The Challenges of Defining Terrorism in International Treaty Law

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Introduction

The age of modern international terrorism began on 23 July 1968, when the Popular Front for the Liberation of Palestine hijacked an El-Al flight from London to Rome that was then diverted to Algiers.[1] Terror crossed borders in a way that it had not before, and the international community began to grapple with how to include this form of political violence into the existing international legal framework. Yet today, after five decades of dealing with international terrorism and almost twenty years after a superpower declared a war on terror, a comprehensive convention on the subject has yet to be ratified.[2] This stands in stark contrast to international cooperation on nuclear non-proliferation, chemical weapons, and human rights. In all of those cases, the international community has ratified major treaties, which in turn have impacted on how states and non-state actors act in the international system.[3]

For over two decades, the Comprehensive Convention on International Terrorism (CCIT) has been stuck in negotiations because of disagreements over the definition of terrorism.[4] Definitions are integral to

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[1] Bruce Hoffman, *Inside Terrorism* (Columbia University Press, 2017), pp. 5-67.

[2] Surya P. Subedi, 'The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism,' in Paul Eden & Therese O'Donnell, *September 11, 2001: A Turning Point in International and Domestic Law?* (Transnational Publishers, 2005), pp. 207-225.

[3] Daniel H. Joyner's two books on the international law regimes around nuclear, chemical and biological weapons provide a good analysis of the topic. See: Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, 2009), and Idem, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, 2011).

[4] Subedi, 'The War on Terror', p. 208.

international legal agreements. An act must be defined in order to be outlawed, and without a definition, the Convention has stalled in negotiations.[5] This is not a new problem; there has never been a definition of terrorism in international treaty law, and by extension, there has never been a crime of terrorism in international treaty law.[6]

However, while the lack of a definition of terrorism makes a broad treaty on counter-terrorism difficult to create, this disagreement does make the situation more conducive to smaller treaties focusing on the specific actions that constitute terrorism. Thus far, the United Nations (UN) has been successful at passing and ratifying conventions that outlaw and punish particular tactics that terrorists might use, including airplane-hijacking, hostage-taking, bombings, and nuclear attacks, without defining terrorism as a whole.[7] This piecemeal, or sectoral system, of treaties will remain as long as there is no internationally agreed-upon definition of terrorism, but it has achieved success in bringing a large part of the international community together to ban certain terrorist tactics.[8]

There are two major disagreements about the definition of terrorism.[9] First, a sticking point in negotiations concerns whether or not certain violent non-state actors are terrorists or national liberation groups. This 'freedom fighter' problem has led to a series of stalled negotiations on a major terrorism treaty.[10] The second impasse is whether or not the state should be considered a terrorist actor, or if terrorism should only be defined in terms of violent non-state actors.[11] Together, these two limitations have prevented a universal definition of terrorism and in turn shaped the international legal response, which has focused on the

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[5] Ibid., pp. 222-225.

[6] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006), p. 190.

[7] Andrea Gioia, 'The UN Conventions on the Prevention and Suppression of International Terrorism', in Giuseppe Nesi, *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Ashgate Publishing, 2006), pp. 4-13.

[8] Ibid.

[9] Gerhard Hafner, 'The Definition of the Crime of Terrorism', in Nesi, *International Cooperation in Counter-Terrorism*, pp. 37-9.

[10] Subedi, 'The War on Terror', p. 215.

[11] Ibid.

piecemeal approach that avoids the definition problem all together by concentrating on outlawing terrorist tactics. Thus, the definition of terrorism, or lack thereof, has shaped how the international community has acted. This article analyses the definitional constraints to counter-terrorism cooperation in international treaty law.

This article will proceed in four parts. First, I will examine the reasons why attempts to pass a comprehensive, all-encompassing treaty on counterterrorism have failed. Second, I will examine the international community's success at passing treaties on specific terrorist tactics. Next, I will discuss the controversies surrounding the definition of terrorism and why these have constrained negotiations. Finally, I will assess how these definitional constraints will play out in the future. Recommendations are provided both for new parts of the piecemeal system of tactics-based treaties, and a different approach to defining terrorism that could break the stalemate in negotiations for a comprehensive treaty.

