

**An Examination of the Special Tribunal for  
Lebanon's Explosive Declaration of 'Terrorism' at  
Customary International Law**

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*“Above the gates of hell is the warning that all that enter should abandon hope. Less dire but to the same effect is the warning given to those who try and define terrorism”*

(David Tucker *Skirmishes at the Edge of the Empire* (Praeger, Westport, 1997) at 51)

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## **INTRODUCTION**

Terrorism enjoys a unique stature as one of the most problematic concepts in the annals of contemporary public international law.<sup>1</sup> While condemnation of terrorist activities by the international community has been unanimous and unequivocal,<sup>2</sup> efforts to regulate this phenomenon have been marred by differences of approach and competing concerns. After more than seventy years of academic attention, scholars from many fields have spilled almost as much ink as the actors of terrorism have spilled blood,<sup>3</sup> with little consensus. Some have likened the search for the legal definition of terrorism to the quest for the Holy Grail.<sup>4</sup> Others such as Judge Richard Baxter, formerly of the International Court of Justice, have questioned the helpfulness of a legal definition, stating: “We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise; it is ambiguous; and, above all, it serves no operative legal purpose”.<sup>5</sup>

On the 16<sup>th</sup> of February 2011, the Appeals Chamber of the Special Tribunal of Lebanon (“the Appeals Chamber”) declared a crime of terrorism in customary international law, circumventing issues that had led to almost a century of legal deadlock. Due to its far-reaching consequences, the interlocutory decision’s declaration deserves critical analysis as it has the potential to affect both international and domestic approaches concerning the prosecution of terrorism for many years to come.

This dissertation will examine that decision and its consequences. The first Chapter will examine the on-going difficulties in defining terrorism, before analysing the framework within which the Special Tribunal made its decision. Chapter Two will

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<sup>1</sup> Chile Eboe-Osuji “Another Look at the Intent Element for the War Crime of Terrorism” (2011) 24 Cambridge Review of International Affairs 356 at 357.

<sup>2</sup> Michael Sharf and Mike Newton “Terrorism and Crimes Against Humanity” in L Sadat (ed) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, Cambridge, 2011) at 262.

<sup>3</sup> AP Schmid and AJ Jongman *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (2<sup>nd</sup> ed, North Holland Publishing, Amsterdam 1988) at p. xiii.

<sup>4</sup> Geoffrey Levitt “Is ‘Terrorism’ Worth Defining?” (1986) 13 Ohio Northern University Law Review 97 at 97.

<sup>5</sup> Richard R Baxter “A Skeptical Look at the Concept of Terrorism” (1974) 7 Akron Law Review 380 at 380.

evaluate the Appeals Chamber's resort to international law in light of its domestic jurisdiction *ratione materiae*.<sup>6</sup> The third Chapter will consider the validity of the Appeals Chamber's declaration of a customary crime of terrorism. In particular, Chapter Three will examine the empirical sources of custom relied upon by the Appeals Chamber in support of its conclusion. In light of the earlier conclusions reached, the final Chapter will assess the implications and likely precedential value of the decision.

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<sup>6</sup> *Jurisdiction ratione materiae*: the subject-matter jurisdiction refers to the court's authority to decide a particular case. *Black's Law Dictionary* (9th ed, 2009) available at Westlaw BLACKS <[www.westlaw.com](http://www.westlaw.com)> accessed 20/9/2012.

## **CHAPTER 1: BACKGROUND**

Hardly a day goes by without news of a terrorist bombing, kidnapping, or political assassination somewhere in the world. With the increase of such incidents in the last few decades, the concept of defining terrorism has gained a corresponding importance. Despite this, efforts at formulating an internationally accepted definition have long been frustrated. This chapter will examine the problem of defining terrorism before outlining the Appeals Chamber's decision in declaring a crime of terrorism under customary international law.

### **A. "One Man's Terrorist is Another Man's Freedom Fighter":<sup>7</sup> The Problem of Defining Terrorism**

The international community has attempted to define an international crime of terrorism since 1937, with little success.<sup>8</sup> The inability to formulate a workable legal definition for 'terrorism' stems from its inherent indeterminate and subjective nature.<sup>9</sup> Furthermore, the term is both ideologically and politically loaded, as every form of violence has the potential to inspire terror to its victims. What is labelled 'terrorism' seems to imply a moral judgement, as it is dependent on one's point of view.<sup>10</sup> The difficulty is compounded by the connotations associated with terrorism. The label of 'terrorist' has a capacity to stigmatise and dehumanise those at whom it is directed. As a result, the plethora of divergent definitions evident in international instruments and domestic legislation should come as no surprise.

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<sup>7</sup> G Seymour *Harry's Game* (Corgi Publishing, UK, 1975) at 62.

<sup>8</sup> Christian Walter "Defining Terrorism in National and International Law" in Roben et al (ed) *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, Berlin, 2004) at 5. The League of nations attempted to formulate an international definition of terrorism following the refusal by the Italian Supreme Court of Cassation to extradite the suspects responsible for the assassination of King Alexander I of Yugoslavia whilst in France. Walter submits that it was the failure of the League of Nations to agree on a comprehensive definition of terrorism that led to the sectoral approach of criminalising particular forms of terrorist activities.

<sup>9</sup> BM Jenkins *The Study of Terrorism: Definitional Problems* (The Rand Corp, Santa Monica, 1980) at 3.

<sup>10</sup> At 1. Jenkins goes on to comment (at 2): "the use of the term terrorism implies a moral judgement; and if one party can successfully attach the label terrorist to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint".

Prior to the terrorist attacks of 11 September 2001 (“9/11”), the traditional ‘extra-legal’ perception held by leading international lawyers was that terrorism was regarded as a pernicious contemporary phenomenon which presents complicated legal problems.<sup>11</sup> The traditional consensus was that terrorism was a term without any legal significance. The term was merely a convenient way of “alluding to activities, whether of states or of individuals, widely disapproved of in which either the methods used are unlawful, or the target protected, or both”.<sup>12</sup> By leaving ‘terrorism’ both vague and undefined, the general academic consensus was that existing general norms of international law were sufficient in criminalising terrorism.<sup>13</sup> The term itself served “no operative legal purpose”.<sup>14</sup> Where such norms were found to be insufficient, they were complemented with numerous ‘sectoral’ treaties targeting specific methods of violence employed by terrorists such as hijacking and kidnapping. Significantly, none of the treaties, individually or collectively, contained a comprehensive crime of terrorism. As a result of this pragmatic approach, common manifestations of terrorism were prescribed while the irreconcilable issue of defining the crime was avoided.

The traditional view of the extra-legal status of terrorism has been challenged with distance from 9/11. The continuing persistence of transnational terrorism as a feature of the international landscape demonstrates that the profusion of sectoral conventions focusing on domestic enforcement is no panacea.<sup>15</sup> The attacks of 9/11 highlighted this systematic failure and prompted a renewed interest in the possibility of an internationally accepted definition of terrorism. What followed was a rapid, complex and uncoordinated process of terrorism norm-creation and implementation. From 2001, the term ‘terrorism’ generated legal consequences, with the Security Council requiring states to implement measures against terrorist acts and terrorists.

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<sup>11</sup> B Saul *Defining Terrorism in International Law* (Oxford University Press, USA, 2008) at 66.

<sup>12</sup> R Higgins “The General International Law of Terrorism” in R Higgins and M Flory *Terrorism and International Law* (Routledge, London, 1997) at 28.

<sup>13</sup> Ben Golder and George Williams “What is ‘Terrorism’? Problems of Legal Definition” (2004) 22 *University of New South Wales Law Journal* 270 at 272. It was thought that principles of state responsibility, the law of armed conflict, and international humanitarian law were sufficient in criminalising terrorist activity. The authors conclude that these approaches are now fundamentally flawed in that they link principles from different bodies of law that serve different purposes.

<sup>14</sup> Baxter, above n 5, at 380.

<sup>15</sup> Sharf and Newton, above n 2, at 262.

A clear definition of terrorism would help to confine the term and prevent its abuse.<sup>16</sup> By uniformly defining the crime, a paradigmatic foundation can be created. The ongoing efforts to define a discrete international crime of terrorism denote the importance that the international community attaches to that effort. At a normative level, defining terrorism as a distinct category of legal harm protects certain international community values, and sets legal limits on acceptable means and methods of political action, while condemning and stigmatising those deemed unacceptable.<sup>17</sup> At a practical level, the patchy regulation of terrorism in many domestic legal systems may give rise to impunity as a result of jurisdictional lacunae, definitional differences and gaps in the coverage of sectoral treaties.<sup>18</sup> An international definition is capable of narrowing those gaps. In spite of this, it remains contentious how best to create that definition.

There has been a perceived consistency in state practice in defining terrorism in the post-9/11 era. This has led to divided scholarship on whether a customary crime of terrorism has crystallised.<sup>19</sup> The disagreement suggests a lingering degree of indeterminacy about the conceptual and normative status of terrorism in international law. As Higgins observes, “[w]hether one regards terrorism...as new international law, or as the application of a constantly developing international law to new problems - is at heart a jurisprudential question.”<sup>20</sup> It was against this backdrop that the Appeals Chamber of the Special Tribunal for Lebanon was asked whether a definition of terrorism existed in international law.

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<sup>16</sup> Saul, above n 11, at 5. The author submits that “the absence of a definition enables states to unilaterally and subjectively determine what constitutes terrorist activity, and to take advantage of the public panic and anxiety engendered by the designation of conduct as terrorist to pursue arbitrary and excessive counter-terrorism responses.”

<sup>17</sup> Ben Saul “Civilizing the Exception: Universally Defining Terrorism” in A Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, UK, 2012) at 87.

<sup>18</sup> For example, the 2011 terrorist attacks in Mumbai of 13/7 were not covered by any international conventions.

<sup>19</sup> See generally Marcello di Filippo “Terrorist Crimes and International Cooperation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes” (2008) 19 *European Journal of International Law* 533.

<sup>20</sup> Higgins, above, n 12, at 13.

## B. The Appeals Chamber's Interlocutory Decision on the Applicable Law

On the 14<sup>th</sup> of February 2005, Rafiq Hariri, former Prime Minister of Lebanon, was killed along with 21 others when a van containing explosives equivalent to around 2,500kg of TNT was detonated in close proximity to his motorcade.<sup>21</sup> In the wake of the political turmoil that erupted in response to the assassination, the United Nations (“the UN”) and the government of Lebanon negotiated an agreement to establish a Tribunal to try those responsible for the incident.<sup>22</sup> Unlike any international tribunal created to date, the Special Tribunal for Lebanon is unique as it includes in its jurisdiction *ratione materiae* the crime of terrorism.

The first case to come before the Appeals Chamber was submitted by the Pre-Trial Judge on the 21<sup>st</sup> of January 2011. The submission presented 15 questions of law to be resolved in a factual vacuum to ensure that future indictments would be confirmed on “sound and well founded grounds”.<sup>23</sup> The following chapters will focus on the first three questions concerning the crime of terrorism:<sup>24</sup>

- (i) Whether the Tribunal should apply international law in defining the crime of terrorism;
- (ii) If so, how the international law of terrorism should be reconciled with any differences in the Lebanese domestic crime of terrorism; [and]
- (iii) In either case, what are the objective and subjective elements of the crime of terrorism to be applied by the Tribunal.

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<sup>21</sup> BBC News *Beirut blast “was suicide attack”* (15 February 2005) <[http://www.newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/middle\\_east/4266587.stml](http://www.newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/middle_east/4266587.stml)> accessed 6/5/2012.

<sup>22</sup> Bardo Fassbender “Reflections on the International Legality of the Special Tribunal for Lebanon” (2007) JICJ 1091 at 1093.

<sup>23</sup> *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Appeals Chamber) STL-11-01/I 16 February 2011 at [1] (“Interlocutory Decision”).

<sup>24</sup> *Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence* STL- I I-O1/I, 21 January 2011. This dissertation focuses only on the declaration of terrorism under customary international law and does not address the other 12 questions covered in the interlocutory decision (including conspiracy, homicide, modes of offences and cumulative charging).

Within 30 days of the submission being received, the Appeals Chamber issued a unanimous decision.<sup>25</sup> By using international law as an aid to interpreting Lebanese law, the Appeals Chamber was able to recognise a distinct customary crime of terrorism in times of peace.

Following an empirical examination of a number of sources of international law, a customary crime of terrorism was declared. The definition of terrorism formulated comprised three elements:<sup>26</sup>

- (a) The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
- (b) The intent to spread fear among the population (which would generally entail the creation of a public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; and
- (c) When the act involves a transnational element.

The interpretative techniques and the declaration of a customary crime of terrorism in the decision ignited an explosive reaction within the academic community. Supporters have considered the methodology adopted as being one of judicial statesmanship<sup>27</sup> whereas critics regard it as being a case of judicial overreach.<sup>28</sup> As such, more analysis is necessary.

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<sup>25</sup> Comprising 153 pages, 301 paragraphs and 82,056 words, some commentators have suggested that the decision was procedurally flawed because it was made possible only by an amendment to the Rules of Procedure and Evidence that is arguably *ultra vires* the Statute. For an in-depth critique of that process see M Gillet and M Schuster “Fast Track Justice: The Special Tribunal for Lebanon Defines Terrorism” (2011) JICJ 9 (2011) 989.

<sup>26</sup> *Interlocutory Decision*, above n 23, at [85].

<sup>27</sup> Sharf, M, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation* (4 March 2011) ASIL Insights <<http://www.asil.org/insights110304.cfm>> accessed 6/5/2012. The author wrote that “the landmark decision will give a momentous effect on the decades-long effort of the international community to develop a broadly acceptable definition of terrorism.”

<sup>28</sup> S Kirsch and A Oehmichen “Judges Gone Astray” (2011) 1 *Durham Law Review* 32. At 40 the authors describe the decision at “a deliberate attempt of judicial law-making that shows an unwarranted assumption of legislative power which has never been given to the Tribunal by any authority.”

## **CHAPTER II: INTERPRETATION OF LEBANESE LAW**

The Appeals Chamber's interpretation of the Lebanese law provided a platform for it to declare a customary crime of terrorism. That foundation was constructed by interpreting the seemingly unambiguous provisions of the Statute of the Special Tribunal for Lebanon ("the Statute") in the context of international law and the Arab Convention for the Suppression of Terrorism 1998 ("Arab Convention"). By reference to those sources, the Appeals Chamber was able to interpret its domestic jurisdiction *ratione materiae* in light of perceived international laws concerning terrorism.<sup>29</sup> This Chapter will examine the relevant provisions of the Statute, interpretative jurisprudence of Lebanese criminal law and the approach taken by the Appeals Chamber.

### **A. The Jurisdiction *Ratione Materiae* of the Special Tribunal for Lebanon**

The Special Tribunal for Lebanon is unique<sup>30</sup> in that its Statute makes no mention of (customary) international law as a source of law relevant to the exercise of its jurisdiction *ratione materiae*. Instead, the Special Tribunal's applicable law and subject jurisdiction is to remain "national in character".<sup>31</sup> The view that the Tribunal was permitted to apply only Lebanese criminal law in defining the crimes provided under the Statute is consistent with the position of the Security Council: namely that there is no accepted definition of terrorism under international law.<sup>32</sup> One of the

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<sup>29</sup> *Interlocutory Decision*, above n 23, at [62]. The Appeals Chamber stated that "we conclude instead that the Tribunal may not apply those international sources of law directly because of the clear instructions of article 2 of the Tribunal's Statute, it may refer to them to assist in *interpreting* and *applying* Lebanese Law."

<sup>30</sup> As an ad hoc international tribunal created by Security Council resolution.

