

[A]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain.⁹⁹

B. DISREGARD LABEL AND FOCUS ON FINITE CONDUCT

Ultimately, agreement on a comprehensive definition of terrorism is irrelevant because certain conduct is clearly and universally condemned as terrorism.¹⁰⁰ Consensus for a definitional framework based

Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation, 29 B.C. INT’L & COMP. L. REV. 23, 23 (2006) (arguing that by abstracting from common elements and themes in UN resolutions and treaties there is a core international law definition of terrorism); It is probably unnecessary to establish a comprehensive definition of terrorism because just like Justice Potter Stewart’s famous approach to pornography, one knows it when they see it. PILLAR, *supra* note 37, at 16–17; *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁹⁶ Rosetti, *supra* note 2, at 589.

⁹⁷ See Murphy, *supra* note 2, at 92 (“[P]olitics as a basis for any definition of terrorism should be rejected and one should return to the basic assumption that any use of criminal force to coerce is improper, without exception.”); Shestack, *supra* note 23, at 463 (arguing that international law should “expose and help separate legitimate aims from illegitimate means . . .”).

⁹⁸ LAURSEN, *supra* note 4, at 127–28.

⁹⁹ International Convention for the Suppression of the Financing of Terrorism art. 2(1)(b), *opened for signature* Jan. 10, 2000, T.I.A.S. No. 3075, 2178 U.N.T.S. 197 [hereinafter *Financing Convention*].

¹⁰⁰ Bazzyler, *supra* note 2, at 687 (“[I]nternational law already prohibits nearly all acts of terrorism.”); Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FISA and the Act of State Doctrine*, *supra* note 77, at 194 (“[N]early all forms of terrorism involve conduct that is already proscribed by international law.”).

on finite conduct is widespread.¹⁰¹ Certain concrete acts—such as hijacking or sabotage of civilian aircraft and vessels, taking hostages, intentional targeting of protected persons, extra judicial killings, and torture—clearly violate customary international law.¹⁰² Support for any of these actions is also clearly prohibited under international law. This finite conduct approach to terrorism helps overcome the definitional stalemate by avoiding subjective political motives and focusing on objective actions.

In a recent ATCA decision, *Almog v. Arab Bank*, a U.S. District Court utilized this approach and held that it need not “resolve any definitional disputes as to the scope of the word ‘terrorism’ [to find that] the acts alleged by plaintiffs violated a norm of international law, however labeled.”¹⁰³ The court determined that financing suicide bombers in Israel clearly violated international law, as outlined in the International Convention for the Suppression of Terrorist Bombings (“Bombing Convention”),¹⁰⁴ the Financing Convention,¹⁰⁵ the Geneva Conventions, and UN resolutions.¹⁰⁶ The court concluded that “in light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population . . . such conduct violates an established norm of international law.”¹⁰⁷ The *Almog* decision correctly captures the seminal shift in international consensus since *Tel-Oren* and provides a clear indicator of the emergence of customary international law prohibiting terrorist tactics and support of terrorism.¹⁰⁸

¹⁰¹ See, e.g., Geoffrey Levitt, *International Cooperation in the Prevention and Suppression of Terrorism*, 80 AM. SOC’Y INT’L LAW PROC. 386, 397 (1986) (arguing for definitional framework focused on specific acts); *United States v. Arjona*, 120 U.S. 479, 488 (1887) (“Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.”).

¹⁰² See *infra* Part V.a.

¹⁰³ 471 F. Supp. 2d, 257, 280 (E.D.N.Y. 2007).

¹⁰⁴ International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1998, S. TREATY DOC. NO. 106–6, 2149 U.N.T.S. 256 [hereinafter Bombing Convention].

¹⁰⁵ Financing Convention, *supra* note 99.

¹⁰⁶ *Almog*, 471 F. Supp. 2d at 276–81. The court rejected the age old argument that struggles for self-determination are exempt from the ban on terrorism. *Id.* at 281.

¹⁰⁷ *Id.* at 284.

¹⁰⁸ Drumbi, *supra* note 89, at 942 (“[T]he *Arab Bank* judgment does justice to the many important legal developments regarding the proscription of terrorism that have taken place in the 24 years since *Tel Oren* was decided.”).

Other U.S. courts have also opted to avoid the thorny label of “terrorism,” by focusing instead on finite conduct.¹⁰⁹ For example, in *United States v. Yousef*, the U.S. Second Circuit held that planting a bomb on a civilian aircraft “whether it is termed ‘terrorist’—constitutes the core conduct proscribed by [international law under] the Montreal Convention.”¹¹⁰ Other U.S. courts have also acknowledged that intentional attacks on civilians,¹¹¹ and diplomatic personnel¹¹² can be considered an independent violation of international law, regardless of whether the actions are labeled terrorism. Similarly, courts have recognized that hijacking a civilian aircraft, or taking hostages, are also well-established violations of international law.¹¹³ Ultimately, it is unnecessary to resolve the definitional dispute over the scope of the word

¹⁰⁹ See *United States v. Yousef*, 327 F.3d 56, 98 n.30 (2d Cir. 2003) (per curiam); See also, *Filaritiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (“For although there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture.”).

¹¹⁰ *Yousef*, 327 F.3d at 97–98; The Montreal Convention proscribes attacks on and attempts to damage aircraft. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; See also *United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000) (“[I]nternational law recognizes stopping terrorism and piracy on (or above) the high seas as an interest of all nations, an interest strong enough to give the Greek courts jurisdiction [to prosecute the aircraft bombings.]”).

¹¹¹ See, e.g., *Biton v. Palestinian Interim Self-Gov’t Auth.*, 510 F. Supp. 2d 144, 147 (D.D.C. 2007) (“[T]he conduct at issue here—intentionally bombing a bus load of school children—is ‘terrorism’ by any measure, alleged ambiguities in international law notwithstanding.”); *Almog*, 471 F. Supp. at 285 (concluding that Palestinian attacks on civilians were a violation of the law of nations despite the absence of an agreed-upon definition of “terrorism.”); *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 166 (D.D.C. 2006) (holding that an armed attack on a civilian bus violates “established norms of warfare and armed conflict under international law.”); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (recognizing deliberate attacks on civilians as violation of international law).

¹¹² See, e.g., *Mwani v. Bin Laden*, 417 F.3d 1, 4, 14 n.14 (D.C. Cir. 2005) (holding that the bombing of embassies and diplomatic personnel is a clear violation of the law of nations because it directly infringed on the rights of ambassadors); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 113 (D.D.C. 2005) (describing the bombing attacks on the United States Embassy in Lebanon in 1983 as “clearly contrary to the precepts of humanity as recognized in both national and international law” (citing *De Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980))).

¹¹³ See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1091–92 (D.C. Cir. 1991) (recognizing hostage taking and aircraft hijacking as crimes, clearly condemned under the law of nations); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (holding that aircraft hijacking is a violation of the law of nations); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99–100 (D.D.C. 2003) (“[A]ircraft hijacking is generally recognized as a violation of international law . . .”).