*The Umbrella Approach: The Comprehensive Convention
on International Terrorism (CCIT)*

The international community has long wanted to define terrorism, necessary in order to combat it. As Carlos Fernando Diaz-Paniagua, the UN negotiations coordinator for recent efforts towards a terrorism treaty, noted: 'Human rights law and criminal law principles require that the legal definition of a crime be precise enough that both the courts and the public know whether a certain conduct is lawful or not.'[12] In short, he argues that the international community cannot prevent or punish a crime it has not defined.

The League of Nations was the first international body that attempted to address this problem through international treaties. Following a series of high-profile assassinations, two conventions were drafted in 1937. The first criminalised the assassination of heads of state and other

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[12] Carlos Paniagua, *Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997-2005* (unpublished PhD diss., City University of New York, 2008), p. 49.

representatives of government.[13] The second convention established an international court to prosecute cases of international terrorism.[14] However, only thirteen states ratified the conventions, which was not sufficient to have the treaties enter into force.[15] Additionally, the international community quickly shifted its attention away from the conventions when war broke out in 1939.[16] The first convention defined 'acts of terrorism' as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public', and included among them the targeting of heads of state and other public figures, the destruction of public property, and deliberately endangering the lives of the public.[17]

The debate on a single terrorism treaty was restarted in the early 1970s. One day after the terrorist attack at the 1972 Munich Olympics, the US government told the German embassy that the US would take up the topic of international terrorism at the UN.[18] On 25 September 1972, the US presented the 'Draft Convention for Prevention and Punishment of Terrorist Acts'.[19] The draft Convention was focused specifically on terrorist acts by individual non-state actors.[20] In response, the Third World countries drafted an alternate resolution that criticised state terrorism and stressed the importance of self-determination and national liberation movements.[21] This resolution passed the General Assembly in December 1972, and the US proposal for a conference on the draft Convention was rejected.[22] The

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[13] Paul Wilkinson, 'Terrorism: International Dimensions', in William Gutteridge, *Contemporary Terrorism* (Institute for the Study of Conflict, 1986), p. 44.

[14] Sunga, *Emerging System,* p. 195.

[15] Wilkinson, 'Terrorism: International Dimensions', p. 45; Sunga, *Emerging System,* p. 195.

[16] Ibid.

[17] The 1937 Convention for the Prevention and Punishment of Terrorism can be accessed at <https://www.wdl.org/en/item/11579/>.

[18] Bernhard Blumenau, *The United Nations and Terrorism: Germany, Multilateralism, and Antiterrorism Efforts in the 1970s* (Palgrave Macmillan, 2014), p. 93

[19] 'U.S. Draft Convention for the Prevention and Punishment of Terrorist Acts', *International Legal Materials* 11, 6 (November 1972), pp. 1382-1387.

[20] Ibid.

[21] Blumenau, *The United Nations and Terrorism,* p. 94.

[22] John Dugard, 'The Problem of the Definition of Terrorism in International Law', in Eden & O'Donnell, *September 11, 2001,* p. 193.

resolution also created an ad hoc committee to engage with the question of international terrorism.[23] However, the committee was never able to agree on a definition of terrorism and a comprehensive terrorism convention was not pursued again until the mid-1990s.[24]

In 1996, the UN General Assembly created an *ad hoc* committee and a working group on counter-terrorism. India presented a draft of a treaty in 2000, and negotiations since then have been based on the Indian draft.[25] The CCIT would, among other items, create a universal definition of terrorism to be included in states' legal codes, shut down terrorist training camps, ban terrorist groups, and increase the ease of terrorist extradition.[26] However, the CCIT has reached a complete deadlock in negotiations, largely because the negotiations 'could not avoid the question of the definition of terrorism'.[27] As identified in the 2004 UN High-level Panel on Threats, Challenges, and Change, there are two key issues of the definition of terrorism that have prevented the treaty from being finalised and going to a vote: whether national liberation groups and whether states should fall under the purview of the Convention.[28]

The primary reason that the CCIT has not gone past the negotiations phase in two decades is the debate over who to consider a terrorist versus a freedom fighter. One key limitation is that international law legitimises national liberation groups because they are fighting for self-determination, which is a principle that the UN was founded on. This legitimisation was codified in the 1970 UN Declaration of Principles on International Law:

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[23] Thomas M. Franck & Bert B. Lockwood, Jr., 'Preliminary Thoughts towards an International Convention on Terrorism', in *American Journal of International Law*, Vol. 68, No. 1 (January 1974), p. 71.