<sup>31</sup> *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon* 15 November 2006 (S/2006/893), at [7]. Unlike the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone that also have limited jurisdiction over domestic crimes, the Special Tribunal for Lebanon's *ratione materiae* jurisdiction is limited solely to crimes under the Lebanese Criminal Code and does not extend to crimes under international law.

<sup>32</sup> In its United Nations Counter-Terrorism Committee, *Technical Guide to Implementation of Security Council Resolution 1373 (S/620)*, 2009, the Counter-Terrorism Committee of the Security Council stated that "there is no universally agreed definition of terrorism... Therefore, each state will approach this issue [i.e. the criminalisation of terrorist offences] on the basis of its own domestic legal framework" at 44. The fact that the Security Council could at once hold the view that there is no agreed definition of terrorism, but at the same time give the Tribunal jurisdiction to rely upon international law in defining terrorism is inconsistent.

original drafters of the Statute pointed out that earlier draft versions would have allowed judges to apply international law to define the crime of terrorism under article 2. However, these were intentionally removed to avoid the problematic possibility of considering terrorist offences in terms of international law.<sup>33</sup> Therefore, it is clear that The UN Security Council chose to establish an international tribunal mandated to prosecute the series of terrorist attacks conducted in Lebanon exclusively according to the Lebanese Penal Code.<sup>34</sup> The relevant part of article 2 of the Special Tribunal's Statute reads:<sup>35</sup>

The following shall be applicable to the prosecution and punishment of the crimes referred to in Article 1, subject to the provisions of this Statute:

- (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism...

Accordingly, the Appeals Chamber's starting point was to declare that its Statute required it to apply Lebanese law as interpreted in Lebanese Courts. The relevant provision of the Lebanese Criminal Code was held to be article 314, which reads as follows:<sup>36</sup>

Terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.

Lebanese courts have consistently interpreted the definition of (terrorist) 'means' to be limited to those means that *as such* are likely to create a public danger to the general population.<sup>37</sup> For example, in a 1997 decision, the Court of Justice of Lebanon ruled that the assassination of Sheikh Nizar Al-Halabi, a Sufi religious leader, was not

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<sup>33</sup> Choucri Sader "A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusion" (2007) *Journal of International Criminal Justice* 1083.

<sup>34</sup> At 1087.

<sup>35</sup> Article 2 of the Statute of the Special Tribunal for Lebanon. As recognised by the Appeals Chamber in the *Interlocutory Decision*, above n 23, at [33] the wording of *applicable* criminal law makes explicit and exclusive reference to Lebanese criminal law.

<sup>36</sup> Lebanese Criminal Code, article 314.

<sup>37</sup> Court of Cassation, Judgement No 332/2005, 15 December 2005; Cassation Court, Judgement No 212/2003, 23 July 2003; Judgement, Case No 79/1959, Military Court of Cassation, 29 December 1959.

terrorism because no innocent victims were specifically targeted by using semi-automatic machine guns.<sup>38</sup> It follows that the assassination of public officials and their families would not qualify as ‘terrorist’ acts if such attacks were not likely *per se* to cause a danger to the general population.<sup>39</sup> Although it is not clearly stated in the Appeals Chamber’s decision, this could mean that the assassination of Rafiq Hariri<sup>40</sup> would qualify as an act of terrorism under Lebanese law should it be considered that the bomb did not pose a danger to the general population.

## **B. The Appeals Chamber’s Interpretation of Article 314**

The Appeals Chamber uses international law to (re)interpret (and expand) the definition of terrorism contained in article 314. International law can only be applied by the Special Tribunal where the Lebanese criminal law appears to be “*unreasonable, or may result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon*”.<sup>41</sup> None of these exceptions was deemed relevant.<sup>42</sup> Nevertheless, the Appeals Chamber considered that international customary law and conventions “have legal import under Lebanese law, even if they are not specifically embodied in the Lebanese Criminal Code”.<sup>43</sup> While international law could not be *applied*, the Appeals Chamber ruled that it could be used to *interpret* Lebanese law as part of the overall context. The Appeals Chamber

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<sup>38</sup> Judgement 1/1975, Council of Justice, 23 June 1975; and Judicial Council, Judgement, 17 January 1997 (Case of Assassination of Nizar Al-Halabi); Court of Justice, *Homicide of Engineer Dany Chamoun and others*, decision no 5/1995, 24 June 1995.

<sup>39</sup> *Interlocutory Decision*, above n 23, at [54].

<sup>40</sup> The tribunal has established jurisdiction over three attacks relating to Marwan Hamadeh, George Hawi and Elias El-Murr. The pre-trial judge has also ordered that the Lebanese authorities provide the relevant files to the prosecutor. See *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon* STL-11-02 19/08/2011 (Pre-Trial Chamber); *Ordonnance portant dessaisissement en faveur du Tribunal spécial pour le Liban de la juridiction libanaise saisie de l’affaire concernant l’attaque perpétrée le 12 juillet 2005 contre M. Elias El-Murr* STL-11-02 19/08/2011 (Pre-Trial Chamber); and *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon* STL-11-02 19/08/2011 (Pre-Trial Chamber).

<sup>41</sup> *Interlocutory Decision*, above n 23, at [39].

<sup>42</sup> At [41]. For instances where the departure of the application and interpretation of national law by national courts is justified see in particular *Serbian Loans* (1929) PCIJ Series A No 20 at 46-47; *Solomon (United States) v Panama* (1993) RIAA. Vol VI 370 at 371-373; *Putnam (United States) v United Mexican States* (1927) RIAA Vol IV, 151 at 153; *Prosecutor v Milorad Krnojelac (Appeal Judgement)* Appeals Chamber IT-97-25-A 17 September 2003 at [114]; and *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, Case No ARB/83/2 Award, 31 March 1986

<sup>43</sup> *Interlocutory Decision*, above n 23, at [46].

insisted that there was a theoretical distinction between the two in principle.<sup>44</sup> However, the practical effect of the Appeals Chamber's approach is to blur the line between international law and Lebanese law so that its interpretation of the Lebanese Criminal Code in light of international law could equally be seen as the application of international law under the Statute.<sup>45</sup>

The interpretative techniques applied by the Appeals Chamber enabled it to use international law to determine the Lebanese Criminal Code's definition of terrorism.<sup>46</sup> The conventional two-step method of interpretation stipulates that where the plain meaning of a text is clear there is no need to resort to "rules of interpretation" to elucidate the meaning. Only where there is an ambiguity in the meaning of the text should it be construed a second time in light of interpretative aids.<sup>47</sup> On this approach a court cannot create an ambiguity out of the law to legitimise a process of interpretation that will result in the effective amendment of existing law.<sup>48</sup> In combination, the clear language used in article 314 coupled with its consistent application by Lebanese courts for over fifty years suggests that resort to interpretative aids was not required. In spite of that, the Appeals Chamber noted that the apodictic position that a text is clear and can be applied straightforwardly is a logical fallacy.<sup>49</sup> As a result, the Appeals Chamber concluded that interpretation is always necessary when applying a legal rule as the language used needs to be read within the Statute's legal and factual contexts. In doing so, the Appeals Chamber explicitly rejected the conventional methodology, noting that the maxim *in claris non*

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<sup>44</sup> At [81]-[82] and [123]-[124]. At [81] the Appeals Chamber states that while the Special Tribunal could utilise international law as an interpretative aid it was restricted from directly applying it: "deference to the will of the Lebanese legislature, which has never chosen to modify the definition used in the Lebanese Criminal Code, and to the letter of the Statute mandates this approach [of not applying international law directly as an independent source of law]".

<sup>45</sup> Kai Ambos "Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?" (2011) 24 *Leiden Journal of International Law* 655 at 660 ("Judicial Creativity").

<sup>46</sup> Gillet and Schuster, above n 25, at 998.

<sup>47</sup> *The Lotus Case (France v Germany)* (1927) PCIJ Series A No 10 at 16; *Italy v Federal Republic of Germany* (1959) ILR 29 at 442-449.

<sup>48</sup> *Kartinyen v Commonwealth of Australia* (1998) 195 CLR 337 at 417-418 (per Kirby J): "[the process of interpretation] does not authorise the creation of ambiguities by reference to international law where none exist."

<sup>49</sup> *Interlocutory Decision*, above n 23, at [19]. The Appeals Chamber quoted with approval Dworkin (R Dworkin *Law's Empire* (Oxford University Press, Oxford, 1998) at 253) and Dupuy (PM Dupuy *Droit International Public* (9<sup>th</sup> ed, Dalloz, Paris, 2008) at 448). The Appeals Chamber observed at [19] that "Interpretation is an operation that always proves necessary when applying a legal rule... One must always start with a statute's language. But that must be read within the statute's legal and factual contexts."

*fit interpretatio*<sup>50</sup> is “in truth fallacious.”<sup>51</sup> The Appeals Chamber concluded that such an approach overlooks the spectrum of meanings that words may have and misses the truth that context determines meaning.<sup>52</sup>

The Appeals Chamber regarded international law as being part of the context of Lebanese law. It observed that the principle of construing national legislation to align with international legal standards is common to most states of the world.<sup>53</sup> This suggestion that there is a *general* principle that domestic criminal laws must be interpreted in accordance with international law, finds little to no support in the practice of states.<sup>54</sup> While many states draw upon international law as an aid in domestic legal interpretation, the manner and context in which they do so varies significantly. Professor Ben Saul submits that the variances in national legal orders are more nuanced, with states relying on international law for a number of reasons.<sup>55</sup> Some states use it to interpret domestic provisions that implement treaty obligations,<sup>56</sup> while some only draw on it where there is ambiguity in domestic law, but not where the domestic law is clear or settled.<sup>57</sup> Others only invoke it for protective purposes, to

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<sup>50</sup> *In claris non fit interpretatio*: “When [the law] is clear it does not need interpretation”. *Black’s Law Dictionary* (9th ed, 2009) available at Westlaw BLACKS <[www.westlaw.com](http://www.westlaw.com)> accessed 20/9/2012.

<sup>51</sup> *Interlocutory Decision*, above n 23, at [19].

<sup>52</sup> At [20].

<sup>53</sup> At [41].

<sup>54</sup> International law does not impose any obligations that would contravene the application of Lebanese law before the Special Tribunal. As noted by E Denza “The Relationship Between International and National Law” in M Evans (ed) *International Law* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2006) at 423: “[n]ational constitutions are therefore free to choose how they give effect to treaties and to customary international law. Their choice of methods is extremely varied... There are almost as many ways of giving effect to international law as there are national systems”. See generally, W Ferdinandusse *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, The Hague, 2006) whom writes at 247 that: “[t]ypically most domestic criminal courts apply their criminal law without apparent regard to the state of (customary) international criminal law. The suggestion that states should endeavour to interpret their domestic law in accordance with an international convention is only true of the case where the domestic law being interpreted is passed to give effect to an international convention.”

<sup>55</sup> Ben Saul “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism” (2011) 24 *Leiden Journal of International Law* 677 at 680 the author asserts that: “This practice [of relying on international law] is so diverse that one author has suggested that “there simply does not exist a single uniform principle of the kind”. See also Maurice Mendelson “The Effect of Customary International Law on Domestic Law: An Overview” (2004) 4 *Non-State Actors and International Law* 75 at 82 for an in-depth discussion on national variations on the hierarchy of norms between domestic and international law.

<sup>56</sup> Saul, above n 55, at 680 .

<sup>57</sup> At 680.

read down excessive or invasive domestic laws in light of human-rights protections, but not to impose burdens (especially new criminal liabilities) on individuals.<sup>58</sup>

These interpretative uses are distinct from the Appeal Chamber's approach, which: firstly does not concern a domestic provision that implements a treaty; secondly does not involve ambiguity in the domestic law, as the text is clear and settled; and thirdly does not call upon international law to protect an individuals' rights, but instead to widen their criminal liability.<sup>59</sup> Accordingly, on close scrutiny, the proposition that international law can be relied upon to interpret Lebanese law finds little support.

Nevertheless, the Appeals Chamber justified its use of international law as an interpretative aid on three grounds.<sup>60</sup> Firstly, the Hariri attacks were of such a grave nature that they were regarded as "threats to international peace and security" by the Security Council.<sup>61</sup> Secondly, that the transnational nature of the attacks required an international tribunal. Thirdly, that the United Nations established an international tribunal to address them. These justifications are open to criticism.

The fact that the Security Council qualified the attacks as "threats to international peace and security" operated only as a trigger mechanism to establish the Special Tribunal under Chapter VII of the UN Charter, rather than a basis for including international crimes in the Tribunal's Statute. Indeed, as discussed above, the reference to international crimes was explicitly omitted during the Statute's drafting.<sup>62</sup> The argument that the alleged transnational nature of the attacks justifies recourse to

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<sup>58</sup> At 680.

<sup>59</sup> The effect of the Appeal Chamber's assertion is that most states are presumptively monist. This proposition is untenable as it ignores the requirement of whether or not a state's legal order requires implementing legislation to incorporate a treaty or custom. To the contrary, a number of national courts have explicitly recognised that crimes under customary international law have no domestic legal effect without legislative incorporation due to concerns over vagueness and unfairness to the accused. See, e.g. *Nulyarimma v Thompson* [1999] FCA 1192; (1999) 165 ALR 621 (per Wilcox and Whitlam JJ); *Re N*, Military Court of Appeal of Switzerland, 26 May 2000 (both providing illustrations regarding the non-application of the customary crime of genocide in the absence of domestic legislation); *Habibullah Jalazo* (2007) LJM AZ9366 The Hague (Court of Appeal) 09-751005-04 (excluding customary international law on criminal jurisdiction in the absence of domestic legislation); and *Jones and Milling, Olditch and Pritchard v Gloucester Crown Prosecution Service* [2004] EWCA 1981 (UK) (excluding the application of the customary crime of aggression in the absence of domestic legislation).

<sup>60</sup> *Interlocutory Decision*, above n 23 at [124] and [128].

<sup>61</sup> Security Council Resolution 1636 (2005).

<sup>62</sup> The significance is further watered down when one considers that the Security Council considers all terrorist attacks to as "threats to peace and security". See UN Security Council Resolution 1566 (2004).

international law is problematic. The acts were committed in downtown Beirut within the territorial jurisdiction of the national courts of Lebanon. The Appeals Chamber appears to ignore that the effect of a terrorist act, which might threaten international peace and security, does not impact on the applicable national law. Rather, it is up to the state with territorial jurisdiction to decide, pursuant to its own domestic rules, whether it applies any national offences or has recourse to international law.<sup>63</sup>

Significant contextual factors are also overlooked by the Appeals Chamber. None of the justifications stated by the Appeals Chamber acknowledge that the drafters of the Statute directed the Tribunal to apply only the Lebanese crime of terrorism. Nor does the Appeals Chamber recognise the Lebanese courts are the best placed to determine an appropriate interpretation because they have an “organic familiarity with terrorist attacks perpetrated in the Lebanese context and their long experience in applying the Lebanese Criminal Code”.<sup>64</sup>

### **C. The Relevance of the Arab Convention in Interpreting Article 314**

The Appeals Chamber attached particular emphasis and importance to the Arab Convention in interpreting article 314.<sup>65</sup> The Arab Convention is the only international treaty ratified by Lebanon that provides a general definition of terrorism.<sup>66</sup> On this basis, the Appeals Chamber adopted the Arab Convention as an aid to “part of the overall context relevant to [the Lebanese Criminal Code’s] interpretation”.<sup>67</sup> Significantly, the Convention does not restrict the means by which a terrorist act can be carried out. Accordingly, the Appeals Chamber used the Arab Convention’s broader definition of terrorism as a tool for ascertaining a wider notion of terrorism than under article 314.