“terrorism.” Rather, the issue is whether the alleged conduct, however labeled, violates international law.¹¹⁴

V. SOURCES FOR INTERNATIONAL LAW PROHIBITION OF TERRORISM

As customary international law has developed over time, courts look to treaties, UN resolutions, state practice, domestic legislation, and the work of international law scholars to determine the current parameters of the law of nations.¹¹⁵ These sources provide evidence of international consensus.¹¹⁶ In our globalized world, norms can develop fairly quickly based on multilateral treaties and consensus in international forums, like the UN GA.¹¹⁷ For example, the International Court of Justice recently recognized genocide as a crime under customary international law based on the Genocide Convention and UN resolutions.¹¹⁸ Commentators look to these sources to discern the development of new international norms.¹¹⁹

A. TREATIES

International treaties are an important source of evidence for the development of customary international law.¹²⁰ The international community has promulgated a vast array of treaties condemning different

¹¹⁴ *United States v. Arjona*, 120 U.S. 479, 488 (1887) (“Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.”); *Almog*, 471 F. Supp. 2d at 280 (“[T]he pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled.”).

¹¹⁵ See I.C.J. Statute, *supra* note 5, art. 38(1)(b); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (concluding that courts should determine “the current state of international law, looking to those sources we have long, albeit cautiously, recognized”); *The Paquete Habana*, 175 U.S. 677, 700 (1900); See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980) (looking through international law sources and finding consensus that torture is prohibited).

¹¹⁶ See *Filartiga*, 630 F.2d at 882–83; BROWNIE, *supra* note 6, at 4–5.

¹¹⁷ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758 (2001).

¹¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 161 (Feb. 26).

¹¹⁹ See, e.g., Isanga, *supra* note 78, at 255 (arguing that based on UN resolutions and domestic courts consensus “a customary rule has emerged which places on States a positive obligation to respect human rights in taking counter-terrorism measures.”).

¹²⁰ See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, 41–43 (Feb. 20); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 273 (E.D.N.Y. 2007);

types of terrorism and recognizing terrorism as an international crime.¹²¹ These treaties represent a collective effort to discourage terrorist methods. International efforts to address terrorism were initially piecemeal, usually in response to high-profile terrorist incidents, and only delineating specific crimes.¹²² These early treaties only prohibited specific acts such as aircraft hijacking,¹²³ hostage taking,¹²⁴ attacks on international airports,¹²⁵ sea vessels,¹²⁶ oil platforms,¹²⁷ and internationally protected persons like diplomats.¹²⁸ Other early terrorism related treaties established international requirements to prevent nuclear terrorism,¹²⁹ and facilitated investigation of terrorist attacks.¹³⁰

However, more recently, two treaties have addressed the issue of terrorism more thoroughly. The Bombing Convention was negotiated in the aftermath of the 1998 U.S. Embassy bombings in Kenya and Tanzania.¹³¹ Soon thereafter, the UN promulgated the Financing Convention.¹³² These two treaties reaffirm, reinforce, and unify the other terrorism related treaties. Furthermore, the Financing Convention expanded the scope of protection by providing punishment for aiding and abetting the various offenses outlined in previous terrorism treaties.¹³³

¹²¹ Van Schaack, *supra* note 4, at 410; Acharya, *supra* note 42, at 661.

¹²² Van Schaack, *supra* note 4, at 409.

¹²³ 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 [hereinafter Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Hijacking Convention]; Montreal Convention, *supra* note 110.

¹²⁴ Hostage Convention, *supra* note 49.

¹²⁵ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. No. 100-19, 1589 U.N.T.S. 474.

¹²⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. No. 101-1, 1678 U.N.T.S. 201.

¹²⁷ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. No. 101-1, 1678 U.N.T.S. 201.

¹²⁸ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, *adopted* Dec. 9, 1994, U.N.T.S. 363.

¹²⁹ Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; International Convention for the Suppression of Acts of Nuclear Terrorism, *opened for signature* Sept. 14, 2005, 2445 U.N.T.S. 89.

¹³⁰ Convention on the Marking of Plastic Explosives for the Purposes of Detection, *opened for signature* Mar. 1, 1991, S. TREATY DOC. No. 10-8, 2122 U.N.T.S. 359.

¹³¹ Bombing Convention, *supra* note 104.

¹³² Financing Convention, *supra* note 99.

¹³³ See Van Schaack, *supra* note 4, at 414-16.

Most of the terrorism treaties have widespread acceptance, indicating a high degree of international consensus.¹³⁴ Indeed, there was a huge surge in ratification of these treaties in the aftermath of September 11th.¹³⁵ While some of the early treaties in the 1980s reflected historic ambivalence about the legitimacy of certain violent acts in certain political contexts, the motive-based exemptions have been gradually abandoned as a less politicized prohibition has emerged.¹³⁶ The more recent Bombing and Financing Conventions unequivocally condemn terrorism as “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”¹³⁷ Most importantly, the majority of the ratifying states of the Bombing and Finance Conventions, objected to attempts to make a reservation exempting resistance for self-determination.¹³⁸

Similar regional pacts reinforce the development of an international norm prohibiting terrorism. European countries have ratified several Conventions on the Suppression of Terrorism,¹³⁹ which focus solely on the method of violence ignoring any attempts to justify or exempt conduct based on motives behind the attack.¹⁴⁰ The Organization

¹³⁴ *Id.*; The Bombing Convention has been ratified by 164 Member States as of October 2, 2011 and the Financing Convention has been ratified by 173 Member States as of October 2, 2011. Security Council Counter-Terrorism Committee, *International Counter-Terrorism Legal Instruments*, UN, <http://www.un.org/sc/ctc/laws.html> (last visited October 2, 2011).

¹³⁵ LAURSEN, *supra* note 4, at 108–09 n.25.

¹³⁶ Van Schaack, *supra* note 4, at 410; The stalemate based on the exemption for national liberation movements supported by Arab countries was broken in the early 1990s when North African countries became the victims of terrorism and the Soviet Union fell. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 25–27 (1999). This shift has become more pronounced as countries such as Iraq, Afghanistan and Pakistan have been ravaged by terrorism.

¹³⁷ Financing Convention, *supra* note 99, art. 6; Bombing Convention, *supra* note 104, art 5.

¹³⁸ Van Schaack, *supra* note 4, at 416–17. Not surprisingly, the countries were Pakistan, Egypt, Jordan and Syria, but they included the important caveat that the pursuit of self-determination must comply with international law which can implicitly exclude terrorist tactics. *Id.*; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 282 n.28 (E.D.N.Y. 2007); European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93; Agreement on the Application of the European Convention for the Suppression of Terrorism, Dec. 4, 1979, 19 I.L.M. 325 (1980); Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm>.

¹³⁹ Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm>.