[24] Ibid., p. 72.

[25] Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', in *Journal of International Criminal Justice*, Vol. 4 (2006), p. 1032.

[26] Suhasini Haider, 'Delhi Hopes UN will Push Global Terror Convention', in *The Hindu*, 3 July 2016, <http://www.thehindu.com/news/national/Delhi-hopes-UN-will-push-global-terror-convention/article14467324.ece>.

[27] Paniagua, *Negotiating Terrorism*, p. 515.

[28] 'A More Secure World: Our shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change', UN Doc UN A/5565, p. 48.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence.[29]

Thus, the UN is trapped by the freedom fighter problem because any international treaty regarding terrorism must punish terrorist acts while still respecting the rights of all peoples to fight for their self-determination.

Several states have pressed for a definition that distinguishes between 'acts of terrorism and the legitimate struggle of peoples under foreign occupation and colonial or alien domination in the exercise of their right to self-determination'.[30] The Organization of Islamic Countries (OIC) has led this effort to exclude acts by national liberation movements. In 2002, the OIC proposed an alternate wording of Article 18, which is the section of the Convention that describes how the treaty will apply to armed conflict. The proposed text states that 'activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.[31] Since international humanitarian law states that armed struggle for self-determination is legitimate, the proposed text would offer an exception for groups that

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[29] 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', *United Nations*, 24 October 1970, <http://www.un-documents.net/a25r2625.html>.

[30] 'Summary Record of the 27th meeting', UN Doc. A/C.6/70/SR.27, Sixth Committee, 24 November 2015,
<http://legal.un.org/docs/index.asp?symbol=A/C.6/70/SR.27>.

[31] 'Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996', UN Doc A/57/37, Sixth Session (28 January - 1 February 2002), p. 17.

operate under the name of national liberation. However, negotiations on this front have stalled, regardless of India's efforts to lobby the OIC states.[32]

The secondary reason for the deadlock in CCIT negotiations is the idea of state terrorism. Several states have expressed concern that the CCIT would apply only to non-state actors and would like to include language that would expand the definition of terrorism to states as well. Countries as varied as Nicaragua, Afghanistan, Kuwait, and Malaysia have urged the inclusion of a state terrorism definition.[33] The US in particular has argued against this and has sought a definition solely based around non-state actors. This disagreement has contributed to the now over two-decade stall in finalising the CCIT. The international political relationships driving this discussion can be seen in the transcripts of UN committee meetings. For example, during a 2012 meeting of the UN Sixth Committee, which is responsible for legal matters, Saudi Arabia specifically pointed to what it called Israel's acts of 'official state terrorism' towards the Palestinian people.[34] Moreover, the US in particular has fought the introduction of language that would include state actions because the US government does not want to be liable for punishment for actions the US military may commit during combat operations overseas.[35] Thus, the US has argued that 'acts of terrorism could only be committed by groups or individuals' and 'not by states'.[36]

The issue of state terrorism has been addressed through the inclusion of language to exclude states. Specifically, the compromise draft states that the actions of armed forces are governed by humanitarian law

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[32] 'What is the Comprehensive Convention on International Terrorism?', in *LiveMint*, last updated 28 September 2016, <http://www.livemint.com/Politics/Ee84kLhbyP5NJ9mFnMzkKO/Will-Sushmas-speech-at-the-UNGA-give-fresh-push-to-antiter.html>.

[33] 'Legal Committee Urges Conclusion'. 'Speakers Urge that Differences be Resolved in Draft Comprehensive Convention on International Terrorism, as Sixth Committee Begins Session', UN Doc. GA/L/3475, 7 October 2014.

[34] 'Legal Committee Urges Conclusion of Draft Comprehensive Convention on International Terrorism', UN Doc. GA/L/3433, 8 October 2012.

[35] Haider, 'Delhi Hopes'.