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<sup>63</sup> Ambos, above n 45, at 660.

<sup>64</sup> Gillet and Schuster, above n 25, at 1002. Two of the five judges sitting on the Appeals Chamber are from Lebanon (namely Judges Ralph Riachy and Afif Chamsedinne, both former Presidents of the Lebanese Court of Cassation and members of the Court of Justice).

<sup>65</sup> *Interlocutory Decision*, above n 23, at [82].

<sup>66</sup> Arab Convention for the Suppression of Terrorism 1998 (“Arab Convention”), Article 1(2).

<sup>67</sup> *Interlocutory Decision*, above n 23, at [82].

The Appeals Chamber placed too much weight on the Arab Convention as an interpretative aid. The Appeals Chamber was correct in noting that the Arab Convention had been ratified by the Lebanese Parliament and that Law No 57 made its provisions part of the Lebanese legal order. However, those provisions did not become part of the Lebanese criminal law and none of them figure in the Lebanese Criminal Code.<sup>68</sup> Rather, the Arab Convention only provides a legal basis for the limited purpose for which the Convention was adopted, enabling cooperation between States. The Arab Convention is not intended to provide a penally enforceable definition of terrorism.<sup>69</sup> Article 1(3) of the Convention affirms this, making it clear that criminalisation of terrorism is to be left to domestic laws, and that the Convention was not intended to interfere with a party's competence and independence in that regard.

The definition of the Arab Convention differs significantly from that contained in article 314. On this basis it cannot serve to interpret the latter. The relative expansion of the potentially culpable conduct in the Arab Convention is explainable on the grounds that the Convention's definition was never intended to provide a foundation for criminalisation. Instead, it was intentionally drafted widely so that it could be extensively applied to cover the widest realm of permissible cooperation between states in their common anti-terrorist activities. For that reason, the broad nature of the Convention's definition has been criticised as being arbitrary and vague, raising human rights concerns that count against its use in domestic interpretation.<sup>70</sup>

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<sup>68</sup> *Defence Office Submissions Pursuant to Rule 176bis(B)* STL-11-01/I 31 January 2011 ("Defence Office Submissions") at [60].

<sup>69</sup> Arab Convention, above n 66. The preamble explicitly acknowledges that the legislative power to determine what constitutes a terrorist offence is, and remains with, state parties. It states that the purpose of the Convention is "to promote mutual cooperation in the suppression of terrorist offences, which pose a threat to the security and stability of the Arab Nation and endanger its vital interests".

<sup>70</sup> Amnesty International "The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights" (2002) AI Index: IOR 51/001/2002 at 18. See also UN Sub Commission on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, 11 August 2004 at [56]. Having reviewed various regional conventions on terrorism, including the 1998 Arab Convention, the UN Sub-Commission on the Promotion and Protection of Human Rights concluded that, "[d]espite their having certain elements in common, the different definitions adopted...diverge in significant aspects."

The Tribunal has no jurisdictional competence to apply international treaties. Indeed, the Security Council expressly excluded the application of the Arab Convention for the purpose of defining the prohibition contained in article 2 of the Statute.<sup>71</sup> The removal of the reference to the Arab Convention from the original draft effectively deprived the Special Tribunal of the possibility of basing its proceeding using the broad definition of terrorism provided for in the Arab Convention. As a participant in the negotiation of the Special Tribunal's Statute pointed out, the real aim of the UN Security Council was to strictly confine the Special Tribunal to the application of domestic laws.<sup>72</sup>

In light of this, the Arab Convention is not relevant to domestic criminal law, its definition adds no clarity to interpreting article 314, and its use constitutes a violation of the Special Tribunal's jurisdictional boundaries. As noted by the Defence Office, the definition contained in the Arab Convention is “inapplicable, irrelevant and unhelpful”<sup>73</sup> for the purpose of interpreting a definition of ‘terrorism’ within the jurisdiction of the Special Tribunal.

#### **D. The Position under the Lebanese Criminal Code**

The Appeals Chamber's decision does not include any reference to Lebanese case law to support its interpretation of the Lebanese legal system, despite purporting to “stand back and identify the principles that express the state of the art in Lebanese jurisprudence.”<sup>74</sup> The Lebanese legal system is in the civil law tradition, based on the model used in France. Under this system of *lex scripta*,<sup>75</sup> judges “act as the mouthpiece that pronounces the words of the law.”<sup>76</sup> Their role is to apply the law

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<sup>71</sup> Nidal Jurdi “The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon” (2007) 5 JICJ 1120 at 1128.

<sup>72</sup> Sader, above n 33, at 1087. The author notes that this approach avoids the problematic possibility of considering terrorist offences as crimes falling under international law.

<sup>73</sup> Defence Office Submissions, above n 68, at [122].

<sup>74</sup> *Interlocutory Decision*, above n 23, at [36].

<sup>75</sup> *Lex scripta*: written law / statute. *Black's Law Dictionary* (9th ed, 2009) available at Westlaw BLACKS <[www.westlaw.com](http://www.westlaw.com)> accessed 20/9/2012.

<sup>76</sup> Charles Montesquieu *L'esprit des lois* (Cambridge University Press, Cambridge, 1989) at Book XI, Chapter VI.

strictly, and not overlook what falls under the exclusive jurisdiction of Parliament.<sup>77</sup> In the legalist criminal law system, the judge exercising jurisdiction “does not have the power to compensate, by analogy or induction, beyond the cases provided for exhaustively by the texts.”<sup>78</sup> Wider context has no role in determining the meaning of an unambiguous text. Therefore, criminal law must be interpreted strictly, with clear texts to be applied to the letter. It is not for the judge to extend the meaning of the text beyond what the legislator desired or make up for what is a conscious omission on their part.<sup>79</sup>

Although an expansionist approach may be appropriate in the context of international law, the Special Tribunal’s mandate over terrorism is restricted to the Lebanese Criminal Code, which renders that approach inappropriate. The Appeals Chamber may be right that the conduct it identified should be an international crime. Indeed, it seems repugnant to ideals of justice that suspected terrorists should be exempt from criminal responsibility on technical grounds. Regardless, the *lex ferenda* should not be misrepresented to be the *lex lata*, however compelling the moral case.<sup>80</sup>

The Appeals Chamber has turned a blind eye to the principles of the legalist criminal law system. It observed on the one hand that the provisions of the Statute clearly state that “the Tribunal is to apply the definition of terrorism found in the Lebanese Criminal Code”<sup>81</sup> but then, on the other hand, it extended the scope of that definition through interpretation of international law. The effect of this misguided interpretation casts a shadow of doubt over the correctness of the conclusions reached.

Unhelpfully, at no point in the decision did the Appeals Chamber elucidate how the crime of customary international law can be incorporated into the Lebanese Criminal

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<sup>77</sup> *Conseil Constitutionnel de France* (2000) 428 DC; *Conseil Constitutionnel de France* (1991) 283 DC.

<sup>78</sup> *Cour de Cassation Criminal* (1977) No 198 (France).

<sup>79</sup> *Cour de Cassation Criminal* (1999) No 127 (Lebanon); *Cour de Cassation Criminal* (1964) No 114. (Lebanon); *Revue Judiciaire Libanaise* (Liban. Ministère de la justice, Beirut, 1963) p.1191.

<sup>80</sup> *Lex ferenda* (“future law”): the law as it should be. *Lex lata* (“current law”): the law as it is. *Black’s Law Dictionary* (9th ed, 2009) available at Westlaw BLACKS <[www.westlaw.com](http://www.westlaw.com)> accessed 20/9/2012. See also Prakash Puchooa “Defining Terrorism at the Special Tribunal for Lebanon” (2011) *Journal of Terrorism Research* 34. The author suggests that the Appeals Chamber exceeded their judicial role by adopting an expansive role of its statute.

<sup>81</sup> *Interlocutory Decision*, above n 23, at [81].

Code. In order for the customary rule to be used to interpret the Lebanese Criminal Code, it must be part of the Lebanese criminal law. Civil law systems have traditionally been resistant to the notion of relying on customary international law in their criminal legal orders. In the French system, the legal order most closely aligned to the Lebanese, customary international law cannot be relied upon except in limited civil proceedings.<sup>82</sup> Thus the Lebanese Code of Civil Procedure enables limited reliance upon customary law in the civil context.<sup>83</sup> By contrast, the omission of any reference to customary international law in the Lebanese Criminal Code supports the contention that Lebanese criminal courts cannot apply customary international law as a means of interpreting offences in the Lebanese Criminal Code.<sup>84</sup> As far as the criminal law is concerned, there cannot be a contradiction between Lebanese criminal law and competing international law. Only what is criminalised in the Lebanese Criminal Code is pertinent to its internal criminal law system.<sup>85</sup>

Thus the undisputed position in the Lebanese legal system may be summarised as follows:<sup>86</sup>

- (i) In the criminal field, one cannot talk about criminal ‘customs’ and/or criminal ‘usage’, unless provided for by law;
- (ii) The principle of legality of offences and penalties implies that the Criminal Code has only one source, which is the law or the written text. Every single written legal rule emanating from a legislative authority is considered to be a written legal text;

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<sup>82</sup> Ferdinandusse, *Direct Application*, above n 54 at 65-66; Juillette Lelieur-Fisher “Prosecuting the Crimes Against Humanity Committed during the Algerian War: an Impossible Endeavour?” (2004) 2 JICJ 231 at 234-237. While article 55 of the French Constitution provides for the superiority of principle of treaties over national law, the Conseil d’Etat has made it clear that this is not the case in relation to customary law: Conseil d’Etat, 6 June 1997, No 148683, *Revue Generale de droit international public* (1997) 838 at 1053. The only limited exception is where customary law provides for a defence or justification that would exclude criminal liability.

<sup>83</sup> Article 2 of the Lebanese Code of Civil Procedure reads as follows: “Courts shall abide by the principle of hierarchy of norms. In the event of conflict between the provisions of international treaties and the provisions of ordinary law, the former has supremacy over the latter in application. Courts may not declare the acts of the legislative authority invalid on the grounds that ordinary law does not conform to the provisions of the Constitution or international treaties”.

<sup>84</sup> See articles 1 and 3 of the Lebanese Criminal Code which state that the Lebanese Criminal code is the only relevant source of penally-sanctioned norms.

<sup>85</sup> *Cass Crim* (1999) No 142 (Lebanon); Elias Abu Eid *Criminal Law: Between Texts and Literature, A Comparative Study* (Birzeit University, Palestine, 2008); Samir Alia *Explication du droit penal libanais* (Association Universitaire pur les etudes, Beirut, 2002) at 53, 63 and 67.

<sup>86</sup> Eid, above at n 85, at 8. The author submits that “Customs, ministerial publications pertaining to law implementation in addition to instructions given by senior figures in the judiciary are not considered to be a direct source of the Criminal Code.”

(iii) If customs can be a direct source of legal rules in general and of breaches of private law in particular, they do not acquire this value in the field of criminal law with regard to incrimination and penalties. As long as the written text is the only direct source of the criminal law, customs shall not be considered a source for incrimination and penalties because this would expressly be contrary to the principle of ‘no offence and no penalty without law’.

Therefore, the only way that international law can be of significance in interpreting domestic Lebanese law is for it to have been incorporated into the Lebanese legal order through legislation. To date, the Lebanese Parliament has not passed any legislation to the effect that supplements the acts prohibited by article 314 of the Lebanese Criminal Code. Consequently, the Appeals Chamber’s reliance on international customary law as an interpretative aid is questionable to say the least.

## **E. An Alternative Option**

An alternative option available to the Appeals Chamber was to disagree with the Lebanese interpretation of article 314. The specified “means” of committing terrorist acts in article 314 are prefaced by the phrase “such as”, indicating that the specified means are not exhaustive. Thus, the interpretation given to this article by the Lebanese courts has led to a restrictive means element, not the article itself. Article 4(1) of the Statute specifies that the Special Tribunal and the national courts of Lebanon have concurrent jurisdiction. Within its jurisdiction, the Tribunal has primacy over the national courts of Lebanon.

The Appeals Tribunal could simply have disagreed with the interpretation given by Lebanese courts in the same way that any other Lebanese court could have. As an inquisitorial civil law state, Lebanon does not operate on a *stare decisis*<sup>87</sup> basis of binding precedent. By expanding the terms of “such as” in interpreting article 314, the Appeals Chamber was free to base its decision on the meaning of the article without

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<sup>87</sup> *Stare decisis*: The legal principle of determining points in litigation according to precedent. *Black’s Law Dictionary* (9th ed, 2009) available at Westlaw BLACKS <[www.westlaw.com](http://www.westlaw.com)> accessed 20/9/2012.

any reliance on international law.<sup>88</sup> Compared to the expansionist approach taken, this avenue would have been less offensive to Lebanese law. It would have applied article 314 directly without requiring the use of international law while still creating the same expanded definition of terrorism.

## **F. The Effect of the Appeals Chamber's Interpretation**

The practical effect of relying on international customary law as an interpretative aid is to broaden the scope of criminal liability. Article 314 has been effectively expanded to include wider elements of liability, namely additional unspecified means (such as guns and knives). It is worth noting that both the Prosecutor and Defence Office held the view that international customary law is not material to the interpretation of the Lebanese law on terrorism.<sup>89</sup> One author is more sceptical about the underlying rationale for such an expansive interpretation of article 314:<sup>90</sup>

One does not need to be extraordinarily gifted to understand that all those methodological twists and turns were only meant to set the stage for a really big coup: the fabrication of terrorism as an international crime.

In conclusion, by adopting a teleological and contextual approach, the Appeals Chamber was able to justify using international law to interpret a seemingly unambiguous provision of Lebanese law.<sup>91</sup> In doing so, the Appeals Chamber was able to admit a customary crime of terrorism into article 2 of the Special Tribunal's Statute via the back door.

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<sup>88</sup> Kirsch and Oehmichen above n 28, at 40.

<sup>89</sup> *Prosecutor's Brief Filed Pursuant to the President's Order of 21 January 2011 Responding to the Questions Submitted by the Pre-trial Judge (Rule 176 Bis)* STL1101/I/AC/R176bis 31 January 2011 ("Prosecutor's Brief") at [4]-[5]; and Defence Office Submissions, above at n 68, at [58], [70], [88]-[89].

<sup>90</sup> Kirsch and Oehmichen, above n 28, at 7.

<sup>91</sup> *Interlocutory Decision*, above n 23, at [20]-[32] and [135].

## **CHAPTER III TERRORISM: A CRYSTALLISED CUSTOMARY CRIME?**

The most controversial aspect of the interlocutory decision is the Appeals Chamber's recognition that a customary crime of terrorism has crystallised at international law. This conclusion comes after decades of detailed and (to-date) inconclusive inter-state negotiations aimed at agreeing on a comprehensive legal definition of terrorism.<sup>92</sup> Both the Office of the Prosecutor<sup>93</sup> and the Defence Office<sup>94</sup> submitted that no such definition exists. Despite this, there is growing, albeit currently limited, academic recognition of a customary crime of terrorism.<sup>95</sup> That dichotomy of opinion did not obstruct the Appeals Chamber's declaration of a customary crime.<sup>96</sup>

Although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of

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<sup>92</sup> Michael Sharf "Defining Terrorism as the peacetime Equivalent of War Crimes: Problems and Prospects" (2004) 36 Case Western Reserve Journal of International Law 359 at 360-65.

<sup>93</sup> Prosecutor's Brief, above n 89, at [18], [20]-[24]; and *Prosecutor's Skeleton Brief in Response to "Defence Office Submissions Pursuant to Rule 176bis (B)" and Corrigendum to Prosecutor's Brief STL-11-01/I/AC/R176bis* of 21 January 2011 at [2].