¹⁴⁰ See, e.g., Council Framework Decision 475/2002, on Combating Terrorism, art. 1, 2002 O.J. (L 164) 3, 4 (EU) (prohibiting “(a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place

of American States,¹⁴¹ Commonwealth countries,¹⁴² and South Asian states¹⁴³ have all adopted similar conventions to combat terrorism. Even African,¹⁴⁴ Arab,¹⁴⁵ and Islamic¹⁴⁶ countries have recognized a general proscription of terrorism, albeit with exemptions for national liberation movements not affecting their territorial sovereignty, and with the important caveat that the pursuit of self-determination be in accordance with principles of international law.¹⁴⁷

Additionally, the Geneva Conventions on the “law of war” explicitly prohibit the use of terrorist tactics.¹⁴⁸ For example, the distinction principle prohibits intentional targeting of civilians.¹⁴⁹ The Fourth Geneva Convention explicitly prohibits “all measures . . . of

or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; and (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life”).

¹⁴¹ Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance art. 1, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 191 (“[T]o prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults”); Inter-American Convention Against Terrorism arts. 4–6, June 3, 2002, S. TREATY DOC. No. 107–18 (aiming to eradicate financing of terrorism).

¹⁴² Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, *available at* <http://treaties.un.org/doc/db/Terrorism/csi-english.pdf>.

¹⁴³ South Asian Association for Regional Co-operation, Regional Convention on Suppression of Terrorism, Nov. 4, 1987, *reprinted in* United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism*, *available at* <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>.

¹⁴⁴ OAU Convention, *supra* note 82.

¹⁴⁵ Arab Convention, *supra* note 83.

¹⁴⁶ Islamic Convention, *supra* note 84.

¹⁴⁷ These treaties require that the use of force be “in accordance with international law;” likely not insulating terrorists targeting of civilians. Van Schaack, *supra* note 4, at 464 n.345.

¹⁴⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Van Schaack, *supra* note 4, at 431 (“Many of these crimes involve the same conduct that often constitute acts of terrorism, such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, and the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully . . .”).

¹⁴⁹ LAW OF WAR HANDBOOK 166 (MAJ Keith E. Puls ed., 2005); Protocol I, *supra* note 32, art. 48 (“Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

terrorism against civilians.”¹⁵⁰ Moreover, the additional Protocols to the Geneva Conventions reiterate this explicit protection for civilians.¹⁵¹ While these rules only directly apply during official armed conflict between signatory states, they have developed into fundamental norms, binding on the whole international community. At the very least, Common Article III of the Geneva Conventions universally requires the protection of noncombatants, even by non-signatories and during non-international armed conflict.¹⁵²

B. UN RESOLUTIONS

UN resolutions echo this convergence on a customary norm prohibiting terrorism.¹⁵³ Security Council (“UN SC”) resolutions under Chapter VII of the UN Charter are binding international law.¹⁵⁴ UN GA resolutions, while non-binding, can be “powerful and authoritative” declarations of existing international custom.¹⁵⁵ Specifically, UN resolutions have been used by U.S. courts¹⁵⁶ and international courts¹⁵⁷ as

¹⁵⁰ Geneva IV, *supra* note 148, art. 33(1).

¹⁵¹ Protocol I, *supra* note 32, art. 51(2) (“[C]ivilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (“[C]ivilian population[s] as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); Id. art. 4(2)(d) (prohibiting “acts of terrorism” against all persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted.”).

¹⁵² See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 83 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (announcing framework for adjudicating war crimes in non-international armed conflicts); *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 278–79 (E.D.N.Y. 2007) (applying common article 3 to terrorist attacks).

¹⁵³ Van Schaack, *supra* note 4, at 430 (“[T]here is a high degree of congruence between the prohibitions contained within treaties and authoritative pronouncements by the United Nations . . .”).

¹⁵⁴ See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 167 (2d Cir. 2003).

¹⁵⁵ See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992); *Bodner v. Banque-Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248, 255 (D.N.J. 1999); Isanga, *supra* note 78, at 242 (noting that non-binding resolutions serve an evidentiary function); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 102, cmt. c. (1987) (discussing how GA resolutions can indicate *opinio juris* for a rule of customary international law).

¹⁵⁶ *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 126 (E.D.N.Y. 2005) (“A General Assembly resolution, even though not binding, may provide some evidence of customary international law when it is unanimous (or nearly so)”); See, e.g., *Filártiga v. Peña-Irala*,

evidence of the “law of nations.” While consensus on terrorism at the UN has historically been lacking,¹⁵⁸ recently there has been a significant shift in rhetoric.¹⁵⁹

Within the past twenty years, the UN SC has unequivocally recognized terrorism as a crime and a threat to international peace and security.¹⁶⁰ The UN SC has forcefully stated that “acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians.”¹⁶¹ The UN SC has also encouraged the adoption of existing anti-terrorism treaties.¹⁶² In the landmark UN SC Resolution 1373, adopted unanimously in the wake of September 11th, the UN SC reaffirmed that international terrorism poses a “threat to international peace and security” and acting under Chapter VII of the UN Charter, the UN SC

630 F.2d 876, 882–84 (2d Cir. 1980) (relying on UN resolutions as evidence of customary international prohibition of torture); *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 279–80 (E.D.N.Y. 2007) (relying on UN resolutions as evidence of customary international prohibition of terrorist acts).

¹⁵⁷ See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 128–29 (Dec. 19); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 254 (July 8) (“General Assembly resolutions . . . can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinion juris . . .”).

¹⁵⁸ For a thorough history of the UN attempts to address terrorism see LAURSEN, *supra* note 4, at 105–37.

¹⁵⁹ See Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT’L L. 307, 350 (2009) (“[T]he UN stands historically united in the area of terrorism and the efforts to combat this global problem.”).

¹⁶⁰ See, e.g., S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (unequivocally condemning the September 11th attacks, and all international terrorism, as a threat to international peace and security; calling on members to help bring the perpetrators to justice through increased cooperation and implementation of relevant anti-terrorism conventions); S.C. Res. 1267, ¶ 4(b), pmbl., U.N. Doc. S/RES/1267 (Oct. 15, 1999) (freezing assets controlled by the Taliban and declaring the “conviction that the suppression of international terrorism is essential for the maintenance of international peace and security.”); S.C. Res. 731, pmbl., U.N. Doc. S/RES/731 (Jan. 21, 1992) (“[Recognizing] the right of all States . . . to protect their nationals from acts of international terrorism that constitute threats to international peace and security.”).

¹⁶¹ See, e.g., S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (reaffirming that terrorism is a criminal act which is “under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”); S.C. Res. 1456, pmbl., U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1269, ¶ 1, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (unequivocally condemns “all acts, methods, and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed.”).