[36] Paniagua, *Negotiating Terrorism*, p. 577.

and are thus not under the purview of the CCIT.[37] However, while this may placate the US in its objections to the treaty, there are still many states that want to see state actions included. The delegation from Nicaragua strongly encouraged the General Assembly to include state actions in the definition of terrorism, asserting that Nicaragua 'had been a victim' of state terrorism.[38]

After over 20 years since discussions began, it remains clear that a comprehensive treaty on international terrorism will not be passed as long as the international community cannot agree on a definition of terrorism. The 2004 high level panel expressed extreme disappointment, stating that a 'lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nation's image. Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative.[39] The issue will continue to be brought up, particularly by CCIT-sponsor India, but the pattern of negotiations has shown that even an event such as 9/11 cannot create enough political will to get beyond the disagreements over state actions and national liberation movements.[40]

The Piecemeal Approach: UN Treaties on Terrorist Tactics

While the comprehensive, umbrella approach to international cooperation on counter-terrorism has stalled, the UN does in fact have a history of passing anti-terrorism conventions. From 1963 to 2013, the UN General Assembly passed fourteen conventions and four amendments on counter-terrorism.[41] Unlike the CCIT, these conventions do not focus on terrorism

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[37] Thalif Deen, 'U.N. Remains Divided over Domestic and State Terrorism,' in *Inter Press Service,* 1 July 2015, <http://www.ipsnews.net/2015/07/u-n-remains-divided-over-domestic-and-state-terrorism/>.

[38] 'Legal Committee Urges Conclusion'; 'Speakers Urge that Differences be Resolved in Draft Comprehensive Convention on International Terrorism, as Sixth Committee Begins Session', UN Doc. GA/L/3475, 7 October 2014.

[39] 'A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change', UN Doc UN A/5565, p. 48.

[40] Hmoud, 'Negotiating the Draft Comprehensive Convention', p. 11.

[41] 'UN Action to Counter Terrorism,' *United Nations,*

as a whole. Rather, the treaties take a piecemeal approach, each focusing on criminalising a different action or tactic that terrorist organisations might use, including airplane-hijackings, bombings, and possession or use of nuclear weapons. In general, these treaties focus on outlawing specific terrorist acts by obligating 'parties to the Convention to either prosecute offenders or extradite them to countries in which the act in question took place'.[42]

All of the aforementioned treaties avoid defining terrorism. For example, instead of defining terrorism at large, some of the more recent treaties have called the acts they are criminalising 'an offence within the meaning of this Convention'.[43] By circumventing the definition of terrorism, these treaties were not deadlocked by the problems of incorporating either state actors or national liberation movements.

In fact, three treaties on international terrorism have been passed while the CCIT was being theorised and debated — the 1997 Terrorist Bombing Convention, the 1999 Terrorist Financing Convention, and the 2005 Nuclear Terrorism Convention. Two of those treaties, on bombing and finance, were drafted and deliberated in the same ad hoc committee responsible for the CCIT.[44] A total of 188 states are party to the Terrorist Financing Convention, making it the most widely accepted international treaty concerning terrorism.[45] Other conventions have achieved widespread support as well, namely the 1979 Hostages Convention (176 states are

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<https://web.archive.org/web/20130104040743/http://www.un.org/terrorism/instruments.shtml>.

[42] Angus Martyn, 'The Right of Self-Defence under International Law-the Response to the Terrorist Attacks of 11 September', *Australian Parliament*, Current Issues Brief 8, 12 February 2002, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0102/02CIB08>.

[43] Paniagua, *Negotiating Terrorism*, p. 46.

[44] 'Finalizing Treaty Requires Agreement on 'Armed Forces', 'Foreign Occupation', Anti-Terrorism Committee Told', UN Doc. L/2993, 1 February 2002.

[45] 'International Convention for the Suppression of the Financing of Terrorism', *United Nations*, Treaty Collection, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en>.

party) and the 1997 Terrorist Bombing Convention (169 states are party).[46] Thus, this method allows for much greater cooperation than the umbrella approach, which has been stalled for two decades. See figure 1 for a complete listing of the treaties, protocols, and amendments and their adoption by states.