<sup>94</sup> Defence Office's Submission, above at n 68, at [60].

<sup>95</sup> The President of the Appeals Chamber Antonio Cassese wrote extensively on the topic in his academic capacity in favour of the view that a customary crime of terrorism has emerged. See, e.g. Antonio Cassese "Terrorism as an International Crime" in A Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Oxford, 2004) Chapter 10 at 218; A Cassese *International Criminal Law* (2<sup>nd</sup> ed, Oxford University Press, London, 2008); Antonio Cassese "Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 EJIL 992 at 994; Antonio Cassese "The Multifaceted Criminal Notion of Terrorism in International Law" (2006) 4 JICJ 933 (at 935 the author wrote "a customary rule on the objective and subjective elements of the crime of terrorism in the time of peace has evolved"). Proponents of this school of thought assert that there is a widely shared consensus on the broad parameters of the definition of the crime of 'terrorism'. They argue that on-going contention is limited to the specific contours of the crime of terrorism, in particular the exceptions. The two notable exceptions that have proved a barrier to formulating a definition of terrorism are: (i) whether violence conducted by self-determination movements should be classified as terrorism, and (ii) whether action taken by states themselves can amount to terrorism. This school of thought has been strongly contested by many and considered to lie on the outskirts of mainstream scholarship. See E Chadwick *Self-Determination, Terrorism, and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff Publishers, The Hague, 1996) and more recently P Wilkinson *Terrorism Versus Democracy: The Liberal State Response* (Taylor & Francis, London, 2006) at 158-211; Robert Barnidge "Terrorism: Arriving at an Understanding of a Term" in *Terrorisme et droit international* (Nijhoff Publishers, Leiden, 2008) at 157-193; M Williamson *Terrorism, War and International Law The Legality of the Use of Force Against Afghanistan in 2001* (Ashgate Publishing, Surrey, 2009) at 49; Yoram Dinstein "Terrorism as an International Crime" (1989) 19 Israel YB on Human Rights at 55; Alex Schmid "Terrorism: The Definitional Problem" (2004) 36 Case Western Reserve Journal International Law 375; Saul, above n 16, at 270.

<sup>96</sup> *Interlocutory Decision*, above at n 23, at [83] (footnote reference omitted).

the marked differences on some issues, closer scrutiny demonstrates that in fact such a definition has emerged.

Assessment of whether an international prohibition of terrorism has transformed into an international customary crime in its own right is a matter of empirical investigation. Accordingly, the Appeals Chamber's decision invoked, *inter alia*, a wide range of converging evidence to support its conclusion including national laws, Security Council and General Assembly resolutions, judicial decisions, and international and regional treaties. From these sources the Appeals Chamber acknowledged that while 'penumbral' differences in definitions of terrorism remained, these did not obstruct the declaration of a customary crime based on consistent general practice.<sup>97</sup> This chapter will examine the novel approach to the formation of custom adopted by the Appeals Chamber before critically examining the sources relied on in support of its conclusion.

## A. Formation of Custom

Customary international law is defined as "evidence of a general practice accepted as law".<sup>98</sup> The essence of custom is a demonstration of "settled practice",<sup>99</sup> through "a considerable degree of agreement"<sup>100</sup> between states as to the content of the law. Generally, customary international law is binding on all states.<sup>101</sup> In order for a rule or prohibition to become part of customary international law, there must be clear compelling evidence of two requirements:

- i. *State practice*: widespread repetition by States through constant and uniform usage.<sup>102</sup> When assessing this element, substantial divergences

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<sup>97</sup> At [97].

<sup>98</sup> Statute of the ICJ, article 38(1)(b).

<sup>99</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3 at [44].

<sup>100</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392 at [97].

<sup>101</sup> For a more in-depth commentary on regional custom and the doctrine of persistent objectors see M Shaw *International Law* (6<sup>th</sup> ed, Cambridge University Press, Cambridge, 2008) at 89-93

<sup>102</sup> See generally, I Brownlie *Principles of International Law* (7<sup>th</sup> ed, Oxford University Press, Oxford, 2008) at 7-8 and references contained therein.

of approach should be regarded as evidence of the absence of “constant and uniform” practice among states and thus of a customary prohibition.<sup>103</sup>

- ii. *Opinio juris et necessitatis*: the belief that such a rule is legally binding and that there is a sense of obligation to comply with its terms.<sup>104</sup>

This system of formation of customary international law can thus be thought of as circular. States are in effect creating a rule, by acting in conformity with such a rule over a period of time, because they feel they are legally obligated to do so. So, in order for there to be a crime of terrorism at customary law, there needs to be evidence of a general recognition among states that the elements of a definition of ‘terrorism’ exist as an international crime. Moreover, there must also be a shared belief that this practice is legally binding.

The approach adopted by the Appeals Chamber is different from the traditional methodology for determining the existence of customary law. The historical piecemeal evolution of terrorism is distinct from other international crimes, such as crimes against humanity and torture. Perhaps on the basis of this distinction the Appeals Chamber adopted an unconventional methodology to customary law formation. Instead of focusing on the differences in state practice, the Appeals Chamber extracted the common elements. By focusing on these core elements, state practice was seen to be generally consistent. Divergences concerning the scope of definitions of terrorism do not necessarily mean that the central conception of terrorism differs fundamentally. As the International Court of Justice recognised in *Nicaragua v United States*, such differences, provided they are minor, are not fatal to the emergence of custom.<sup>105</sup>

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<sup>103</sup> *Asylum Case (Colombia v. Peru)* [1950] ICJ Rep 395 at [276]-[277]. See, also Brownlie, above n 102, at 7 and footnote 21.

<sup>104</sup> Brownlie, above n 102, at 8-10.

<sup>105</sup> *Nicaragua v United States of America*, above n 100, at [98] (emphasis added) that “The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in *absolutely rigorous conformity* with the rule. In order to deduce the existence of a customary rule, the Court deems it sufficient that the conduct of the States should, in *general*, be consistent with such rules.”

For that reason, customary law is sufficiently flexible to accommodate the practice of states that does not precisely accord with the rule.<sup>106</sup> Such an approach avoids the formalism of rejecting a definition of terrorism due to a lack of strict uniformity, by which minor issues would be elevated beyond their significance.<sup>107</sup> Divergent state practice does not act as an automatic customary law executioner. Despite some uncertainty, the approach of casting aside non-fundamental differences and focusing on core central elements maintains significant jurisprudential backing.<sup>108</sup>

The evolution of the customary rule of aggression reflects this ‘line of best fit’ means of development, serving as a useful analogy to terrorism. Despite divergent approaches in domestic laws and the lack of a consensus on a working definition, a customary law on the crime of aggression has emerged through a general understanding of ‘core elements’ of the crime.<sup>109</sup> In that context, a number of states have criminalised and labelled conduct as ‘aggression’ when it would not be classified so under customary international law. This does not mean that the practice of those states is to be excluded or ignored for the purposes of recognising the crystallisation of a customary law.<sup>110</sup> Instead, provided that such states accept the ‘common elements’ of the custom identified, then they can still be regarded as contributing to state practice.

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<sup>106</sup> Customary international law and treaty law can (and do) exist independently of one another. For example, in *Nicaragua*, above n 100, the ICJ was able to rely on principles of customary international law that had been codified in a multilateral treaty to which both states were party to, notwithstanding that the United States had placed a reservation to the ICJ’s jurisdiction over multilateral treaties.

<sup>107</sup> Gillet and Schuster, above n 25, at 1007.

<sup>108</sup> The ICJ in the *North Sea Continental*, above n 99, at [43] required a standard of “both extensive and virtually uniform” practice. However, the same Court later stated in the *Nicaragua v United States of America*, (above n 100, at [98]) that it is not necessary for the state practice to be held in “absolute rigorous conformity”. The mixed messages issued by ICJ have yet to be harmonised by that institution. However, it is now generally accepted that the threshold is that practice should, in general, be consistent. The assessment of general practice will depend on both the nature of the alleged rule and the opposition it arouses (see M Shaw *International Law*, (5<sup>th</sup> ed, Cambridge University Press, Cambridge, 2003) at 90).

<sup>109</sup> This was explicitly recognised in the House of Lords decision in *R v Jones* [2006] UKHL16, 29 March 2006. The Court noted at [19] that “that the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime”.

<sup>110</sup> E Wilmshurst “Aggression” in R Cryer, H Friman, D Robinson, and E Wilmshurst (eds) *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007) at 262. The author submits that “aggression is widely regarded as a crime under customary international law”.

This ‘core elements’ approach finds support in state practice. A recent study of the criminal law of 90 states found that only 25 states had provisions relating to aggression as an international crime.<sup>111</sup> Of those states, there was a wide divergence in the definitions of ‘aggression’, particularly in relation to what constitutes aggression and whether only high-ranking officials bear responsibility for aggression.<sup>112</sup> Decades of deadlock resulted from difficulties in formulating a workable definition that was both precise enough for individuals to know what acts are prohibited, and general enough to cover a wide variety of acts which could occur in the future though unknown at present.<sup>113</sup> Consequently, the development of a definition of aggression proved elusive until recently.<sup>114</sup> Even with inconsistent judicial pronouncements on the appropriate standard of what constitutes ‘general’ practice, it is significant that the divergent national definitions of aggression did not appear to be a barrier to its crystallisation as a crime under international customary law.

Bearing this in mind, it is not appropriate to analyse the Appeals Chamber’s decision on the basis of peripheral definitional distinctions. The enquiry instead becomes whether there is a sufficient legislative commonality in state practice, coupled with international instruments supporting the crystallisation of customary international law. Such a rule does not require universality in application, but instead some common degree of correlation and continuity.

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<sup>111</sup> See AR Coracini “Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute’s Complementarity Regime” in C Stahn and G Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden, 2009); and AR Coracini “National Legislation on Individual Responsibility for Conduct Amounting to Aggression” in R Belleli (ed) *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate Publishing Limited, Surrey, 2010) at 547-578. Those that had provisions included Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cuba, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Montenegro, Poland, Portugal, Russian Federation, Serbia, Slovenia, Tajikistan, Ukraine and Uzbekistan.

<sup>112</sup> Coracini, “National Legislation on Individual Responsibility for Conduct Amounting to Aggression”, above n 111, at 548.

<sup>113</sup> Mattias Schuster “The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword” (2003) 14 *Criminal Law Forum* 1 at 14.

<sup>114</sup> For a history of attempts at defining terrorism see G Gaja “The Long Journey towards Repressing Aggression” in A Cassese, P Gaeta, and D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) Vol. 1, 430. Although a working definition was created in UN General Assembly Resolution 3314 in 1974 it was not until the 2010 Review Conference that states finally accepted and incorporated the definition into Art 8bis of the Rome Statute.

## B. National Laws

The Appeals Chamber commenced its examination of state practice by seeking to identify common elements or themes within domestic definitions of terrorism.<sup>115</sup> While a convergence of national laws may provide evidence of *opinio juris* and state practice, on their own they are not sufficient evidence of custom.<sup>116</sup> Following an analysis of 37 national laws,<sup>117</sup> the Appeals Chamber concluded that national statutes “consistently define terrorism in similar, if not identical terms to those used in international instruments.”<sup>118</sup> Taking into account the considerable number of national laws that give legal life to ‘terrorism’, a closer examination of both those laws examined and those laws not examined reveals that the portrait painted by the Appeals Chamber is highly fragmented and incomplete.

Firstly, the Appeals Chamber failed to distinguish between national laws that address domestic terrorism with those concerned with transnational terrorism. Only the latter are relevant to the Appeals Chamber’s finding.<sup>119</sup> National laws on purely domestic terrorism cannot be relied upon to provide any evidence of widespread consensus on combating international terrorism. Furthermore, no support can be placed on definitions that do not contain a transnational element and provide for extraterritorial jurisdiction. Of the 37 ‘best case’ national laws examined by the Appeals Chamber, only 11 contained definitions relating to transnational terrorism.<sup>120</sup>

Secondly, the Appeals Chamber conflated penal definitions of terrorism with non-penal definitions. States sometimes deploy different definitions of terrorism for

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<sup>115</sup> *Interlocutory Decision*, above n 23, at [88].

<sup>116</sup> *Lotus (France v Turkey)*, above n 47, at 96 (Separate Opinion of Judge Altamira); K Wolfke *Custom in Present International Law* (2<sup>nd</sup> ed, Martinus Nijhoff Publishing, Dordrecht, 1993) at 148.

<sup>117</sup> The 37 national laws considered reflective of a global standard at [92] were Egypt, Jordan, Tunisia, Iran, Brazil, South Africa, New Zealand, Iraq, United Arab Emirates, Sweden, Belgium, Germany, Austria, Netherlands, France, Finland, United Kingdom, Australia, Canada, Colombia, Peru, Chile, Panama, Mexico, Argentina, Ecuador, United States, Russian Federation, India, Philippines, Uzbekistan, Seychelles, Saudi Arabia, and Pakistan.

<sup>118</sup> *Interlocutory Decision*, above n 23, at [91].

<sup>119</sup> Including the laws cited from Peru, Jordan, Germany, Finland, Argentina, the Philippines, New Zealand, Belgium, France, Panama, Uzbekistan, Pakistan, Russian Federation, Ecuador, Sweden, the Seychelles, Brazil, Uzbekistan, Iran and Saudi Arabia.

<sup>120</sup> Only the laws enacted in India, Tunisia, the United Kingdom, the United Arab Emirates, South Africa, Australia, Canada, Colombia, Mexico, Egypt and Austria fulfilled this requirement.

different purposes whether in civil, administrative or criminal law.<sup>121</sup> These definitions tend to be internally inconsistent and preclude any suggestion that practice is universally consistent, or that it has hardened into a single, all-purpose definition.<sup>122</sup>

Thirdly, some of the domestic laws relied upon arguably fall short of the human rights standards which the Special Tribunal has promised to uphold.<sup>123</sup> A number of the definitions provide “vague, unclear or overboard definitions of terrorism” breaching the International Covenant on Civil and Political Rights 1996.<sup>124</sup> Saul notes that various laws cited by the Appeals Chamber raise such human rights concerns<sup>125</sup> that “the Appeals Chamber’s punitive impulse to enlarge criminal liability for terrorism appears to overshadow its concern for human-rights considerations”.<sup>126</sup> By holding up rights-violative national and regional definitions of terrorism as global standards, the Appeals Chamber provides encouragement and legitimacy to despots to convict their opponents as terrorists.

Lastly, and perhaps most significantly, even where national laws do define terrorism, there are significant discrepancies between definitions. An extensive examination of the state reports to the UN Counter-Terrorism Committee shows clear evidence of these wide variations.<sup>127</sup> Rather than comprising “peripheral variations” as suggested

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<sup>121</sup> N Keijzer “Terrorism as a Crime” in W Heere (ed) *Terrorism and the Military: International Legal Implications* (Asser Press, The Hague, 2003) 115 at 121. See also Saul, above n 16, at 262 where the author observes that definitions may serve to trigger law-enforcement powers, activate emergency powers, prompt immigration restrictions, specify jurisdictional arrangements, modify procedural rules, or enhance criminal penalties underlying ordinary offences.

<sup>122</sup> In the US for example, different definitions of terrorism are used by the State Department, the Defence Department, the FBI and the CIA, as discussed in *Flaow v Iran* (1998) F Supp 1, DDC 17.