¹⁶² See, e.g., S.C. Res. 1456, ¶ 2, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1269, ¶ 2, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

required all UN members to criminalize the financing of terrorism, freeze terrorist assets, deny terrorist safe havens, and bring terrorists to justice.¹⁶³ The binding nature of the resolution effectively reaffirmed a universal international law prohibiting not just terrorist acts, but also the underlying finance and support of terrorism.¹⁶⁴ This clear conviction prohibiting terrorism has been unambiguously reiterated by the UN SC.¹⁶⁵ These subsequent resolutions confirm a fundamental definition of terrorism, based on offenses already outlined in treaties (i.e. hijacking and hostage taking), while also including a broader catch-all component that prohibits attacks against civilians with the political purpose to provoke a state of terror to intimidate or compel action.¹⁶⁶

¹⁶³ S.C. Res. 1373, ¶¶ 1–3, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁶⁴ U.N. Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, ¶ 77, delivered to the General Assembly, U.N. Doc A/60/825 (Apr. 27, 2006), available at <http://www.un.org/unitingagainstterrorism> (“[A]ll States should ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts are established as serious criminal offences in domestic laws and regulations.”); S.C. Res. 1822, ¶ 1, U.N. Doc. No. S/RES/1822 (June 30, 2008) (expanding the list of targeted individuals beyond al Qaeda to associated “individuals, groups, undertakings and entities”); Strauss, *supra* note 159, at 340 (noting that SC resolutions “effectively established an international public policy in support of unified financial methods against terrorism.”).

¹⁶⁵ See, e.g., S.C. Res. 1624, pmbl., ¶ 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005) (“Condemning in the strongest terms all acts of terrorism irrespective of their motivation,” as well as the incitement to such acts and calling on member states to prohibit by law incitement to commit terrorist acts, prevent such incitement, and deny safe haven to any perpetrators); S.C. Res. 1535, pmbl., U.N. Doc. S/RES/1535 (Mar. 26, 2004) (reaffirming that “terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security”); S.C. Res. 1456, pmbl., U.N. Doc. S/RES/1456 (Jan. 20, 2003) (“[T]errorism in all its forms and manifestations constitutes one of the most serious threats to peace and security; any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians; measures to detect and stem the flow of finance and funds for terrorist purposes must be urgently strengthened; [a]ll States must take urgent action to prevent and suppress all active and passive support to terrorism . . . [to] bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens”); See generally *Security Council Actions to Counter Terrorism*, UN, <http://www.un.org/terrorism/securitycouncil.shtml> (last visited Oct. 15, 2011).

¹⁶⁶ See, e.g., S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004); The GA has also essentially agreed to this consensus definition. U.N. Secretary-General, *High Level Panel on Threats, Challenges and Change to Assess Threats to International Peace and Security*, ¶ 164(d), delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High Level Panel*], available at <http://www.un.org/secureworld/> (“[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566, 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.”).

Until recently, UN GA resolutions were the main impediment to the establishment of a consensus.¹⁶⁷ However, despite the loophole for resistance movements, the UN GA has always declared that terrorism should be considered a crime.¹⁶⁸ The UN GA overcame the impasse by finally looking beyond the motives-based exemption for national liberation movements and consensus dramatically shifted to unequivocal condemnation of terrorism regardless of its cause.¹⁶⁹ This change in rhetoric took place over time as the UN GA finally removed the language exempting national liberation movements and strengthened its condemnation of terrorism as a crime, regardless of the actor's intentions.¹⁷⁰ For example, in 2004 the UN GA stated that it "strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable wherever and by whomever committed" and reiterated "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

¹⁶⁷ Yoram Dinstein, *Terrorism and Wars of Liberation Applied to the Arab-Israeli Conflict: An Israeli Perspective*, 3 *ISR. Y.B. ON HUM. RTS.* 78, 87 (1973) (noting that originally the "[A]tmosphere in the United Nations [was] not conducive to a strong stand against terrorism.").

¹⁶⁸ See, e.g., G.A. Res. 44/29, U.N. Doc. A/RES/44/29 (Dec. 4, 1989); G.A. Res. 42/159, pmbl., U.N. Doc. A/RES/42/159 (Dec. 7, 1987) (condemning international terrorism and encouraging efforts to eliminate "this criminal scourge"); G.A. Res. 40/61, pmbl., U.N. Doc. A/RES/40/61 (Dec. 9, 1985) (recognizing the importance of international conventions addressing terrorism and encouraging law enforcement measures against the crime of terrorism); G.A. Res. 34/145, ¶ 11, U.N. Doc. A/RES/34/145 (Dec. 17, 1979) (calling upon states to work together to prevent and combat terrorism through exchange of info and treaties for extradition and prosecution).

¹⁶⁹ LAURSEN, *supra* note 4, at 11; See, e.g., Opening Statement By the President of the 61st Session of the General Assembly, Opening Statement to Launch the UN Global Counter-Terrorism Strategy (Sept. 19, 2006), <http://www.un.org/ga/president/61/statements/statement20060919b.shtml> ("[W]e, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated."); High Level Panel, *supra* note 168, ¶ 157 ("[We must give] an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes."); High Level Panel, *supra* note 168, ¶ 160 ("[T]here is nothing in the fact of occupation that justifies the targeting and killing of civilians.").

¹⁷⁰ LAURSEN, *supra* note 4, at 116–17 ("[B]ased on the developments in the resolutions from the GA, particularly during the 1990's, it is possible today, as opposed to ten years ago, to state without reservations that no justification, struggle for self-determination or other, exists for employing terrorism."); This shift is exemplified by a change in the title of the terrorism agenda item from: "Measures to prevent international terrorism which endanger or take innocent human lives or jeopardize fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical change" to just: "Measures to eliminate international terrorism." G.A. Res. 46/51, U.N. Doc. A/RES/46/51 (Dec. 9, 1991).

considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”¹⁷¹ The UN GA has called upon states to “take all necessary and effective measures . . . to prevent, combat and eliminate terrorism . . . [and] strengthen, where appropriate, their legislation to combat terrorism.”¹⁷² This shift clearly signals the emergence of customary international law unequivocally condemning terrorism regardless of motive.¹⁷³

C. STATE PRACTICE

State practice emanating from a sense of legal obligation is one of the most revealing sources of customary international law.¹⁷⁴ The global effort to freeze terrorists’ assets following September 11th is a significant collective indicator of an international norm prohibiting terrorism.¹⁷⁵ Charges for terrorist financing have been brought in many countries.¹⁷⁶ Over 120 countries have modified their domestic laws to proscribe supporting terrorists as a crime and over 170 countries have participated in freezing terrorists’ assets worldwide.¹⁷⁷ For example, the

¹⁷¹ G.A. Res. 58/81, ¶¶ 1–2 U.N. Doc. A/RES/58/81 (Jan. 8, 2004); see also World Summit Outcome, G.A. Res. 60/1, ¶ 81, U.N. Doc. A/Res/60/1 (Oct. 24, 2005) (“[S]trongly condemning terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.”); G.A. Res. 55/158, ¶ 2, U.N. Doc. A/RES/55/158 (Jan. 30, 2001); G.A. Res. 54/110, ¶¶ 1–2, U.N. Doc. A/RES/54/110 (Feb. 2, 2000); G.A. Res. 51/210, ¶ 2, U.N. Doc. A/RES/51/210 (Jan. 16, 1997); G.A. Res. 51/210, ¶ 3, U.N. Doc. A/RES/51/210 (Dec. 17, 1996) (“[Acts] intended or calculated to provoke a state of terror in the general public . . . for political purposes are in any circumstance unjustifiable.”); Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, annex, ¶ 3, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) (“[Condemning] 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 . . . whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”).