Figure 1: Anti-Terrorism Convention Adoption in the International Community			
Treaty Name	*Topic*	*Year*	*States Party to the Treaty*
Tokyo Convention	Offences onboard aircraft	1963	186
Hague Convention	Seizure of aircraft	1970	185
Montreal Convention	Sabotage of aircraft	1971	188
Diplomatic Agents Convention	Diplomats	1973	180
Hostages Convention	Hostages	1979	176
Nuclear Materials Convention	Nuclear materials	1980	153
Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Act)	Maritime safety	1988	166
SUA Protocol	Offshore fixed platforms	1988	155
Airport Protocol	Supplement to Montreal Convention	1988	175
Plastic Explosives Convention	Explosives	1991	153
Terrorist Bombing Convention	Explosives	1997	169
Terrorist Financing Convention	Finance	1999	188
Nuclear Terrorism Convention	Nuclear weapons	2005	113
Maritime Protocol	Supplement to SUA Act	2005	40
SUA PROT 2005	Supplement to SUA Protocol	2005	35
Beijing Convention	Civil aviation	2010	22
Beijing Protocol	Amendment to Hague Convention	2010	22

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[46] 'International Convention Against the Taking of Hostages', *United Nations*, Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&clang=_en; 'International Convention for the Suppression of Terrorist Bombings', *United Nations*, Treaty Collection, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en>.

The tactics-based treaties have been highly reactive: the conventions are typically drafted after a significant terrorist attack or series of attacks.[47] For example, the 1970 Hague Convention, which covered aircraft-hijacking, came just two years after the 1968 PFLP hijacking. The 1998 SUA Act, which covered maritime safety, was negotiated following the 1985 hijacking of the *Achille Lauro* cruise ship.[48] This flexibility has allowed the General Assembly to respond to terrorist tactics as they change over time in a timely manner.

Definitional Problem with 'Terrorism'

The international legal approach to counter-terrorism cooperation has been constrained by the lack of a definition of terrorism itself. Terrorism is notoriously difficult to define. There has never been a universally accepted definition of terrorism in academia.[49] Leading terrorism studies scholar Walter Laqueur identified over 100 different definitions of terrorism, and found that 'the only characteristic generally agreed upon is that terrorism always involves violence or the threat of violence'.[50] Terrorism is political violence, and while those two elements are vital to any definition of terrorism, more specificity is needed to separate terrorism from other forms of political or criminal violence. War involves violence, and drugstore armed robbery involves the threat of violence, yet neither belong in a definition of terrorism. In a similar study of 109 definitions of terrorism, Schmid and Jongman found that 51% included fear, 41.5% included psychological effects, and 37.5% included victim-target differentiation, suggesting that there is a psychological aspect.[51]

The problems faced when defining terrorism intensify when moving beyond academic arguments and into the policy question of how

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[47] Blumenau, *The United Nations and Terrorism*, p. 204.

[48] Ibid.

[49] Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Kluwer Law International, 1997), p. 191.

[50] Walter Laqueur, *New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford University Press, 1999), pp. 5-6.

[51] Alex P. Schmid & Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Transaction Books, 1988), pp. 5-6.

terrorism should be defined in international treaty law. Schmid argues that terrorism is a subjective label that carries a sense of de-legitimisation.[52] Thus, defining terrorism allows the creator of the definition to decide who is delegitimised. This has led to two key questions which have blocked the search for a definition of terrorism in international law: a) can a national liberation movement be considered a terrorist organisation, and b) can a state be considered a terrorist actor?[53] Both of these were present in the CCIT negotiations, and both grapple with the political, policy, and ideological question of *who* gets labeled as a terrorist.

First is the freedom fighter problem: can national liberation groups be labeled as terrorist organizations? The adage 'one man's terrorist is another man's freedom fighter' has held true internationally, with debates that continue to this day. Terrorism remains a highly subjective term, as former US National Security Advisor Zbigniew Brzezinski noted: 'to the Indians, it is the Muslims in Kashmir; to the Russians, it is the Chechens; to the Israelis, it is the Palestinians; to the Arabs, it is the Israelis'.[54]

Terrorist groups do not call themselves terrorists either—many use names that evoke a sense of freedom, honour, and legitimate armed struggle. A simple survey of some of the most influential terrorist organisations of the last half-century shows this trend. Terrorist groups including the *Liberation* Tigers of Tamil Eelam, the Peoples Front for the *Liberation* of Palestine, the Palestine *Liberation* Front, and the Algerian National *Liberation* Front (FLN), all evoke the sense of a freedom fighter with their name. Other groups, such as the Red *Army* Faction and the Provisional Irish Republican *Army*, preferred to gain a sense of legitimacy by alluding to militaries and guerrilla forces with their names. As terrorism scholar Bruce Hoffman noted, the Jewish terrorist group Lehi 'chose as the name of the organization not Terrorist Fighters for Israel but the far less pejorative Freedom Fighters for Israel'.[55] Terrorist is a pejorative term, and

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[52] Alex P. Schmid, *The Routledge Handbook of Terrorism Research* (Routledge, 2011), p. 43.