<sup>123</sup> Ben Saul “Amicus Curiae Brief – The Notion of Terrorist Acts” 14 February 2011 at [41]; Defence Office Submissions, above n 68 at [101]; STL Factsheet: “The Special Tribunal’s standards of justice, including principles of due process, will be based on the highest international standards of criminal justice as applied in other international tribunals” Factsheet: Special Tribunal for Lebanon <<http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml>> accessed 7/8/2012; Special Tribunal for Lebanon Rules of Evidence and Procedure, Rule 3(B) which states: “Any ambiguity .... shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.”

<sup>124</sup> Report of the Special Rapporteur (Martin Scheinin) *The promotion and protection of human rights and fundamental freedoms while countering terrorism* UN Doc E/CN/4/2006/98 28 December 2005 at [27]-[28], [45]-[47], [56] and [62]. Such unlawful acts are not accompanied by any *opinio juris* to the effect that rights-violating definitions are permissible as sources of custom under international law.

<sup>125</sup> Saul, above n 55, at 684. The author observes at footnote 34 that “the cited laws of Egypt, Peru, Uzbekistan and Iraq to name but a few” raise concerns over human rights breaches.

<sup>126</sup> At 684.

<sup>127</sup> A vast survey of definitions in national legislation has been carried out by Ben Saul (Saul, above n 16, Chapter 4). By analysing the State Reports submitted to the Counter-Terrorism Committee since

by the Appeals Chamber, fundamental differences exist between national approaches.<sup>128</sup> Specialised scholarship has come up with between 73<sup>129</sup> and 106<sup>130</sup> differences in definitions of terrorism. Having examined the limited 37 ‘best-example’ national laws relied on by the Appeals Chamber, a considerable diversity of approaches is apparent. It is questionable whether the lack of commonality in those laws, let alone in those jurisdictions omitted, can sustain the conclusion that there is a converging global consensus on a definition of terrorism based on national practice.

### C. Security Council Resolutions 1373 and 1566

Security Council resolutions do not formally create international law, but rather, are normative obligations on UN member states under the Charter.<sup>131</sup> Before 2001, reference to terrorism in Security Council resolutions was limited to specific instances and incidents of terrorism.<sup>132</sup> However, the terrorist attacks of 9/11 acted as a catalyst for change, evidencing a radical shift in the Security Council’s approach to combating terrorism. Since then, the Security Council has imposed a number of binding, quasi-legislative measures against terrorism in general.<sup>133</sup>

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late 2001 on the basis of [3(2)] of the UN Security Council Resolution 1373, he observed that 87 states lacked special terrorism definitions or offences, 46 states had *simple generic* terrorism definitions, and 48 states had *composite generic* terrorism definitions. This is reinforced in *The 2009 Global Survey of the Implementation of Security Council Resolution 1373* (2001) by member states that notes “close attention to national laws shows that wide divergences in national definitions make it difficult to ascertain any common, customary definition”.

<sup>128</sup> See generally B Saul “The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalizing Thought?” in A.Lynch, E. MacDonald and G. Williams (eds) *Law and Liberty in the War on Terror* (Federation Press, Sydney, 2007) at 28-38.

<sup>129</sup> L Weinberg, A Perdzhur and S Hirsch-Hoefler “The Challenge of Conceptualizing Terrorism” (2004) 16 *Terrorism and Political Violence Journal* 777.

<sup>130</sup> A Scmid and A Jongman *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data bases, Theories and Literature* (North Holland Publishing Co, Amsterdam, 2005). The pair isolated 22 different elements characterising terrorism.

<sup>131</sup> M de Brichambaut “The Role of the United Nations Security Council in the International Legal System” in M Byers (ed) *The Role of International Law in International Politics* (Oxford University Press, Oxford, 2001) at 268.

<sup>132</sup> These issues were predominantly consigned to the General Assembly prior to 2001. No resolution defined terrorism in that period.

<sup>133</sup> Significantly, these resolutions are unconnected to specific incidents and unlimited in time. See Eric Rosand “Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism” (2003) 97 *AJIL* 333; Stefan Talmon “The Security Council as World Legislature” (2005) 96 *AJIL* 901; Jane Stromseth “The Security Council’s Counter-Terrorism Role: Continuity and Innovation” (2003) 97 *ASIL Proceedings* 41.

The first resolution that “evinces a widespread stand on and a shared view to terrorism”<sup>134</sup> was Security Council Resolution 1373 (2001).<sup>135</sup> The resolution declared international terrorism as a threat to “international peace and security.”<sup>136</sup> It also imposed binding obligations on all UN member states, directing them to criminalise terrorist acts in domestic law. Significantly, the resolution did not define terrorism for the purpose of national criminalisation, which enabled states to define the term as they saw fit. This resulted in decentralised and inconsistent implementation amongst states with many states adopting definitions to suit their own geo-political agenda. It was not until 2004, by which time a majority of states in the international community had criminalised terrorism, that Security Council Resolution 1566 offered a non-binding definition<sup>137</sup> of terrorism, allowing states to adopt their own definitions.<sup>138</sup>

These resolutions do not act as evidence of the formulation of a customary crime of terrorism. While the frequent designation of terrorism as a threat to peace and security is significant,<sup>139</sup> the resolutions do not delegate to states universal jurisdiction to

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<sup>134</sup> *Interlocutory Decision*, above n 23, at [92].

<sup>135</sup> *Threats to International Peace and Security Caused by Terrorist Acts* SC Res 1373, 28 September 2001

<sup>136</sup> Paragraph 2(a) requires that “All States shall: ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”

<sup>137</sup> Paragraph 3 defines terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.” Of note is that the definition only criminalises offences within the scope of international conventions and protocols relating to terrorism. Resolution 1566 does not therefore criminalise any additional conduct that is not already criminal under existing anti-terrorism conventions. Instead, it reclassifies existing criminal wrongs as ‘terrorism’ where they have the aim to terrorise, intimidate or compel. Saul, above n 55, at 686 notes that the Appeals Chamber’s definition was drafted precisely so as to avoid the limitations of Lebanese law... by recognised *any* criminal means that cause the requisite harm” (emphasis added). By contrast, existing anti-terrorism sectoral treaties only cover a limited range possible terrorist means or methods (that cause death, bodily injury or taking of hostages). Consequently, little weight can be placed on the resolution as a source of customary law for the proposition of a crystallised crime of transnational terrorism.

<sup>138</sup> *Threats to International Peace and Security Caused by Terrorism* SC Res 1566, 8 October 2004

<sup>139</sup> Mention was made in UN Security Council Resolutions 731 (1992); 748 (1992); 1044 (1996); 1054 (1996); 1070 (1996); 1189 (1998); 1193 (1998); 1267 (1999); 1368 (2001); 1390 (2002); 1455 (2003); 1511 (2003); 1526 (2004). Caution is warranted given that the Council is first and foremost a political decision-maker rather than a judicial body applying legal rules. See also Vera Gowlland-Debbas “The

prosecute suspected terrorists.<sup>140</sup> In light of the diversity of approaches under national legal systems, the Security Council resolutions only act as “soft law guideposts”,<sup>141</sup> indicating the direction of the development of international law on terrorism. Over time, the Security Council’s repeated references to terrorism may be of normative significance to the formation of customary law of terrorism. For now, however, the sheer variation in national laws means that it is too soon to judge whether these measures have contributed to customary norms on terrorism.

#### **D. Judicial Decisions**

Judicial decisions act as a subsidiary means for determining international legal rules.<sup>142</sup> Consequently, they may constitute persuasive evidence of a customary rule.<sup>143</sup> Acts of terrorism are rarely prosecuted as crimes of international terrorism; rather as sectoral or ordinary offences. While a limited number of isolated decisions suggest the emergence of a definition of ‘terrorism’ under international law, they all offer different definitions of what it entails. The Appeals Chamber cited nine judicial decisions as evidence of explicit recognition of a crime of terrorism under customary international law.<sup>144</sup> More significant, however, is what the Appeals Chamber does not discuss. It ignored, either by omission<sup>145</sup> or relegation to a single footnote,<sup>146</sup> a number of identifiable authoritative domestic precedents that directly contradict its conclusion. In particular, there was no reference to the only known international precedent according to which “terrorism has never been singly defined under

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Functions of the United Nations Security Council in the International Legal System” in Breyers (ed), *The Role of International Law in International Politics* (Oxford University Press, Oxford, 2001) 268 at 300.

<sup>140</sup> Robert Kolb “Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Statutes and Trends in Contemporary International law” (1997) 1 *Revue Hellenique Droit International* 43 at 77.

<sup>141</sup> Oscar Schachter “The Quasi-Judicial Role of the Security Council and the General Assembly” (1964) 58 *AJIL* 960 at 964.

<sup>142</sup> ICJ Statute, article 38(1)(d).

<sup>143</sup> See also A D’Amato *The Concept of Custom in International Law* (Cornell University Press, New York, 1971) at 43.

<sup>144</sup> *Interlocutory Decision*, above n 23, at [100].

<sup>145</sup> See Defence Office Submissions, above n 68, at [98]-[101] and references contained therein (none of which appear to have been considered in the interlocutory decision).

<sup>146</sup> *Interlocutory Decision*, above n 23, at footnote 127, where the Appeals Chamber dismissed three cases and a number of writings by academics solely on the grounds that “for the reasons, authorities and international instruments set out in this decision, we cannot subscribe to this view”.

international law”.<sup>147</sup> Nonetheless, the Appeals Chamber presents the cited cases as reflective of the collective jurisprudence of the international community:<sup>148</sup>

In recent years courts have reached concordant conclusions about the elements of an international crime of terrorism... Judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminished each year.

Closer scrutiny of the cases suggests that the Appeals Chamber appears to have “misread, exaggerated, or misinterpreted every one of those decisions”.<sup>149</sup> Some national judicial decisions have recognised that specific offences of terrorism, such as hijacking and hostage taking, may have acquired customary status.<sup>150</sup> Yet these do not support the contention that a comprehensive universal definition of terrorism exists. In the cases that mention customary law, the methodology of analysing customary formation “rest[s] upon a very inadequate use of the sources”.<sup>151</sup> One case concerned exclusion from refugee status,<sup>152</sup> another was in a civil context and did not concern criminal liability,<sup>153</sup> one noted that “there is no single definition that is accepted internationally”,<sup>154</sup> while another mentions terrorism incidentally but not dispositively.<sup>155</sup>

Only one decision explicitly states that terrorism has crystallised into a customary crime and provides a definition.<sup>156</sup> Yet in that decision by the Italian Supreme Court of Cassation, the definition formulated departed from that proffered by the Appeals

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<sup>147</sup> *Prosecutor v Stanilav Galic (Trial Judgement and Opinion)* Appeals Chamber IT-98-29-T 5 December 2003 at fn 150.

<sup>148</sup> *Interlocutory Decision on the Applicable Law*, above n 23, at [100].

<sup>149</sup> Saul, above n 55, at 691.

<sup>150</sup> D Freestone “International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction” in K Higgins & M Floy (ed) *Terrorism and International Law* (Routledge, London, 1997). See also Shaw, above at n 55, at 602, footnote 136.

<sup>151</sup> Brownlie, above n 102, at 22 (speaking of national decisions generally).

<sup>152</sup> *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 364.

<sup>153</sup> *Almog v Arab Bank* (2007) 471 F Supp 2d 257. The term ‘terrorism’ is not even used in the judgement.

<sup>154</sup> *Suresh v Canada (Minister for Immigration and Citizenship)* [2002] 1 SCR 3 at 53 at [94]. The Judge went on to warn at [94] that “one searches in vain for an authoritative definition [of transnational terrorism]”.

<sup>155</sup> *Chile v Clavel* (2004) Argentina Supreme Court Enrique Lautaro Arancibia Clavel Case No 259. The joint majority did not even mention terrorism, rather the case concerned genocide and crimes against humanity.

<sup>156</sup> *Bouyahia Maher Ben Abdelaziz et al*, Judgement of 11 October 2006 Corte di Cassazione.

Chamber. The Italian Court required an additional indispensable motive element in order for conduct to amount to terrorism.<sup>157</sup> By disregarding a mandatory element of the Italian Court’s definition, the Appeals Chamber’s reliance is both selective and objectionable. Thus the key judgement on which the Appeals Chamber relies is fundamentally incompatible with its own conclusion. None of the decisions analysed, individually or collectively, supports the Appeals Chamber’s formulation of a customary crime of terrorism.

The Appeals Chamber’s decision is also significant for glossing over or omitting cases that do not support its finding. The case of *US v Yousef*<sup>158</sup> is directly in point, yet the Appeals Chamber did not make mention to it. In that case three individuals were charged with conspiracy to bomb twelve United States commercial aircraft in Southeast Asia. In coming to its decision, the United States Court of Appeal examined whether there was universal jurisdiction over terrorism under customary international law. The Court held that universal jurisdiction only extended to a “limited set of crimes that cannot be expanded judicially”, concluding that there is “no international consensus on the definition of terrorism or even its proscription”.<sup>159</sup> Instead, noting “strenuous disagreement between states about what actions do or do not constitute terrorism”,<sup>160</sup> the Court concluded that terrorism “is a term as loosely deployed as it is powerfully charged.”<sup>161</sup>

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<sup>157</sup> At [2.1] The Italian Court of Cassation required that the act in question must contain a “political, religious or ideological motivation in accordance with generally accepted international standards”. The Court stated that without this purposive element, the concerned act cannot be constituted as terrorism as it lacks the additional characteristic that transforms other crimes into the special crime of terrorism. The Appeals Chamber (*Interlocutory Decision*, above n 23, at 106) observed that discrepancies in state practice concerning the inclusion of an element of ideological, political, religious or racial motive “has not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law....[I]t remains to be seen whether one day it will emerge as an additional element of the international crime of terrorism”, and so omits the requirement from the definition formulated.

<sup>158</sup> *US v Yousef et al* 327 F 3d 56 (US Crt App, 2<sup>nd</sup> Cir) 4 April 2003. See *Interlocutory Decision*, above n 23, at footnote 127.

<sup>159</sup> At [51].

<sup>160</sup> At [51]. Of note, the three judge bench observes that United States legislation has adopted several approaches to defining terrorism, demonstrating that, even within nations, no single definition of “terrorism” or “terrorist act” prevails.

<sup>161</sup> At [51]. The Court of Appeal affirms an earlier decision of *Tel-Oren v Libya* 726 F 2d 774 (DC Cir 1984), per Judge Robery H. Bork who stated at [88] that the claim a defendant had “violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues . . . . [N]o consensus has developed on how properly to define ‘terrorism’ generally.” Instead the court found that the question of assigning culpability for terrorist acts to be “non-justiciable” and outside of the courts as inextricably linked with ‘political questions’ at [89].

Two other significant cases were effectively dismissed in footnotes.<sup>162</sup> In 2004 the Indian Supreme Court stated that “terminology consensus” on terrorism was required for agreement on “any meaningful international countermeasure”.<sup>163</sup> It suggested that this lack of agreement amongst the international community had proved an unsurpassable barrier in criminalising terrorism. In a similar vein, the French Court of Cassation in *Gaddafi* held that terrorism was not an international crime for the purposes of removing official head of state immunity in the context of a request for extradition.<sup>164</sup> By not addressing the arguments raised in each case, the Appeals Chamber’s proposition that there is an international collective jurisprudence recognising a customary crime of terrorism is severely undermined.

## **E. International and Regional Conventions and Treaties**

The Appeals Chamber observed that “most of the regional and multilateral conventions regarding terrorism incorporate into their definition of terrorism the specific offences criminalised in a long line of terrorism-related conventions”.<sup>165</sup> To date, the UN has formulated 13 multilateral international instruments that combat specific manifestations of terrorism.<sup>166</sup> The Appeals Chamber regards their apparent consistency as indicative of the emergence of a customary rule.