¹⁷² G.A. Res. 56/160, ¶ 6, U.N. Doc. A/RES/56/160 (Feb. 13, 2002); see also G.A. Res. 61/40, U.N. Doc. A/RES/61/40 (Dec. 4, 2006) (discussing measures to eliminate terrorism).

¹⁷³ See Acharya, *supra* note 39, at 667 (“It is crystal clear that the General Assembly (majority view of the international community) has, with its series of resolutions, determined that terrorism is a crime.”).

¹⁷⁴ See, e.g., *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶¶ 41–42, 44 (Feb. 20).

¹⁷⁵ See Strauss, *supra* note 152, at 352 (arguing that collective efforts to freeze terrorist assets show that “the international community shares a strong commitment to fight terrorism in its myriad manifestations.”).

¹⁷⁶ Drumbl, *supra* note 89, at 937.

¹⁷⁷ See Bill Steigerwald, *Bankers vs. Terrorists*, PITTSBURGH TRIB.-REV., Jan. 28, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/opinion/halfpagebooks/s_490515.html; Press

U.S. has issued several executive orders,¹⁷⁸ under the International Emergency Economic Powers Act,¹⁷⁹ to freeze the assets of terrorist organizations. This unified endeavor is considerable evidence of an international norm for universal condemnation of terrorism.¹⁸⁰

Moreover, there have been widespread official pronouncements that denounce terrorist tactics outright regardless of motives.¹⁸¹ At the 2005 World Summit there was unprecedented consensus condemning terrorism without reservations.¹⁸² Even the traditionally obstinate Non-Aligned Movement recently condemned “all acts, methods and practices of terrorism as unjustifiable whatever the considerations or factors that

Release, U.S. Dep’t of State, Shutting Down Terrorist Financial Networks (Dec. 4, 2001), *available at* http://usinfo.state.gov/is/Archive_Index/Shutting_Down_Terrorist_Financial_Networks.html.

¹⁷⁸ Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (1995) (Bill Clinton designated several organizations as terrorists, including Hamas, and blocked their assets); Exec. Order No. 13,224, 66 C.F.R. § 49,079 (2001) (George W. Bush designated several Islamic charities and Middle Eastern financial institutions as terrorists and blocked their assets); See generally, CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT’L L. 849 (2009); See, e.g., *Holy Land Found. v. Ashcroft*, 33 F.3d 156, 167 (D.C. Cir. 2003) (upholding the executive authority to designate groups as terrorist organizations).

¹⁷⁹ International Emergency Economic Powers Act, 50 U.S.C. § 1701–07 (2000).

¹⁸⁰ See generally JOHN B. TAYLOR, *GLOBAL FINANCIAL WARRIORS: THE UNTOLD STORY OF INTERNATIONAL FINANCE IN THE POST-9/11 WORLD* (2007); *United States v. Yousef*, 327 F.3d 56, 106 n.41 (2d Cir. 2003) (per curiam) (noting that Malaysian Prime Minister Mahathir Mohamad proposed a definition of terrorism as “all attacks on civilians”).

¹⁸¹ See, e.g., *Proposals For Reform of the Military Commissions System: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Before the Committee on the Judiciary House of Representatives*, 111th Cong. 108–110 (2009) (testimony of Steven A. Engel, Assistant Attorney General) (“[I]t cannot be denied that acts of terrorism themselves constitute a violation of international law and, when associated with armed conflict, a war crime. U.N. security council resolutions condemn terrorism and require that all States criminalize it, and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, the murder of innocent civilians, and other acts of terrorism.”); Susilo Bambang Yudhoyono, President of Indonesia, *How to let Islam and the West Live in Harmony*, *THE ECONOMIST*, Nov. 13, 2009, at 66 (“An Islamic renaissance will do much to alter the misperception among some Muslims that they are victims of global injustice. It will also help to reduce terrorism to what it really is: a crime that is neither a holy war nor a struggle for justice.”); *Terrorism Issue Splits Muslim Conferees*, *CHI. TRIB.*, Apr. 2, 2002, at 10 (The Deputy Foreign Minister of Bosnia-Herzegovina stated that “if a person kills or harms a civilian . . . he is a terrorist” irrespective of the “race or religion” of the perpetrator and the victims.); Anatoly Safonov, Special Representative of the President of Russia, *Understanding Terrorism*, *N.Y. TIMES*, Apr. 23, 2010 (“[T]errorism, whatever clothes it wears, or of whatever gender, is always a crime punishable by law and cannot be justified for any reason. This is recognized by the entire world community and affirmed by the U.N. Security Council and General Assembly.”).

¹⁸² Strauss, *supra* note 159, at 350.

may be invoked to justify them.”¹⁸³ This shift in consensus will continue as more and more innocent people become victims of indiscriminate terrorist attacks. Beyond mere declarations, countries all over the world have taken concrete action to prohibit, prevent and punish terrorism.¹⁸⁴

D. DOMESTIC LEGISLATION

Widespread acceptance of rules in domestic law can be evidence of the development of international norms and “general principles of law recognized by civilized nations.”¹⁸⁵ Domestic codification of proscriptions of terrorism signal acceptance of emerging international norms or give rise to consensus for the foundation of new principles.¹⁸⁶ Most countries have adopted domestic legislation forbidding terrorism and support of terrorism, especially in the wake of UN SC Resolution 1373.¹⁸⁷

U.S. law, in particular, closely tracks and incorporates current international norms. In this regard, U.S. domestic legislation can provide a litmus test for the state of customary international law. Indeed, many domestic laws implement international obligations under various treaties and customary international law.¹⁸⁸ The U.S. Constitution authorizes Congress to “define and punish . . . Offences against the Law of Nations.”¹⁸⁹ Congress has outlawed specific terrorist acts, such as hijacking, hostage taking, and attacks on protected persons, by reference

¹⁸³ Ministerial Meeting of Co-Ordinating Bureau of the Non-Aligned Movement, Final Document 22–23, ¶ 93, Apr. 29, 2002, available at <http://www.nam.gov.za/minmeet/dbncob.pdf> (The Non-Aligned Movement is a voting bloc of states that tried not to take sides at the UN during the Cold War).