[53] Ibid.

[54] Thalif Deen, 'POLITICS: UN Member States Struggle to Define Terrorism', *Inter Press Service*, 25 July 2005, <http://www.ipsnews.net/2005/07/politics-un-member-states-struggle-to-define-terrorism/>.

[55] Hoffman, *Inside Terrorism*, p. 21.

terrorist organisations avoid the word at all times in their names and messaging.[56]

The second problem that arises when defining terrorism in international law, is whether or not a country can commit terrorist acts. This is one of the main differences in the academic discussion of terrorism between the orthodox terrorism studies and critical terrorism studies scholars.[57] State terrorism involves the use of force to coerce or intimidate a population, either foreign or domestic.[58] For international law, this definitional question is critical because those actions overlap with actions outlawed under international humanitarian law and the laws of war. Moreover, including state terrorism in a legal definition presents a political question: since states are ratifying the Convention and the definition within, would the states put their own actions under the scrutiny of a new legal framework? This disagreement has contributed to the now over two-decade stall in finalising the CCIT.

Ultimately, the lack of a universally agreed upon international legal definition of terrorism since the first one was presented in 1937 has constrained and shaped the type of international law that has been created: piecemeal tactics-based treaties have been successful, but a comprehensive convention cannot get past negotiations. With these definitional problems in mind, this paper will now move to an analysis of potential options in future negotiations that could result in new legal frameworks.

Future Steps to Consider: Can the International Community Reach Agreement?

The deadlocked negotiations on the CCIT demonstrate that defining terrorism is an enduring problem to which the international community has yet to find an answer. However, the lack of a definition has given rise to an alternative strategy, fuelling cooperation on specific terrorist tactics. Thus, as long as there are strong disagreements over whether national

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[56] Ibid., p. 23.

[57] See for more on the orthodox versus critical studies approach to defining state terrorism: Richard Jackson & Samuel J. Sinclair (eds.), *Contemporary Debates on Terrorism* (Routledge, 2012).

[58] Schmid, *The Routledge Handbook*, pp. 203-206.

liberation groups and state actions belong in the definition of terrorism, a comprehensive treaty will not be passed.

The 'piecemeal' tactics-based approach is effective at criminalising specific terrorist behaviours. However, the current method fails to address underlying causes and motivating factors behind terrorism, and a clear legal definition of terrorism may be necessary in order to do so. The international community can continue with the current piecemeal method or change the definitional approach in order to overcome negotiation stalemate and ratify a reformed and renewed CCIT.

1. Continuing the Piecemeal Approach

The series of tactics-based conventions have proven to be timely, highly targeted, and effective at garnering the cooperation and buy-in of numerous states. With the exception of the treaties on nuclear terrorism and nuclear materials, the tactics-based conventions are highly reactive. In order to continue, the international community must be proactive and identify new challenges not addressed in the current set of treaties or emerging terrorist tactics, and update the current conventions or create new conventions as necessary. There are two terrorist tactics utilised to varying effect over the last two decades that have yet to be addressed in the piecemeal approach: terrorist use of the internet (both for cyber-attacks and online recruitment and propaganda), and terrorist use of remotely-piloted vehicles, or drones.

Terrorists have been utilising the internet since the early 1980s, when American far-right groups created message boards to further a strategy of leaderless resistance.[59] By the mid-2000s, there were 4,300 terrorist websites used to elicit donations, spread ideology, and share news.[60] Concerns over terrorist use of the internet have risen with the Islamic State's social media recruitment blitz in 2014 and 2015 that attracted

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[59] George Michael, 'The New Media and the Rise of Exhortatory Terrorism', in *Strategic Studies Quarterly*, Vol. 7, No. 1 (Spring 2013), pp. 42-3.