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<sup>162</sup> *Madan Singh v State of Bihar* [2004] INSC 225 (2 April 2004) and *Gaddafi* 125 ILR 490 (2001) (Court of Cassation, France).

<sup>163</sup> *Madan Singh v State of Bihar*, above at n162 (per Arijit Pasayat J).

<sup>164</sup> *Gaddafi*, above n 162.

<sup>165</sup> *Interlocutory Decision*, above n 23, at [140].

<sup>166</sup> *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, entered into force 4 December 1969; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, entered into force 14 October 1971; *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, entered into force 26 January 1973; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, entered into force 20 February 1977; *International Convention against the Taking of Hostages*, 17 November 1979, entered into force 3 June 1983; *Convention on the Physical Protection of Nuclear Material*, 26 October 1979, entered into force 8 February 1987; *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, entered into force 1 March 1992; *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, entered into force 1 March 1992; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, entered into force 6 August 1989; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, entered into force 21 June 1998; *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, entered into force 23 May 2001; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, entered into force 10 April 2002; *International Convention for the*

Before too much reliance can be placed on these conventions, it is important to note that each sectoral treaty was created precisely because states could not reach agreement on a definition of terrorism. In addition, the Appeals Chamber omitted to mention that not one of the treaties includes a comprehensive definition of terrorism, or establishes a general international crime of terrorism per se. To the contrary, as observed by the Special Rapporteur of the Commission of Human Rights, “[n]one of the 13 anti-terrorism conventions contains a comprehensive definition of the term ‘terrorism’. Rather, the Conventions are operational in nature and confined to specific subjects.”<sup>167</sup> The conventions can therefore be regarded as sectoral responses to addressing particular manifestations of terrorism. After arriving at a similar conclusion (“finding an all-encompassing and generally acceptable definition of terrorism is too ambitious an aim”),<sup>168</sup> the UN Sub-Commission on the Promotion and Protection of Human Rights stated that since there is no international definition of terrorism, “the initial characterisation of an activity as ‘terrorist’ is made by the domestic legal system”.<sup>169</sup> Hence there is little support for the wider proposition that the conventions provide evidence of the crystallisation of a discrete customary rule of terrorism.

Regional treaties also display different or conflicting definitions of terrorism. As noted in the Report on Terrorism and Human Rights concerning regional treaties:<sup>170</sup>

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*Suppression of Acts of Nuclear Terrorism*, 13 April 2005, entered into force 7 July 2007; *International Covenant on Civil and Political Rights*, 16 December 1966, entered into force 23 March 1976; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, entered into force 3 September 1953.

<sup>167</sup> The ‘peeling off’ common-minimum-denominator approach adopted by the Appeals Chamber in defining terrorism has been further criticized in Special Rapporteur, Commission on Human Rights *Promotion and Protection of Human Rights- Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* 28 December 2005, E/CN.4/2006/98, at [37]-[38], [40]-[41].

<sup>168</sup> United Nations Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities in Particular Terrorism*, 8 August 2003 at [23]. The Commission also submitted that “the efforts and initiatives taken in the framework of the United Nations indicate very clearly that almost universally insurmountable difficulties that, to this very day, stand in the way of formulating a single, acceptable general definition of the crime of ‘terrorism’” at [23].

<sup>169</sup> At [49].

<sup>170</sup> Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* (OEA/Ser.L/V/II.116, 2002). The Report went on to state in Chapter II: “At best... it may be said that the international community has identified certain acts of violence that are generally considered to constitute particular forms of terrorism.”

In defining the parameters of member states' obligations [under regional treaties], it must also be recognized that to-date there has been no consensus on a comprehensive international legal definition of terrorism.

An “accurate reading”<sup>171</sup> demonstrates significant variations and diversity. Some treaties focus on specific terrorist methods without specifying a definition of ‘terrorism’;<sup>172</sup> others do not create offences at all;<sup>173</sup> some contain wide or conflicting definitions;<sup>174</sup> and others reclassify ordinary crimes or public-order offences as terrorism.<sup>175</sup> Furthermore, several of the treaties concerning terrorism have not attracted widespread support,<sup>176</sup> and even when they have, the treaties may not have influenced state practice at all.<sup>177</sup>

## F. UN General Assembly Resolutions

The phenomenon of terrorism has consistently reverberated throughout the organs of the UN since the mid-1970s. The most significant General Assembly resolution to date is the 1994 Declaration on Measures against International Terrorism.<sup>178</sup> For the

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<sup>171</sup> Saul, above n 16 at 264.

<sup>172</sup> *Organisation of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persona and Related Extortion that Are of International Significance 2002*; and the *Inter-American Convention against Terrorism 1971*.

<sup>173</sup> A number of treaties concern issues of extradition and law enforcement cooperation: *Inter-American Convention against Terrorism 1971*; *Council of Europe Convention on the Suppression of Terrorism 1977*; *South Asia Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism 1987*; and the *Commonwealth of Independent States Treaty on Cooperation in Combating Terrorism 1999*.

<sup>174</sup> *1998 Arab Convention for the Suppression of Terrorism*; *Organisation of the Islamic Conference (OIC) Convention on Combating International Terrorism*; *1999 Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism*; *2002 EU Framework Decision on Combating Terrorism*.

<sup>175</sup> *Arab Convention*, Art 1(2), 1998; *OIC Convention*, Art 1(2), 1999; *Shanghai Cooperation Organization Convention on Combating Terrorism, Separatism and Extremism, 2001*; *Council of Europe Convention on the Prevention of Terrorism, 2005*; *SAARC Additional Protocol to the 1987 Convention, 2004*; *African Union Protocol to the 1999 Convention, 2004*.

<sup>176</sup> For example, more than a decade since the OIC treaty, only one quarter of the OIC members are parties to the treaty, substantially impinging its impact.

<sup>177</sup> The OAU treaty does not appear to have penetrated deeply or even at all into many national legal systems in Africa, where a majority of countries still lack terrorism laws.

<sup>178</sup> *Interlocutory Decision*, above n 23, at [88] and footnote 136 cited therein. The 1994 Declaration on Measures to Eliminate International Terrorism (“1994 Declaration”) recalls that “criminal acts intended or calculated to provoke a state of terror in the general public, or group of persons or particular persons for political purposes are in any circumstance unjustifiable.” Treaties negotiated after 1994 have adopted different definitions, challenging the apparent international consensus surrounding the 1994 Declaration.

first time, the General Assembly was able to agree on a political definition of terrorism, comprising:<sup>179</sup>

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

General Assembly resolutions can express a general consensus, creating an expectation of adherence, which may in time become binding as normative customary rules.<sup>180</sup> As an indicator of custom, it is significant that the 1994 Declaration was adopted without a vote, suggesting consensus among states, and has been reiterated in numerous later resolutions.<sup>181</sup>

Several factors qualify the significance of the 1994 Declaration. Although all UN members approved the declaration, the preamble itself emphasises the need to progressively develop and codify the law on terrorism.<sup>182</sup> Reinforcing this is the fact that a number of states have continued to insist on the importance of achieving a legal definition of terrorism.<sup>183</sup> Adoption by consensus does not necessarily reflect unanimity among states, but rather the absence of formal objections.<sup>184</sup> Furthermore, resolutions adopted by consensus need not signify universal acceptance of their

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<sup>179</sup> 1994 Declaration, above n 178, at [3].

<sup>180</sup> Jennings and Watts (eds) *Oppenheim's International Law* (9<sup>th</sup> ed, Longman, London 1992) at 45

<sup>181</sup> A/RES/49/60 Annex (1994), at [3]; A/RES/64/118 (2009), at [4]; A/RES/63/129 (2008), at [4]; A/RES/62/71 (2007), at [4]; A/RES/61/40 (2006), at [4]; A/RES/60/43 (2005), at [2]; ARES159146 (2004), at [2]; A/RES/58/81 (2003), at [2]; A/RES/57/27 (2002), at [2]; ARES156188 (2001), at [2]; A/RES/55/158 (2000), at [2]; A/RES/54/10 (1999), at [2], A/RES/53/108 (1998), at [2]; A/RES/52/165 (1997), at [2]; ARES/51/210 (1996), at [2]; A/RES/50/53 (1995), at [2].

<sup>182</sup> Preamble to the 1994 Declaration at [12].

<sup>183</sup> Non-Aligned Movement ('NAM'), XIV Ministerial Conference, Final Doc., Durban, 17–19 August 2004, at [98]–[99], [101]–[102], [104]; NAM, XIII Conference of Heads of State or Government, Final Doc., Kuala Lumpur, 25 February 2003, at [105]–[106], [108], [115]; NAM, XIII Ministerial Conference, Final Doc., Cartagena, 8–9 April 2000, at [90]–[91]; OIC Resolutions 6/31-LEG (2004), at [5]; 7/31-LEG (2004), preamble, at [1]–[2]; 6/10-LEG(IS) (2003), at [5]; 7/10-LEG (IS) (2003), at [1]–[2]; OIC, Islamic Summit Conference (10th Session), Final Communiqué, Malaysia, 16–17 October 2003, at [50]; OIC (Extraordinary Session Foreign Ministers), Declaration on International Terrorism, Kuala Lumpur, 1–3 April 2002, at [8], [11], [16], and Plan of Action, at [2]–[3].

<sup>184</sup> E Suy "The Meaning of Consensus in Multilateral Diplomacy" in R Akkerman, P Van Krieken, and C Pannenberg (eds) *Declarations on Principles: A Quest for Universal Peace* (Springer, New York, 1977) at 272.

provisions, since states may not object on the basis that the document is non-binding.<sup>185</sup> The 1994 Declaration and the succeeding declarations affirming it reveal that states remain profoundly divided on formulating a definition of terrorism, even with resolutions evincing a “clear sign of deep concern regarding the problem.”<sup>186</sup> The 1996 Supplement to the 1994 Declaration reinforces the notion that the definition was not supposed to carry any legal weight.<sup>187</sup> The supplement delegated the task of formulating a definition of terrorism to the Ad Hoc Committee on Negotiating a Comprehensive Treaty of Terrorism (“the Ad Hoc Committee”).

The Ad Hoc Committee has been unable to formulate an accepted definition of terrorism since its creation in 1996. The Appeals Chamber pointed out that there is a “large measure of approval”<sup>188</sup> in defining terrorism within the Ad Hoc Committee, and note a definition proposed by the Coordinator of the Draft Treaty that was considered “acceptable” (but never accepted) by those delegates who took a position on the matter in 2003.<sup>189</sup> Despite the apparent ‘consensus’, as recently as 13 April 2011 the Ad Hoc Committee reported that the delegations have still not formally agreed upon any definition of terrorism.<sup>190</sup> The Appeals Chamber’s analysis ignores the glaring reality that negotiations amongst the Committee have yet to result in a common definition of the elements after decades of deadlock. It follows that the UN Draft Treaty is the best evidence of an *absence* of consistent state practice. In view of this, limited reliance can be attributed to the efforts of the Ad Hoc Committee. It would seem anomalous if a customary crime of terrorism existed at a time when states remained stalemated in attempts to formulate a definition in treaty form.

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<sup>185</sup> P Van Krieken *Terrorism and the International Legal Order* (Asser, The Hague, 2002) at 121.

<sup>186</sup> *Legality of the Threat or Use of Nuclear Weapon (Opinion)* [1996] ICJ Rep 226 Advisory Opinion at [71].

<sup>187</sup> 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.

<sup>188</sup> *Interlocutory Decision*, above n 23, at [88].

<sup>189</sup> At [88] and fn 138.

<sup>190</sup> Report of the Ad hoc Committee established by the General Assembly Resolution 51/210 of 17 December 1996, *Fifteenth Session Report A/66/37*, 2011

## **G. The Status of Customary International Law Surrounding Terrorism**

There remain fundamental differences concerning definitions of terrorism. Broadly speaking, there is a movement towards a general definition. Notwithstanding this, a closer examination reveals that significant deviations in approaches continue to exist. These differences are not “small inconsistencies”,<sup>191</sup> but instead reflect fundamental disagreement about the notion of terrorism. Neither requirement of customary international law is fulfilled. An examination of the sources of custom reveals no general practice on the part of states in prohibiting terrorism. Nor does the Special Tribunal succeed in demonstrating that state practice is driven by a sense of international legal obligation, as opposed to domestic convenience in prosecuting one’s own terrorists, or procedural compliance with UN Security Council resolutions.<sup>192</sup> Without more, this fact is incompatible with the Appeals Chamber’s declaration and raises serious questions about the implications and significance of the decision.

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<sup>191</sup> *Anglo-Norwegian Fisheries Case (UK v. Norway)* (1951) ICJ Rep 116 at 131.

<sup>192</sup> Ben Saul “The Special Tribunal for Lebanon and Terrorism as International Crime: Reflections on the Judicial Function” (2012) Sydney Law School Research Paper No 12/64 at 12.

## **CHAPTER IV IMPLICATIONS AND SIGNIFICANCE OF THE DECISION**

The Appeals Chamber's conclusion entails a number of far-reaching consequences. The first half of this chapter will examine the potential gaps in the definition formulated and human rights implications. The second will consider the wider precedential value of the decision. This part will highlight issues of implementation before assessing its enduring influence.

### **A. The Over-Inclusive Nature of the Definition**

The definition of terrorism declared by the Appeals Chamber can be criticised as being over-inclusive. The requirement of a bifurcated special intent, coupled with an open-ended formulation of qualifying conduct, may extend the definition of terrorism to encompass conduct not typically regarded as terrorism in everyday understanding.

The first criticism of the Appeals Chamber's definition is that the *dolus specialis*, the special intent, requirement could encompass activities that do not cause terror or fear. The Appeals Chamber established a bifurcated special intent standard, requiring two alternative mental elements:<sup>193</sup>

- (i) [A]n intent to spread fear amongst the population (which would generally entail the creation of public danger) *or* (ii) directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it.

Where the two do not overlap, the second limb is potentially over-inclusive. It is feasible that it may extend to conduct that would not typically be considered

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<sup>193</sup> *Interlocutory Decision*, above n 23, at [85].

terrorism, such as political protest.<sup>194</sup> The effect of this expansion could provide governments with a powerful legal tool to suppress discord by political opponents.

According to the principle of *bonam partem*,<sup>195</sup> article 314 of the Lebanese Criminal Code can only be interpreted in a manner that is in favour of the accused. For that purpose, one solution would be to require proof of both mental elements. Otherwise, the Appeals Chamber's alternative mental elements would broaden the scope of article 314 since perpetrators with either of the two intents could qualify as terrorists.

The second criticism is the open-ended formulation of the 'means' element of the definition. Lebanese Courts have consistently held that the list contained in article 314 is not exhaustive. Instead, the means listed share the common feature that they are all uncontrollable once activated. This is the *raison d'être* for categorising these acts as 'terrorism': their use entails spreading fear and terror through uncontrollable risks to an undetermined number of persons and objects.<sup>196</sup> It follows that any additional means not listed must be comparable in nature to those that are.

The Appeals Chamber's definition expands the 'means' requirement of "acts that cause public danger" to include other conduct such as "murder, kidnapping, hostage taking, arson *and so on*".<sup>197</sup> This implicitly severs the link between the listed and additional means, with the latter unable to be reasonably defined. The inclusion of the words "and so on" at the end of the formulation leaves the means open to expansive interpretation. As the present decision attests, "the expansive judicial interpretation of potential ambiguities is not merely a remote hypothesis".<sup>198</sup> Coupled with the bifurcated intent standard, the definition's open-ended formulation means that it is

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<sup>194</sup> The Appeals Chamber attempts to dismiss any criticism by claiming that the distinction is not critical as "a terrorist generally coerces by spreading fear, these two articulations of the special intent required for the crime of terrorism, in practical terms, *largely* overlap with each other" at *Interlocutory Decision*, above n 23, at fn 223 (emphasis added).