¹⁸⁴ Pollock, *supra* note 2, at 247 (“[S]ufficient international consensus has been demonstrated for terrorism to be deemed a violation of the ‘law of nations’ based on a uniformity of purpose in seeking to prevent and punish acts of terrorism.”); For example: the United States efforts against al-Qaeda in Afghanistan, India’s response to Kashmiri terrorism, Russia’s response to Chechnyan terrorism, Indonesia’s response to Jemaah Islamiyah terrorism, and Israel’s response to Palestinian terrorism. See LAURSEN, *supra* note 4, at 126–27.

¹⁸⁵ Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060 TS No. 933, at 30.

¹⁸⁶ Van Schaack, *supra* note 4, at 430.

¹⁸⁷ Strauss, *supra* note 159, at 347–48 (“[T]he domestic laws of the vast majority of member states reflect and, indeed, embody the UN’s counter-terrorism goals and objectives.”); see, e.g., Can. Crim. Code, R.S.C. 1985, C-46, § 83.01(1)(b)(ii)(E) (1985), amended by S.C. 2001, c. 41 (Can.); LEY ORGÁNICA DEL PODER JUDICIAL (Law on the Judiciary) [L.O.P.J.] art. 23.4 (Spain) (providing for universal jurisdiction over the undifferentiated crime of terrorism).

¹⁸⁸ Paust, *supra* note 77, at 214; For a discussion of terrorism related U.S. legislation, see Strauss, *supra* note 159, at 311–14, 327–36.

¹⁸⁹ U.S. CONST. art. I, § 8, cl. 10.

to the “law of nations” and international obligations.¹⁹⁰ In the Antiterrorism and Effective Death Penalty Act of 1996, Congress explicitly invoked its power to define and punish violations of the law of nations, when it proscribed the provision of material support to foreign organizations engaged in terrorist activity.¹⁹¹ Similarly, in the Military Commissions Act Congress noted that it was only codifying existing offenses under international law.¹⁹² The Military Commissions Act includes the typical discrete terrorism offenses, such as intentional attacks on civilians, taking hostages, hijacking aircrafts or vessels, and the use of human shields,¹⁹³ but it also includes a general offense for terrorism and its support.¹⁹⁴

In 1990, the U.S. enacted the Anti-Terrorism Act (“ATA”) to provide a civil remedy of treble damages to American victims of international terrorism.¹⁹⁵ The ATA defines terrorism as violent acts intended to intimidate or coerce a civilian population,¹⁹⁶ and lists several specific manifestations of terrorism.¹⁹⁷ The Act also recognizes secondary liability for material support or financing of terrorism.¹⁹⁸ Similarly, the

¹⁹⁰ See, e.g., The Aircraft Sabotage Act, 18 U.S.C. § 37 (1996) (referring to acts of violence against people at airports and destroying airport facilities); Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (1996); The Act for Protection of Foreign Officials and Official Guests of the United States and Internationally Protected Persons, 18 U.S.C. § 112 (1985).

¹⁹¹ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, § 301(a)(2), 110 Stat. 1214, 1247 (1996).

¹⁹² Military Commissions Act, 10 U.S.C. § 950p (2006).

¹⁹³ *Id.* § 950v(b).

¹⁹⁴ *Id.* § 950v(b)(24) (defining terrorism as intentional killing or infliction of bodily harm of protected persons to influence or affect the conduct of government or civilian population, by intimidation or coercion); *Id.* § 950v(b)(25) (defining support offense as providing material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism).

¹⁹⁵ Federal Courts Administration Act of 1992, Pub. L. No. 102–572, § 1003, 106 Stat. 4522 (codified as amended at 18 U.S.C. §§ 2331, 2339, 2333). The Act was repealed in 1991 but reenacted with a different title in 1992. For a detailed discussion of the development of the Act see Murphy, *supra* note 22, at 322–28.

¹⁹⁶ 18 U.S.C. § 2331(1) (2001).

¹⁹⁷ 18 U.S.C. § 2332b(a) (2008); 18 U.S.C. § 2332(f) (2006) (providing penalties for unlawfully delivering, placing, discharging, or detonating an explosive in a public place).

¹⁹⁸ 18 U.S.C. § 2339B (2009) (prohibiting knowingly providing material support for terrorist organizations); 18 U.S.C. § 2339C (2006) (providing punishment for anyone who, directly or indirectly, unlawfully and willfully provides or collects funds with intent or knowledge that the funds will be used to cause death or serious injury to a civilian, to intimidate a population, or to compel a government or international organization to do or to abstain from doing any act); see, e.g., *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1015 (7th Cir. 2002) (recognizing aiding and abetting liability); *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 580 (E.D.N.Y. 2005).

Foreign Sovereign Immunities Act ("FSIA") has been amended to allow for private suits against state sponsors of terrorism for acts of torture, extrajudicial killing, aircraft hijacking and sabotage, hostage taking, and provision of material support for such acts.¹⁹⁹

E. SCHOLARS

Scholarly commentary on the state of international law is a secondary source for discerning the development of customary norms.²⁰⁰ International law develops over time and commentators have cataloged significant change within the past twenty years.²⁰¹ Despite lingering definition problems, there is now near unanimity that specific acts of terrorism are forbidden under international law.²⁰² Most importantly, the political obstacle of exemption for national liberation movements has been overcome.²⁰³ Current scholarly commentary reflects and supports the development of international consensus that terrorism is a universal violation of customary international law.²⁰⁴

¹⁹⁹ 28 U.S.C. §§ 1602–07 (2006); Justice for Victims of Terrorism Act of 2007, Pub. L. No. 110–181, § 1083, § 1605A, 112 Stat. 338–44 (2008) (incorporating terrorism exception to sovereign immunity).

²⁰⁰ See Francois Larocque, *Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort*, 46 OSGOODE HALL L.J. 605, 654 (2008).

²⁰¹ LAURSEN, *supra* note 4, at 21 ("[I]nternational law has changed and developed substantially when it comes to addressing the challenge of terrorism.").

²⁰² See, e.g., Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, BRIT. Y.B. INT'L L. 71, 73, 95 (2004) ("Regardless of the lack of a comprehensive definition at the international level . . . [t]here is near unanimity that terrorist acts are crimes under both domestic and international law.").

²⁰³ See *Report of the International Law Commission to the General Assembly*, [1995] 2 Y.B. Int'l L. Comm'n 28, U.N. Doc. A/CN.4/SER.A/1995 [hereinafter ILC YB]; PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 25 (2003) ("[W]e will need to seek as wide agreement as possible that political violence against civilians by anyone – states or their opponents – is so unfair and cruel as to be condemned by most of the world"); Van Schaack, *supra* note 4, at 468 ("[T]he international community has reached a consensus that specific manifestations of terrorism are unlawful regardless of the political context in which they are committed.").