[60] John Curtis Amble, 'Combating Terrorism in the New Media Environment', in *Studies in Conflict and Terrorism*, Vol. 35, No. 5 (2012), p. 341. Gabriel Weimann, 'www.terror.net—How Modern Terrorism Uses the Internet', *United States Institute of Peace*, Special Report 116, March 2004.

thousands of new followers to Iraq and Syria. Recently, the Islamic State has used encrypted communications applications and cryptocurrencies to recruit operatives, plot operations, and finance attacks, all on the internet.[61] Moreover, there is the risk of a terrorist cyber-attack that could obtain valuable information or cripple a critical physical or digital infrastructure system. While there are many barriers to an effective terrorist cyber-attack that decrease the likelihood of cyber-terrorism, the increasing connectivity of critical systems makes them a target worth protecting under statute, just as previous conventions did for aircraft, diplomats, and maritime vessels.[62]

Nowhere in the piecemeal approach does a convention engage with terrorist use of the internet, with the exception of a brief mention of electronic bank transfers in the 1999 Terrorist Financing Convention. A new convention could outlaw acts of digital sabotage, the theft and disclosure of personal information, and the planning or financing of terrorist attacks through digital communications. This is also a rare case in which the legal framework can work in a proactive way against an emerging threat; most of the terrorist cyber-attacks to date have been unsophisticated but having a convention in place before a serious attack that threatens critical infrastructure will allow the international community to respond accordingly.[63]

A second challenge is terrorist use of remotely-piloted vehicles. The first use of drones by terrorist organisations dates back to the late twentieth century, but the full impact has only recently been realised. The first case was in the early 1990s, when the apocalyptic Japanese terrorist group Aum Shinrikyo tested drones with the goal of distributing sarin gas.[64] As early as 2002, a security expert catalogued 43 cases in which terrorist groups

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[61] For an example of these 'virtually-planned attacks', see R. Kim Cragin and Ari Weil, 'Virtual Planners' in the Arsenal of Islamic State External Operations', in *Orbis*, Vol. 62, No. 2 (Spring 2018), pp. 294-312.

[62] Maura Conway, 'Reality Check: Assessing the (Un)Likelihood of Cyberterrorism', in Thomas M. Chen, Lee Jarvis & Stuart Macdonald, *Cyberterrorism: Understanding, Assessment, and Response* (Springer, 2014), pp. 103-121.

[63] Christopher Heffelfinger, 'The Risks Posed by Jihadist Hackers', in *CTC Sentinel*, Vol. 6, No. 7 (July 2013), pp. 1-5.

[64] Robert J. Bunker, *Terrorist and Insurgent Unmanned Aerial Vehicles: Use, Potentials, and Military Implications* (Strategic Studies Institute, August 2015), pp. 7–8.

considered using or developing capabilities for remote delivery of ordnance.[65] Yet, only in the last two years have terrorist organisations begun regularly employing drones in attacks. The first confirmed successful case of terrorist drone attack was conducted by Hezbollah in August 2016 in Syria, when the Shiite militia dropped two bombs on Syrian rebels.[66] This was followed by a sharp increase in terrorist use of drones when the Islamic State began using drones heavily in Mosul and Syria against coalition forces, primarily by using off-the-shelf drones to drop small bombs.[67] In February 2017, the Islamic State claimed 15 drone attacks in only two days.[68] At the same time, the Islamic State was beginning to attack with swarms of drones by piloting three to five drones with bombs to the same area at once.[69]

These recent drone attacks demonstrate a gap in the piecemeal system with regard to the terrorist use of aircraft. In this case, law could be codified in an amendment or supplement to the existing conventions on terrorist attacks on and use of aircraft. While the 2010 Beijing Convention is broad enough in its use of the term 'aircraft' so as to include drones, remotely-piloted vehicles present new legal challenges that may not be sufficiently addressed under the current framework. For example, the Convention outlaws anyone using 'an aircraft in service for the purpose of causing death', but that needs to be specified to include drones and make

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[65] Michael Gips, 'A Remote Threat', Security Management Online, last modified October 2002,
<https://web.archive.org/web/20040222111516/securitymanagement.com/library/001324.html>.

[66] Don Rassler, *Remotely Piloted Innovation: Terrorism, Drones and Supportive Technology* (Combating Terrorism Center, October 2016), p. 29.

[67] Avery Plaw and Santoro, 'Reaping the Whirlwind: Drones Flown by Non-State Actors Now Pose a Lethal Threat', in *Terrorism Monitor*, Vol. 15, No. 17 (11 September 2017), p. 10.

[68] Ibid.