<sup>195</sup> Lebanese law explicitly recognises the principle of retroactivity *bonam partem* ("in a favourable manner"). Article 3 of the Lebanese Criminal Code states: "any statute that amends the definition of an offence in a manner that benefits the accused shall be applicable to the acts committed prior to its entry into force, unless an irrevocable judgement has been rendered."

<sup>196</sup> Reuven Young "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation" (2006) Boston College International and Comparative Law Review 29.

<sup>197</sup> *Interlocutory Decision*, above n 23, at [85], *emphasis added*.

<sup>198</sup> Gillet and Schuster, above n 25, at 1010.

conceivable that crimes committed in protests, such as trespass and resisting arrest, could fall within the Appeals Chamber's definition of terrorism. This threatens to dilute the special character of terrorism, thereby opening the door to potential manipulation of the offence.

If individual cases proceed to trial, these concerns will need to be revisited and resolved in light of fuller submissions from the parties. If the matter is challenged in subsequent trials, this may provide an opportunity for the Appeals Chamber to address these concerns and refine its definition.<sup>199</sup>

## **B. Breaching the Principle of Legality**

By broadening the special intent requirement and abandoning the means restriction, the Appeals Chamber has extended the definition of terrorism. In doing so, it has effectively included conduct that would not previously have qualified under article 314. This expanded definition of article 314 may leave the decision open to a challenge based on a breach of the principle of *nullum crimen sine lege* ("no crime without law"). This well-established principle<sup>200</sup> requires that everyone must know in advance whether specific conduct is consonant with, or a violation of, penal law.<sup>201</sup> The Appeals Chamber dismissed any claims that its definition would breach this fundamental tenet by noting that the crime already existed at international law at the time.<sup>202</sup> This legal construct activates the exception providing for retrospective prosecution and punishment of international crimes under the International Covenant on Civil and Political Rights 1966.<sup>203</sup> Accordingly, referring to international

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<sup>199</sup> The Appeals Chamber has explicitly acknowledged that it could reconsider any aspects of its Decision if challenges are raised during subsequent trials at *Interlocutory Decision*, above n 23, at [8]. The Appeals Chamber has since rejected motions of appeals for reconsiderations of its earlier decision of February 2011 on the basis that no injustice was caused to particular defendants under Rule 176bis (C). See STL, *Prosecutor v Ayyash et al*, Case No STL-11-01PT/AC/R176bis, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February, 18 July 2012.

<sup>200</sup> Lebanese Constitution, article 8; Lebanese Criminal Code, article 1; and the International Covenant on Civil and Political Rights, article 15.

<sup>201</sup> *Interlocutory Decision*, above n 23, at [131].

<sup>202</sup> Unhelpfully, the Appeals Chamber did not specify a time at which the customary law crystallised. It must be assumed that by early 2005 (when the assassination of Hariri was carried out) this had already taken place.

<sup>203</sup> International Covenant on Civil and Political Rights 1966, article 15(2) which states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the

customary rules and international instruments binding upon Lebanon, the Appeals Chamber concluded that.<sup>204</sup>

It was foreseeable for a Lebanese national or anybody living in Lebanon that any act designed to spread terror would be punishable, regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger.

However, this approach is problematic. The Appeals Chamber's reliance on customary international law is not an appropriate basis to determine whether an accused before the Special Tribunal had sufficient notice of the criminality of their conduct. The Appeals Chamber refers to customary law formulated in the International Criminal Tribunal for the former Yugoslavia ("the ICTY") decision of *Milutinović* to support its conclusion that notice of criminalisation was foreseeable.<sup>205</sup> That decision emanated from a Tribunal with authority under its Statute to apply customary international law. In that context, customary law was an appropriate vehicle to provide notice to an accused. By contrast, the Special Tribunal of Lebanon is limited to applying provisions of the Lebanese Criminal Code, making any recourse to customary law inappropriate. Moreover, examination of Lebanese law, notably absent in the Appeals Chamber's analysis, portrays a far less flexible picture of notice. In civil law systems, the principle of *nullum crimen sine lege* is understood strictly, ensuring that "international custom cannot guard against the lack of legislative provision".<sup>206</sup> The approach in the French courts is that international custom cannot impede the fundamental principles of legality of criminal offences and of non-retroactivity of stricter criminal law.<sup>207</sup>

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time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Lebanon is a party to the Covenant, acceding to it 3 November 1972.

<sup>204</sup> *Interlocutory Decision*, above n 23, at [138].

<sup>205</sup> *Prosecutor v Milutinović et al: Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (Judgement)* Appeals Chamber 99-37-AR73 2 May 2003. In that case the Appeals Chamber of the ICTY held that non-codified international customary law could give an individual "reasonable notice" of conduct that could entail criminal liability without infringing the principle of *nullum crimen sine lege*.

<sup>206</sup> (Translation) *Cass Crim* (2003) No 02-83986 (France).

<sup>207</sup> *Isaac Kamali*, 10 December 2010, Paris Court of Appeal, Investigating Chamber. The case concerned the extradition of a Rwandan for his involvement in the 1994 genocide. The Court held that given that domestic legislation on genocide in Rwanda was not passed until 2003, "the application... is contrary to the principles cited above, and clearly, irreconcilable with the inviolable principle of non-retroactivity of stricter criminal laws."

The other supporting material relied upon is equally untenable. The Appeals Chamber concluded that because Lebanon has acceded to a number of international conventions, anyone living in Lebanon would be aware that a wider range of acts could fall under the prohibition of terrorism than those included in article 314, and interpreted by the Lebanese Courts since 1943.<sup>208</sup> These conventions expand the notion of terrorism in particular circumstances, for example seizing an aircraft or using nuclear material. If an accused were to be expected to know of Lebanon's accession to those treaties, "they should equally be expected to know of the specific subject matter of those treaties and their limited coverage".<sup>209</sup> Thus, in order for the conventions to be considered relevant, they must be considered in their specific context, rather than used in support of a general definition of terrorism. Taken to its logical conclusion, this reasoning assumes that an individual will be aware of a possible broader *international* interpretation of an element of a particular national offence and its direct applicability to that *domestic* legal order. To assume such awareness on the part of the accused at the time of the Hariri assassination in 2005 stretches the fiction of knowledge of the law to breaking point.

The Appeals Chamber has since received a request for reconsideration of its interlocutory decisions of 16<sup>th</sup> February 2011.<sup>210</sup> One of the grounds was that the principle of *nullem crimen sine lege* had been breached. The claim was dismissed on the basis that no injustice had occurred as the indictees had been charged with participating in the commission of a terrorist act using means explicitly listed in article 314, namely "an explosive device".<sup>211</sup> Despite this, there exists a strong case for breach of the *nullem crimen sine lege* principle in certain circumstances, such as where an individual is charged with using means falling within the expanded definition formulated by the Appeals Chamber but outside the Lebanese interpretation of article 314.<sup>212</sup>

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<sup>208</sup> *Interlocutory Decision*, above n 23, at [141]. This was done on the basis that because certain conventions did not specify the means element required to commit the offence, it was foreseeable that the crime of terrorism would have a wider ambit.

<sup>209</sup> Gillet and Schuster, above n 25, at 1005.

<sup>210</sup> *Prosecutor v Ayyash et al: Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February (Judgement)* STL Appeals Chamber. STL-11-01PT/AC/R176bis, 18 July 2012.

<sup>211</sup> At [45]-[51].

<sup>212</sup> For example, being charged using means of guns and knives. This is a distinct possibility with the Special Tribunal Prosecutor currently investigating the death of Pierre Gemayel, a Minister of Industry

### C. Prosecuting the Customary Crime of Terrorism

The role of international courts in prosecuting a customary crime of terrorism is likely to be limited. The jurisdiction of international courts is often restricted.<sup>213</sup> Only the Special Tribunal of Lebanon has clear subject matter jurisdiction over terrorism. Nonetheless, a number of tribunals have jurisdiction over acts of terrorism as war crimes, including the International Criminal Tribunal for Rwanda (“ICTR”),<sup>214</sup> the ICTY<sup>215</sup> and the Special Court of Sierra Leone (“SCSL”).<sup>216</sup> The offence of terrorism as a war crime requires different elements to those of the putative crime of terrorism under customary law. As a result, the impact of the Appeals Chamber’s declaration will have little influence on any other international tribunal.<sup>217</sup>

A customary crime of terrorism is unlikely to become a crime within the jurisdiction of the International Criminal Court (“ICC”). Although proposals have been made to include terrorism as a distinct crime in the ICC’s Statute, these have repeatedly been rejected on the grounds that no generally accepted definition of terrorism exists.<sup>218</sup>

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in the Lebanese Government in 2005 who was assassinated in a drive-by shooting. See BBC News *Lebanon fears descent into abyss* (21 November 2006 <[http://www.news.bbc.co.uk/2/hi/middle\\_east/6171024.stm](http://www.news.bbc.co.uk/2/hi/middle_east/6171024.stm)> accessed on 20/9/2012.

<sup>213</sup> See also Report of the UN Secretary General, *The scope and application of the principle of universal jurisdiction: Report of the Secretary-General prepared on the basis of comments and observations of Governments* (UNGA Doc A/65/181, 29 July 2010) at [8]: “Attention was drawn to the establishment of ad hoc tribunals, of a diverse variety, as well as to the Rome Statute of the International Criminal Court. While support was expressed for such arrangements, nothing that the international criminal justice system afforded a range of complementary mechanisms not only to end impunity but also to maintain international peace and security, it was acknowledged by some Governments that such bodies had their own jurisdiction and practical limitations.”

<sup>214</sup> Statute of the ICTR, article 4(d) (although no cases have yet been prosecuted).

<sup>215</sup> The crime is not mentioned in the statute, however article 3 of the ICTY Statute expressly states that the subject matter jurisdiction of the Tribunal “shall include but not be limited to” those instances of violations of the laws and customs of war. See *Prosecutor v. Stanislav Galic (Judgement)* ICTY IT-98-29-T 5 December 2003; *Prosecutor v Vidoje Blagojevic and Dragan Jokic (Judgement)* IT-02-60-T, 15 April 2004.

<sup>216</sup> Statute of the SCSL, article 3. See *Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)* SCSL-2004-14-AR72(E) 31 May 2004; *The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)* SCSL-04-16-T 20 June 2007; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)* SCSL-04-15-T 2 March 2009; *Prosecutor v. Charles Ghankay Taylor (Judgement Summary)* SCSL-03-1-T 26 April 2012.

<sup>217</sup> The definition of terrorism as a war crime was stated in *Galic*, above n 215, at [100] and [103] as requiring conduct of direct or indiscriminate attacks against civilians with a specific intent to spread terror among the civilian population.

<sup>218</sup> Assembly of State Parties, Eighth session, The Hague, OR (ICC-ASP/8/20), Vol 1, Annex II (*Report of the Working Group on the Review Conference*), 18-26 November 2009, at [40]-[51] and Appendix III at 65-66.

Objections to including a crime of terrorism were made on three grounds. Firstly, that there is “no lack of definition of terrorism, since the 13 counter-terrorism conventions defined a multitude of acts that constituted terrorism”.<sup>219</sup> Secondly, that including a crime of terrorism risks politicisation of the matter.<sup>220</sup> And finally, that there are procedural difficulties in amending the Statute.<sup>221</sup> This position is unlikely to change in the near future.

In the tenth session of the Assembly of State Parties (ten months after the interlocutory decision) the Working Group on Amendments considered and rejected a proposal from the Netherlands to include a crime of terrorism in the Rome Statute.<sup>222</sup> Although the decision of the Appeals Chamber may, in time, convince some delegations that a general definition of terrorism is emerging or has emerged, the prospect that the ICC’s jurisdiction *ratione materiae* will be explicitly expanded to contain acts of terrorism in the immediate future is remote. Indeed, the Leiden Policy Recommendations on Counter-Terrorism and International Law conclude that it is not only unlikely, but also “undesirable, that the Rome Statute of the International Criminal Court will be amended to include terrorism as a specifically articulated crime.”<sup>223</sup>

Declaring a customary rule does not amount to an automatic jurisdictional platform for national courts to prosecute suspected terrorists. Applying customary international

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<sup>219</sup> At [45]. The Report also noted that “the Assembly should not send the wrong signal that there were problems with the 13 seccotral conventions.”

<sup>220</sup> At [46]. “It was [...] suggested that the Assembly should strive for universality of the Court, which could be hindered by entering into negotiations on terrorism.” This argument was put forward in view of the fact that terrorism cases are indeed very often politically charged and the fact that the ICC needs the support of (still more) states to enforce its decisions.

<sup>221</sup> At [48]. Proposals to include the crime of terrorism in the same manner as aggression had been was rejected as it was felt that “the analogy could not easily be drawn as a degree of consensus had already existed on the definition of the crime of aggression [...], while no such generally agreed definition of terrorism as yet existed.” In addition, it was expressed that this technique was only to be used “in very exceptional circumstances” and “should not become the norm” at [49].

<sup>222</sup> Assembly of State Parties, Tenth session, New York, OR (ICC-ASP/10/32) Vol 1 (*Report on the Working Group on Amendments*), 9-21 December 2011 at 17. The Netherlands proposal was to add paragraph *ethe crime of terrorism* at the end of article 5, in addition to a further paragraph 3 to that article which would state that the Court could only exercise jurisdiction once another amendment containing a defining and elements of the crime had been agreed to.

<sup>223</sup> Nico Schrijver and Larissa van den Herik *Leiden Policy Recommendations on Counter-Terrorism and International Law* (Grotius Centre for International Legal Studies, Leiden, 2010) at [8]: “domestic states should cooperate to eradicate terrorism to the fullest extent possible based on the unequivocal condemnation of all acts, methods, and practices of terrorism as criminal and unjustifiable committed wherever and by whoever.”

law directly requires that the national law of the state in question allows for the application of unwritten criminal provisions. Every state has the right under customary international law to exercise extraterritorial jurisdiction in respect of international crimes.<sup>224</sup> Whether a state's courts have extraterritorial jurisdiction under domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts.<sup>225</sup>

The principle of legality is likely to pose restrictions on the prosecution of the customary crime. In many states, strict principles of legality prohibit prosecution under unwritten criminal law provisions. At the international level, the International Covenant on Civil and Political Rights<sup>226</sup> and the European Convention on Human Rights<sup>227</sup> allow for criminal prosecution if the act or omission is criminal under either international or national law, irrespective of whether the provision is a written or unwritten norm. However, many national legal systems require compliance with a stricter principle of legality, such as written and clearly defined legal norms.<sup>228</sup> Even if a state's domestic framework allows resort to customary international law, differences in definitions may prevent its application.

There is a real possibility that state national legislature will define terrorism in a way that differs from the customary definition declared by the Special Tribunal. Common law jurisdictions accord primacy to domestic legislation and recognise that international law will not be interpreted in a manner that is inconsistent with clear legislative intent. In practice this will further restrict the number of states that can apply the custom. For example, states which require the additional element of a

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<sup>224</sup> Denza, above n 54, at 435.

<sup>225</sup> In Australia for example, the majority judgement of the Federal Court in *Nulyarimma v Thompson*, above n 59, at 153 found that as the Convention on the Prevention and Punishment of the Crime of Genocide had not been implemented by legislation, genocide was not part of domestic law. See also the majority judgement of the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) ('Pinochet')* (No 3) (1999) 2 All ER 97 which concluded that only after the Convention on Torture had been enacted in the United Kingdom was it possible to satisfy the double criminality rule in order to extradite an accused faced with charges of torture.