²⁰⁴ See, e.g., LAURSEN, *supra* note 4, at 25 ("[I]nternational mores and norms have come to view terrorism as completely unacceptable, which has important normative implications for the development of customary international law."); Lee, *supra* note 80, at 756 (arguing that terrorist attacks can and should be includable as an international crime under the ICC's jurisdiction); Murphy, *supra* note 22, at 316 (considering terrorism an international crime); Kenneth C. Randall, *Further Inquires into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 526 (1986) (noting strong international consensus that terrorist acts are universal offenses); Jessica Stern, *Pakistan's Jihad Culture*, FOREIGN AFF., Nov.–Dec. 2000, at 115, 116 (arguing that terrorist attacks against civilians in Kashmir are a "violation of international norms and law").

VI. TERRORISM AS AN INDIRECT VIOLATION OF INTERNATIONAL LAW

Even if terrorism cannot be classified as an independent violation of customary international law, terrorist attacks violate many well-established international norms.²⁰⁵ Widespread systematic attacks on civilians can be considered crimes against humanity.²⁰⁶ Intentional attacks on civilians in violation of the law of war can be considered the peace-time equivalent of a war crime.²⁰⁷ Terrorist attacks may even implicate the prohibition on genocide if there is intent to destroy a group of people.²⁰⁸ Terrorist attacks might also be considered a violation of preemptory international norms (*jus cogens* or *erga omnes*).²⁰⁹ Some commentators innovatively argue that terrorism can fall under the long-established universal ban on piracy.²¹⁰ Terrorists' use of hijacking and

²⁰⁵ Paust, *supra* note 71, at 213 n.88 ("A number of terrorist offenses violate customary international law" including war crimes, genocide, and crimes against humanity).

²⁰⁶ See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 994 (2001) (discussing the possibility that terrorism may be defined as a crime against humanity); James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 169 (2002); Paust, *supra* note 71, at 211–12 (noting that terrorism could be a crime against humanity or *hostes humani generis*); Van Schaack, *supra* note 4, at 435 ("Acts of terrorism may also constitute crimes against humanity . . ."); ILC YB, *supra* note 203, ¶ 106 (noting that massive attacks could be considered a crime against humanity); see, e.g., *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 276 (E.D.N.Y. 2007) (finding that crimes against humanity were sufficiently pled where plaintiffs alleged that terrorist organizations systematically targeted civilians).

²⁰⁷ See ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 7 (1996) (arguing that terrorism can be considered a war crime); ALEX P. SCHMID & RONALD D. CRELINTEN, WESTERN RESPONSES TO TERRORISM 7–13 (1993) ("[P]eacetime equivalents of war crimes: acts that would, if carried out by a government in war, violate the Geneva Conventions," can be considered acts of terrorism); Murphy, *supra* note 2, at 74; Rosetti, *supra* note 2, at 584 ("[W]ar crimes are similar to acts of terrorism because of the illegitimacy of targets . . ."); see, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995) (recognizing deliberate attacks on civilians to be a violation of international law); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (establishing the same proposition).

²⁰⁸ Van Schaack, *supra* note 4, at 436; see, e.g., *Almog v. Arab Bank*, 471 F. Supp. 2d 257 at 276 (E.D.N.Y. 2007) (finding adequate allegations of genocidal intent).

²⁰⁹ See, e.g., Drumbl, *supra* note 83, at 934 (arguing that widespread attacks on civilians can be considered a violation of *erga omnes* obligations); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 144 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998), <http://www.unhcr.org/refworld/pdfid/40276a8a4.pdf> (holding that torture is a violation of *jus cogens*).

²¹⁰ See Philip Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J., no. 2, 1999 at 61, 64 ("[P]erhaps the first modern assault against the day's version of international terrorists . . ." was the pursuit of the Barbary corsairs);

hostage taking can provide sufficient overlap in requisite conduct.²¹¹ Ultimately, there is unconditional international consensus that terrorism is *per se* unlawful, regardless of the underlying framework used to categorize the conduct.²¹²

VII. IMPORTANCE OF INTERNATIONAL LAW IN COMBATING TERRORISM

The transnational nature of terrorism complicates prosecution, prevention and intelligence gathering.²¹³ International cooperation is essential in combating terrorism because there are limits to the effectiveness of unilateral action in an interconnected world.²¹⁴ Recognition of terrorism as a violation of international law will foster the cooperation necessary to prevent attacks and hold terrorists accountable.²¹⁵ International terrorism, by its very nature, cannot be

Burgess, *supra* note 66, at 298 (“[T]he best and easiest course of formulating a new international law on terrorism is to root it in the existing customary and statutory law of piracy.”); *Id.* at 323 (“[T]errorists, like pirates, are *hostis humani generis* under international law,” and should be subject to universal jurisdiction); *Piracy on the Seas*, DAILY NEWS SRI LANKA, Oct. 29, 2009 (“A terrorist is a *hostis humani generis* or common enemy of humanity.”).

²¹¹ See George R. Constantinople, Note, *Toward a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT’L L. 723, 723–24 (1986) (highlighting connection between piracy and terrorism); See George R. Constantinople, Note, *Toward a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT’L L. 723, 723–24 (1986) (highlighting connection between piracy and terrorism).

²¹² Van Schaack, *supra* note 4, at 478 (“[T]argeting civilians [is] *per se* unlawful, either as war crimes (if they are committed within the context of an armed conflict . . .), crimes against humanity (if committed within the context of a widespread or systematic attack against a civilian population), or terrorism (if the result of an isolated attack outside of a state of war).”).

²¹³ HEYMANN, *supra* note 37, at 19.

²¹⁴ Michael Chertoff, *The Responsibility to Contain: Protecting Sovereignty Under International Law*, FOREIGN AFF., Jan.–Feb. 2009, at 130 (noting that international cooperation is necessary to combat terrorism because it is a transnational enemy which doesn’t respect traditional conventions of warfare); Strauss, *supra* note 159, at 354 (“In order for the international community to successfully combat terrorism, a multilateral approach is necessary.”); see, e.g., HEYMANN, *supra* note 37, at 33 (using the Achille Lauro hijacking to illustrate the importance of international law and cooperation for holding terrorists accountable).

²¹⁵ See Asli Bali, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT’L & COMP. L. 403, 415–16 (2002); HEYMANN, *supra* note 203, at 32 (“[O]ur objective has to be a new international norm against terrorism that is broadly and sincerely based, not because international norms are gentler and fuzzier than missiles and bullets but because only dedicated host-nation cooperation will work.”); It is difficult to extend law enforcement efforts into other countries without consent and cooperation. For instance, in 1985, the terrorists who hijacked the Achille Lauro and murdered a disabled American, eventually escaped with impunity due to a lack of international cooperation. Egypt refused to help apprehend the hijackers who had taken refuge in their country, so the U.S. intercepted their getaway plane forcing it to land on a NATO airbase in Sicily. The Italians were upset that they were not consulted and they refused to

addressed solely by domestic law, because there are gaps in enforcement due to the extraterritoriality of planning and the transnational nature of the enemy.²¹⁶ Domestic courts acting alone often have difficulty establishing personal jurisdiction, effective service of process, sufficient pre-trial discovery, and enforcing judgments.²¹⁷ Terrorists intentionally take advantage of porous borders, easy transportation, and national sovereignty to avoid being brought to justice.²¹⁸ International cooperation is necessary to overcome problems of exercising jurisdiction²¹⁹ and is important to facilitate extradition or collection of judgments.²²⁰ For too long terrorists have exploited the Westphalian system to slip through the cracks of international accountability and customary international law can provide a supplement to fill the gaps between domestic legal systems.