[69] Christopher Dickey, 'As ISIS Prepares its Terror Resurrection, Watch out for Drone 'Swarms'', *The Daily Beast*, last modified 28 February 2017,
<https://www.thedailybeast.com/as-isis-prepares-its-terror-resurrection-watch-out-for-drone-swarms>.

clear who is at fault (the remote operator, those assisting in creating and maintaining the drone, the seller, or some combination).[70]

        2. Renewing the Comprehensive Convention
        on International Terrorism

First, after years of negotiation stalemate, is the CCIT still worth pursuing? Some have argued that the comprehensive approach is obsolete now that the piecemeal approach has outlawed most forms of terrorism.[71] Duggard suggests increasing implementation of the existing tactics-focused treaties, which are already supported by a wide range of states (see figure 1, above).[72] However, a comprehensive framework does have value. If the CCIT was ratified, states would have agreed to a singular definition on terrorism for the first time in international treaty law, and in doing so, would have created an international crime of terrorism for the first time.[73] Even if many of the offences are already outlawed in previous treaties, establishing terrorism as a distinct international crime specifies that terrorism is a definite form of political violence separate from private acts that may still be covered under the sectoral treaties.[74]

      If the international community wishes to move the CCIT past draft negotiations, then a different definitional approach must be adopted. One option is for the international community to define terrorism based on its targets rather than its intent. The current problem in defining terrorism occurs because whether a group is considered a terrorist organisation depends, as Lyal Sunga notes, 'not so much on the means and methods they may have employed to reach their objectives, but on purely political considerations reflecting particular ideological proclivities and self-interests'.[75] Focusing solely on an organisation's goals makes the distinction

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[70] 'Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation', *International Civil Aviation Organization,* Treaty Collection, 10 September 2010, p. 4.

[71] Dugard, 'The Problem of the Definition of Terrorism', pp. 203-204. Gioia, 'The UN Conventions', p. 21.

[72] Duggard, 'The Problem of the Definition of Terrorism', p. 204-5.

[73] Saul, *Defining Terrorism*, p. 190.

[74] Ibid., p. 7.

[75] Sunga, *Emerging System*, p. 193.

between terrorist and freedom fighter blurry — both can be fighting for national liberation.

However, a distinction could be made between the populations that organisations target and the actions they take — guerillas attack military personnel and installations, while terrorists purposefully attack civilians. Thus, the international community could define terrorism, as Brian Jenkins wrote, 'by the nature of the act, not by the identity of the perpetrators or the nature of their cause'.[76] It should be made clear that any organisation that intentionally targets civilians, regardless of its stated goals, is a terrorist organisation.[77] Were the international community to adopt this model, it could help clarify the terrorist-freedom fighter distinction and allow them to define terrorism without infringing on the principles of self-determination stated in the Declaration of Principles on International Law. While this framework would have to be fully fleshed-out through negotiations, it may pave the way for a comprehensive treaty on counter-terrorism.

Conclusion

To date, there is no universally agreed-upon definition of terrorism in international treaty law. The very idea remains a 'contested concept' and the creation of a definition in international treaty law is both a policy and a political and ideological question.[78] The lack of a definition has constrained how the international community has responded; whereas the Geneva Convention defines war and states what is legal in wartime, no such convention exists for terrorism because the very act is yet to be defined. Disagreements over national liberation movements and state actors have stalled the process towards a singular, comprehensive treaty on terrorism. Yet, 14 conventions and four amendments on counterterrorism have been passed in a piecemeal fashion that focus on tactics, without defining terrorism. Thus, the lack of a definition has constrained and shaped the

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[76] Brian Jenkins, 'The Study of Terrorism: Definitional Problems', *Rand Corporation*, December 1980, pp. 2-3.

[77] Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' in *Police Practice and Research*, Vol. 3, No. 4 (2002), p. 287.

[78] Schmid, *The Routledge Handbook of Terrorism Research,* p. 43.

manner in which the international community has acted towards the subject. Definitions have been central to the development of the international legal framework for counter-terrorism cooperation. Moving forward, this paper highlights two non-exclusive pathways. The piecemeal system should continue to be updated for emerging threats not already addressed, starting with cyber-terrorism and drones. The piecemeal system is much better suited for responding to emerging threats than the comprehensive convention, because tactics can be outlawed relatively quickly after they arise. Secondly, a new definition for the CCIT should be considered that focuses on the targets rather than the intent. Together, these actions will allow for a more robust international legal framework for counter-terrorism cooperation.