<sup>226</sup> International Covenant on Civil and Political Rights, article 15(1).

<sup>227</sup> European Convention on Human Rights, article 7(1)(1).

<sup>228</sup> Dinah Shelton "International Law in Domestic Systems: Congress of the International Academy of Comparative Law" in K Brown and D Synder (eds) *General Reports of the XVIIIth Congress of the International Academy of International Comparative Law* (Springer, Netherlands, 2012) at 501-524.

political, religious or ideological motivation will have a more specific definition of terrorism, and so will not be able to apply the broader definition under customary law.

States may be able to exercise universal jurisdiction in prosecuting suspected terrorists. The Appeals Chamber labelled terrorism as an “international crime”.<sup>229</sup> Implicitly, this could enable states to prosecute terrorists using universal jurisdiction. Universal jurisdiction provides every state with jurisdiction over a limited category of international crimes under customary international law, regardless of where the offence occurred and of the nationality of the perpetrator or the victim.<sup>230</sup> In the last decade, universal jurisdiction has been employed in order to prevent impunity for international crimes.<sup>231</sup> To date, 18 states have national statutes that give their courts universal jurisdiction over “offences against international law” under customary international law.<sup>232</sup> It follows that by regarding terrorism as an international crime proper, these states could exercise universal jurisdiction over the newly declared crime.

There are a number of pitfalls inherent in prosecuting terrorism in national courts by means of universal jurisdiction. Firstly, prosecutions may be so politically sensitive that they cannot be tried fairly and any attempt to do so would undermine efforts aimed at restoring international peace and security. Moreover, assertions of universal jurisdiction can potentially intimidate and harass another state or its officials as a form

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<sup>229</sup> *Interlocutory Decision*, above n 23, at [134]. The Appeals Chamber regarded terrorism “as so heinous and contrary to universal values that the whole community condemns [it] through customary rules.”

<sup>230</sup> See the separate opinion of Judge Higgins, Kooijmans and Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3. The judges concluded that a state may claim jurisdiction over an alleged offender who is not on their territory and who has no other link with it, as such jurisdiction is not prohibited by international law. See also *The Princeton Principles on Universal Jurisdiction* (Princeton, N.J.: Program in Law and Public Affairs, Princeton University, 2001), Principle 1(1) at 28.

<sup>231</sup> Mahmoud Bassiouni “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice” (2002) 42 *Virginia Journal of International Law* 82 at 82. The author notes that over jurisdictional platforms based on direct connections between the prosecuting state and the offence (e.g. territorial, nationality, passive personality, and the protective principle). He remains sceptical about their value in prosecuting international crimes given the ease with which they can be impinged by a lack of cooperation or interest by an affected state.

<sup>232</sup> Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, at 1, IOR 53/004/2011 (Oct. 2011); Report of the UN Secretary-General, *Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/65/181 (July 29, 2010) at 11-12, 29.

of 'lawfare'.<sup>233</sup> For example, the two states most active in exercising universal jurisdiction in recent times, namely Belgium and Spain, have buckled in the face of international pressure to amend their national legislation to prevent 'partisan' judges issuing arrest warrants for former or current heads of state or high-level officials.<sup>234</sup> Taking into account the inherently political nature of terrorism, it would be naïve to assume that a third state would reliably be more neutral or impartial than a victim state.

Even if a jurisdictional platform can be constructed to apply to the customary crime, the issue of extraditing the suspect from another state may remain. The international principle of *aut dedere aut judicare* requires states to prosecute alleged offenders of international crimes if they are not to be extradited. At present, the Report of the Special Rapporteur's list of classic international crimes to which the principle applies does not include terrorism. However, the Report notes "the list of crimes and offences covered... seems to still be open and subject to further considerations and discussion."<sup>235</sup> As the obligation applies to serious international and "transnational crimes",<sup>236</sup> it is theoretically conceivable that the principle would encompass the newly declared customary crime of terrorism. The practical application of the principle is not so straightforward, with the degree of difficulty varying from state to state. Some domestic laws on extradition do not include the obligation to extradite or prosecute while others do not allow extradition in the absence of a bilateral extradition treaty. A number of states impose restrictions on the extradition of nationals or

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<sup>233</sup> See Michael Sharf "Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting" (2011) 43 Case Western Reserve Journal of International Law 11, at 12 (Sharf coins the term "lawfare" as meaning "a strategy of using or misusing law as a substitute for traditional military means to achieve an operational result"). It is not unconceivable that states would lodge vexatious prosecutions aimed at state officials concerning state sponsored terrorism.

<sup>234</sup> *Belgium*: See Luc Reydam's "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law" (2003) Journal of International Criminal Justice 679-689. The Belgian penal provision was amended in April 2005 to limit the extent of universal jurisdiction by Belgian courts, after tension developed between the US and Belgium following attempts to have former members of the US Administration investigated in relation to the 2003 invasion of Iraq. *Spain*: Spanish Courts have continued to exercise universal jurisdiction over "any international crime", issuing an arrest warrant for high level members of the military and government of Rwanda in 2008 and have started considering the alleged genocide in Tibet. However, in April 2012, The Supreme Court of Spain cast doubt on the future of Spanish courts ability to exercise universal jurisdiction, refusing an official inquiry into alleged war crimes committed by the Israeli military in the Gaza Strip in 2002.

<sup>235</sup> Zdzislaw Galicki, Special Rapporteur *Third report on the obligation to extradite (aut dedere aut judicare)* A/CN.4/603 (2008) at [96] and Draft article 4: 'International custom as a source of the obligation *aut dedere aut judicare*'.

<sup>236</sup> At [31]: "Including war crimes, crimes against humanity, genocide, torture and specific forms of terrorism [namely hijacking and hostage taking]".

persons who have been granted political asylum while some states' laws contain reservations or exceptions to the principle for crimes that would attract unduly severe penalties in the requesting state.<sup>237</sup>

Thus, on-going issues in prosecuting the declared customary crime remain. Even if the Appeals Chamber's declaration were to be accepted the exercise of jurisdiction and extradition within and between states will be problematic. Although perhaps symbolically significant in criminalising terrorism, on its own a customary crime of terrorism is relatively toothless. What is required is an enforceable obligation on states within their legislative regimes. A comprehensive treaty that is accepted and implemented by a majority of the international community could secure a basis for transnational cooperation. The declaration of a customary crime may operate as an important stepping-stone in bringing about the creation of that comprehensive treaty. The Appeals Chamber's decision shows that there is some common ground between states in formulating a definition of terrorism. By focusing on these similarities, the Ad Hoc Committee stands a better chance at concluding their prolonged negotiations. As the decision attests, it cannot be assumed that custom will wait for them on "perpetual standby".<sup>238</sup>

#### **D. The Precedential Value of the Decision**

The interlocutory decision of the Appeals Chamber is the first time in history that an international tribunal has authoritatively propounded a general definition of terrorism under customary international law. Nonetheless, the authority of the decision does not end with its publication. As Boyle and Chinkin observe in *The Making of International Law*, "the law-making effect of all judicial decisions is contingent on the response of the broader international community and cannot be presumed in

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<sup>237</sup> For an in-depth analysis of individual and regional state practice regarding the principle see Study of the Secretariat, *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute'*, 62<sup>nd</sup> Session of International Law Commission (2010) UN DOC A/CN.4/630; and the 61<sup>st</sup> Session of the International Law Commission (2009), *Comments and Information Received from Government*, UN DOC A/CN.4/599.

<sup>238</sup> Manuel Ventura "Terrorism According to the STL's Interlocutory Decision on the Applicable Law" (2011) JICJ 1021 at 1041.

advance.”<sup>239</sup> The Appeals Chamber’s decision is not binding on courts other than the Special Tribunal.<sup>240</sup> It follows that it is necessary to assess the possible influence the decision will have on the development of international law on terrorism. Broadly speaking, two possible alternative scenarios may eventuate: (i) the customary rule is endorsed as a statement of international customary law, or (ii) the declaration is considered too premature, and its authority is confined to the Special Tribunal.

On one view, the Appeals Chamber’s judgement may be perceived as a crucial turning point in prosecuting transnational terrorism. Until now, a discrete crime of terrorism has not been recognised in international law. Indeed, “the incantatory power of an international tribunal is such that what it says is the law, is the law, or quickly becomes it.”<sup>241</sup> Customary international law is “binding on all nations”,<sup>242</sup> and so the decision may provide a legal foundation to prosecute transnational terrorism in both international and domestic courts.<sup>243</sup>

From another perspective, in light of the divergence in state practice in defining terrorism, the Appeals Chamber’s declaration may be perceived as premature. Consequently, the customary crime could be dismissed in two ways. Firstly, it could be found that the declaration, albeit creative and innovative, was *obiter dictum* since the applicable law on defining terrorism could be found in the Lebanese law. There was no need to internationalise or re-interpret this law because the definition of terrorism should be applied before the Tribunal as understood in Lebanese practice. For the reasons outlined above, the Appeals Chamber’s intertwining of the elements of Lebanese Law with customary international law ensures that this argument is not

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<sup>239</sup> Alan Boyle and Christine Chinkin *The Making of International Law* (Oxford University Press, Oxford, 2007) at 311.

<sup>240</sup> *Interlocutory Decision*, above n 23, at [142].

<sup>241</sup> Saul, above at n 55, at 699.

<sup>242</sup> R Higgins *Problems and Process, International Law and How We Use It* (Oxford University Press, Oxford, 1994) at 210.

<sup>243</sup> Emmanouela Mylonaki “Defining Terrorism” (2011) 175 *Criminal Law and Justice Weekly* 338. As Mylonaki optimistically predicts at 338 “the ruling...is likely to establish a precedent under which the UN may set up international criminal tribunals to persecute future terrorist acts”. The Appeals Chamber’s decision has since been cited with approval for the proposition that there exists a customary crime of terrorism by the High Court of Kerala. In that case, Justice CS Gopinath noted the declaration by the Appals Chamber in oral observations however distinguished it on the facts before him on the grounds that only the third element of transnationality was present in that instance. The case concerned the shooting of two Indian fishermen by members of the Italian navy. See *Mt Enrica Lexie v Circle Inspector of Police* WP(C) No 6083 of 2012 (1).

sustainable. The declaration is part of the decision's *ratio decidendi*, and so part of the law of the Special Tribunal.

The second way in confining the finding of the Appeals Chamber would be to simply restrict its precedent value.<sup>244</sup> The authority and significance of the decision can be distinguished in a number of ways. The Special Tribunal is a hybrid court, even if its judicial composition tilts slightly towards international over national.<sup>245</sup> It was established on an ad hoc basis to deal with a small number of violent acts in one state over a period of two years. Furthermore, the decision was not made in respect of a particular defendant in a criminal trial, but was a preliminary proceeding to clarify certain legal matters before a tribunal mandated to apply Lebanese criminal provisions as the substantive applicable law. These factors provide solid grounds for other courts to distinguish the declaration by the Appeals Chamber. This would effectively neutralise the decision's impact, potentially restricting its influence to cases before the Special Tribunal for Lebanon.

At present, despite the Appeals Chamber's declaration, terrorism can be regarded as a serious transnational treaty-based crime only. The divergence in state practice evident means that it is not yet a customary crime. The legal significance of this is that treaty-based crimes can only be enforced by states at the domestic level, as provided for in suppression conventions.<sup>246</sup> By contrast, international customary crimes create international criminal responsibility. They are binding on individuals with the correlative right of international enforcement, independent of domestic criminalisation and traditional jurisdictional links.<sup>247</sup> With time and consensus, the prohibition of terrorism may mature into a customary law.<sup>248</sup>

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<sup>244</sup> As the Appeals Chamber notes itself in *Interlocutory Decision*, above n 23, at [144], the "decision is not binding on any other court."

<sup>245</sup> At [16]. The Appeals Chamber regards itself as "an international tribunal in provenance, composition and regulation."

<sup>246</sup> As no convention concerning terrorism as a discrete crime yet exists, the treaty-based crime is not enforceable against other states. Accordingly, the decision will likely be confined to the Special Tribunal for Lebanon.

<sup>247</sup> Kai Ambos "Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the 'Torture Memos' Be Held Criminally Responsible on the Basis of Universal Jurisdiction?" (2009) 42 Case WRJIL at 443.

<sup>248</sup> Annyssa Bellal "The 2009 Resolution of the Institute of International Law on Immunity and International Crimes" (2011) 9 JICJ 227 at 233.

A clear statement of the law from an authoritative source could displace the ambiguity surrounding the status of the declaration. As Claus Kress observes, requiring clear statements of the law is the “true test... whether states agree to the internationalization of the criminal law rule and thereby create a crime under international law.”<sup>249</sup> Absent any conclusive definitional formulation in the UN Draft Comprehensive Treaty, the only other option is an unambiguous decision from the International Court of Justice (“ICJ”). The ICJ may acquire jurisdiction through two routes. Firstly, a state may submit a legal dispute in the ICJ’s compulsory jurisdiction.<sup>250</sup> As any affected states can exercise their own domestic jurisdiction over acts of terrorism a dispute is unlikely to occur unless a third state refuses to cooperate, for example by refusing to extradite or prosecute suspects. The other available route is if the Court receives a request for an advisory opinion, usually from the General Assembly of the United Nations.<sup>251</sup> The political and logistical difficulties in referring a question,<sup>252</sup> with efforts at establishing a Comprehensive Treaty still continuing, effectively rules out this option.

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<sup>249</sup> C Kress “International Criminal Law” in R Wolfrum (ed) *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2008).

<sup>250</sup> ICJ Statute, article 36(1).

<sup>251</sup> Article 36(1).

<sup>252</sup> See generally Michla Pomerance “The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial” (2005) 1 *American Journal of International Law* 26.

## CONCLUSION

The need for an internationally accepted definition of terrorism is clear. The world's experience of calamitous and rapidly evolving terrorist attacks lends substantial support to the argument that the sectoral approach to criminalising specific manifestations of terrorist behaviour is severely limited. Leaving states to use their own national definitions effectively opens the door to a fragmented approach. While the essence of what constitutes terrorism is generally understood, postulating that there is a clear internationally recognised crime of terrorism under international law is clearly problematic.

The Appeals Chamber's use of international law as an interpretative aid grossly violated fundamental principles of Lebanese criminal law. When one considers the clear provision of article 314 and its consistent application by Lebanese courts since 1943, there no need for the Appeals Chamber to re-interpret the provision. By rejecting the apodictic position of applying a clear text as it stands, the fundamentals of the legalist civil law system that constitute its *rationae materiae* were completely ignored. From the outset, the decision was based on crumbling foundations, casting doubt over every other conclusion reached in the judgement.

The declaration of a customary crime of terrorism by the Appeals Chamber badly misjudged the available evidence. All the sources of custom relied upon were inaccurately applied, misinterpreted or embellished beyond their significance. Key sources that undermined the Appeals Chamber's finding were hastily dismissed or omitted altogether. Fundamental differences in defining terrorism reveal that there is no best fit in core elements of state practice. Inconsistency in state practice removes any basis for the recognition of a *crime* under customary international law. The Appeals Chamber's declaration is thus both fatally flawed and based on scant empirical evidence.

The definition formulated risks subjugating potential defendants to retrospective criminal punishment and a potentially limitless expansion of the offence. Unhelpfully, the decision offers no assistance, beyond the context of the Special Tribunal, on how

the customary crime can be implemented and jurisdictional difficulties avoided. In light of the decision's serious shortcomings, it is likely that the international community's response to the declaration will be to confine the decision to its unique jurisdiction, serving no wider precedential utility for the establishment of a discrete crime of terrorism under customary international law. Only time will determine whether this decision will have any enduring impact.

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