Recognition of terrorism as a violation of international law will also promote cooperation necessary to prevent terrorism. Collaboration and exchange of intelligence is needed to track down and disrupt diffuse networks of terrorists.²²¹ Terrorist groups operate in many different countries and strike around the world, thus the sharing of intelligence information is crucial.²²² International law can facilitate cooperation by establishing a common enemy and encouraging trust and partnerships. Ultimately, international consensus and cooperation is important given the interdependence required for effective counter-terrorism efforts.²²³

authorize extradition. Then, astoundingly, the Italians let some of the terrorists go, despite vigorous U.S. protest, and the rest were convicted but allowed to escape while on leave. HEYMANN, *supra* note 37, at 23–33.

²¹⁶ See Burgess, *supra* note 66, at 326; Chertoff, *supra* note 214, at 130–31 (“[Terrorists] often strike at global or transnational targets, seeking to exploit the seams between national jurisdictions, where enforcement may be shared, ambiguous, or inconsistent.”).

²¹⁷ John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 530 n.25, 564–65 (2008); Strauss, *supra* note 159, at 318–19.

²¹⁸ HEYMANN, *supra* note 37, at 47.

²¹⁹ Strauss, *supra* note 159, at 310; Estate of Ungar v. Palestinian Auth., 304 F. Supp. 2d 232, 257–59 (D.R.I. 2004) (discussing difficulties of effectuating service of process on Hamas).

²²⁰ It is extremely difficult to attach assets to satisfy judgments because they are all over the world. Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT’L L. 679, 726 (2005); see, e.g., Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 6 (D.D.C. 1998).

²²¹ Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT’L L. 65, 82 (2009).

²²² HEYMANN, *supra* note 37, at 25, 34.

²²³ PILLAR, *supra* note 37, at 15.

Recognition of terrorism as a violation of international law may also help deter terrorist attacks. Establishing a clear rule, condemning specific conduct, reduces incentives to utilize terrorist tactics.²²⁴ For example, international efforts to criminalize hijackings and hostage takings likely contributed to the dramatic decline in the use of these tactics in the 1990s.²²⁵ The credible threat of punishment, through criminal prosecution or civil liability, can potentially deter terrorism and its support.²²⁶ Under a principle of universal criminal jurisdiction, the burden to bring terrorists to justice could be shared among nations to increase the likelihood of prosecution and avoid unpopular unilateral efforts.²²⁷ Civil liability is a helpful supplement to criminal prosecution, especially in light of the collective action problem on the international stage.²²⁸ Civil lawsuits brought by victims of terrorist attacks can help deter terrorist financing by exacting a huge cost from sponsors.²²⁹ Since foreign courts are often reluctant to enforce other jurisdictions' awards,²³⁰ a basis for global recognition of judgments would facilitate effective enforcement of the rule of law.²³¹ Stronger consensus in international law

²²⁴ See *id.* at 35.

²²⁵ Obviously in conjunction with concrete preventative security measures like anti-hijacking safeguards on planes and more thorough screening. *Id.* at 36.

²²⁶ *Id.* at 34.

²²⁷ Burgess, *supra* note 66, at 327 (“[T]he war on terrorism would become an international effort, transforming itself from personal vengeance and individual state security to international condemnation and the eradication of a global scourge.”).

²²⁸ Van Schaack, *supra* note 4, at 474 (“Civil litigation involving claims of international terrorism has the potential to play a part in a comprehensive anti-terrorism strategy, especially where military strikes or governmental sanctions may be considered too blunt a response, are politically unpalatable, or lack multilateral support. In particular, by harnessing the motivation, investigative capabilities, and resources of private attorneys general and the robust U.S. tort system on behalf of those victims who have access to the U.S. legal system, civil suits can enhance the government’s ability to bring targeted criminal suits, aid in the rehabilitation of victims, and promote the rule of law in the face of acts of terrorism.”); Shipman, *supra* note 217, at 570 (“By creating ‘private attorneys general,’ civil terrorism litigation empowers ordinary citizens to track down private terror networks and seek out sources of terrorist financing.”); Slaughter, *supra* note 8, at 102–03 (“[T]errorism victims . . . are now using lawsuits to defend their rights under international law.” Private suits “both contribute to and benefit from a growing determination to hold individuals accountable for violations of international law.”).

²²⁹ Koh, *supra* note 2, at 185; Murphy, *supra* note 22, at 327–29 (illustrating the effectiveness of civil suits against terrorist organizations); Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT’L L. REV. 726, 726 (1992) (attacking terrorist assets weakens funding and deters); Smith, *supra* note 221, at 84; Strauss, *supra* note 220, at 682 (“[C]rippling terrorist organizations at their foundation . . .”).

²³⁰ Strauss, *supra* note 159, at 325.

²³¹ *Id.* at 327 (“[T]he support of, and collaboration with, the international community can provide the critical element for plaintiffs in the civil battle against terrorism.”).

could encourage reciprocal recognition of awards by more foreign courts.²³² Ultimately, recognizing terrorism as violation of international law will bolster deterrence by facilitating criminal prosecution and victims' pursuit of those assets which finance and support terrorism.²³³

Finally, recognizing terrorism as a violation of international law will help legitimize U.S. efforts to pursue, capture, and punish terrorists by establishing a legal framework for justification.²³⁴ Use of international law to combat terrorism can be an important complementary approach to the use of military force.²³⁵ As world support for military intervention declines, the use of international law as a solution will become increasingly important. As such, reliance on the rule of law to solve the problem of terrorism may increase American credibility and legitimize its' efforts, while isolating and condemning extremism.²³⁶

VIII. CONCLUSION

International law should be an important component in our global counter-terrorism strategy. A misguided focus on establishing a comprehensive definition of terrorism has unnecessarily prevented the recognition of international accord. Ultimately, a lack of definition should not preclude terrorism, however defined, from being considered a violation of the law of nations because an unequivocal international consensus has developed that considers specific terrorist acts to be an offense under customary international law.

²³² *Id.* at 336 (arguing that international norms can lay a "foundation for a more global recognition" of civil judgments against international terrorism).

²³³ Van Schaack, *supra* note 4, at 385.

²³⁴ Burgess, *supra* note 66, at 327.

²³⁵ Strauss, *supra* note 159, at 307.

²³⁶ See Robert W. Tucker & David C. Hendrickson, *The Sources of American Legitimacy*, FOREIGN AFF., Nov.-Dec. 2004, at 18; Hassanien, *supra* note 77, at 235, 251.