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Frederick V. Perry

Florida International University

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Multinationals at Risk: Terrorism and the Rule of Law

Frederick V. Perry*

*If you wish to converse with me, define your terms.*¹

I. INTRODUCTION

Companies and commerce are at risk. Even if they are not themselves the specific targets of attacks, experience seems to show that they can be victims of collateral damage. Faced with the dangers and prospects of coping with terrorist attacks, in the view of the author, companies are at risk for at least two major reasons. The first is that the world community confronts a dilemma – trying to combat something that it cannot clearly identify or define: terrorism.² The international community has so far dealt with the problem by means of a variety of piecemeal, crime-specific treaties; nothing comprehensive and nothing that defines terrorism.³ The second problem is the apparent lack on the part of many companies to take the threat seriously and harden themselves as targets, or at least make themselves less attractive targets.⁴

States are challenged with the problem of identifying those acts of “terror” that are designed to bring about political change: activity which disrupts international relations through violence that the world views as undesirable international norms of behavior.⁵ Globalization

* Clinical Professor of Business Law, Florida International University. The Author acknowledges with gratitude the able assistance in research and editorial comment of Alexandra Kagan, a Ph.D. student at Florida International University.

¹ David A. Green, “I’m OK - You’re OK” *Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” With a Client With a Mental Disability*, 28 J. LEGAL PROF. 65, 65 (2003) (quoting phrase commonly attributed to Voltaire).

² Kofi Anan, Secretary General of the United Nations, *A Global Strategy for Fighting Terrorism*, Keynote Address at the Closing Plenary of the International Summit on Democracy, Terrorism and Security (March 8-11, 2005), (transcript available at <http://english.safedemocracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html#audio>).

³ *Id.*

⁴ *Id.*

⁵ John Dugard, *Towards the Definition of International Terrorism*, 67 AM. J. INT’L L. 94, 94 (1973).

increases firms' vulnerability, as multinational corporations are on the front lines around the world;⁶ they are exposed, mostly as soft targets of opportunity for terrorist attacks, since, in the minds of many would-be terrorists, they become a symbol or proxy for their home countries.⁷ Thus, attacking a multinational, its employees, or its facilities, is often considered an attack on the home country,⁸ since it is simpler than traveling to the United States, for example, in order to attack a symbol of its lifestyle (McDonald's)⁹ or its rampant capitalism (the pharmaceutical industry).¹⁰

The purpose of this paper is two-fold: first, to examine the scope of the problem of terrorism as it affects business in general, and second, the dilemma posed by a lack of definition of the term "terrorism." This paper suggests that a case can be made that the world really does need a universal definition of terrorism, and that companies should take threats seriously, or at least more than they appear to have done. Finally, this paper suggests a way to arrive at universal consensus on a legal definition of the term "terrorism."

II. BUSINESS AS TARGET

Of course, Osama Bin Laden is now dead. Some say that al-Qaeda will die with him,¹¹ or that the fear of the threat of terrorist attacks is overblown.¹² Others are not so sure.¹³ Documents retrieved in the raid on Osama Bin Laden's compound indicate that al-Qaeda may have been planning raids on oil tankers worldwide in order to disrupt the world's energy supplies.¹⁴

⁶ See generally Barbara Krug & Patrick Reinmoeller, *The Hidden Costs of Ubiquity: Globalisation and Terrorism*, 2003 ROTTERDAM INST. OF MGMT, <http://repub.eur.nl/res/pub/993/ERS%20062.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Fareed Zakaria, *Al Qaeda is Over*, THE GLOBAL PUBLIC SQUARE, CNN WORLD (May 2, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/05/02/al-qaeda-is-dead/>; see also Miriam F. Elman, *After Osama Bin Laden: The Future of Al Qaeda and the Study of Terrorism*, CONFLICT & COLLABORATION (May 3, 2011), <http://conflictandcollaboration.wordpress.com/2011/05/03/after-osama-bin-laden-the-future-of-al-qaeda-and-the-study-of-terrorism/>.

¹² John Mueller, *Is There Still a Terrorist Threat?*, 85 FOREIGN AFFAIRS 2, 2, 4-5 (2006).

¹³ The Future of Al Qaeda after Bin Laden, PUB. RADIO INT'L (May 3, 2011), <http://www.pri.org/stories/world/middle-east/the-future-of-al-qaeda-after-bin-laden.html>.

¹⁴ Teresa Anderson, *Morning Security Brief: Lawmakers Discuss Border Issues, DHS Warns Oil Industry, and the Patriot Act Extended*, SEC. MGMT. (May 23, 2011), <http://www.securitymanagement.com/news/morning-security-brief-lawmakers-discuss-border-issues-dhs-warns-oil-industry-and-patriot-act-e>.

Whether or not al-Qaeda survives, many believe that the problem of international terrorism and its causes goes much deeper than one man and his organization.¹⁵ This could mean that terrorism will be with us for a while because the current phenomenon of unpredictable international terrorist attacks by non-state actors seems to be a reaction to globalization and is facilitated by it.¹⁶ It appears, at least, that Osama Bin Laden's franchisees, imitators, those who have been inspired by him, and those who are motivated by other grievances will continue to pose a threat to the international community.¹⁷ New threats continue to be debated,¹⁸ and as Professor Dean C. Alexander has stated, "The daily barrage of predictions of terrorist attacks against numerous business targets – chemical plants, shopping malls, aviation, mass transit, and financial institutions – has accelerated the need to highlight additional lessons learned thus far on the impact of terrorism on business."¹⁹

Terrorism seems to be the economical weapon of choice of the weak actor against the strong nation-state. For the organization that wishes to seek revenge, extract something, convince a population or government to take some path or abstain from some policy, it is certainly far cheaper to terrorize than to engage in conventional military operations. Armies do not have to be supported in the field, large amounts of heavy weapons do not have to be purchased, and no uniforms need to be bought. A well-placed bomb here or there, a strategic kidnapping, and an assassination all can work to affect many minds on the cheap. "As an asymmetric form of conflict, it confers coercive power with many of the advantages of military force at a fraction of the cost. Due to the secretive nature and small size of terrorist organizations, they often offer opponents no clear organization

¹⁵ See generally JAMAL R. NASSAR, GLOBALIZATION & TERRORISM: THE MIGRATION OF DREAMS AND NIGHTMARES 23-42 (Manfred B. Steger et al. eds, 2d ed. 2010).

¹⁶ Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SEC. 30, 30-58 (2002-2003).

¹⁷ Richard N. Haass, *Terrorism Concerns after Bin Laden*, THE BLOG, HUFFINGTON POST (May 2, 2011, 9:44 AM), http://huffingtonpost.com/richard-n-haass/terrorism-concerns-after-bin_856253.html.

¹⁸ *The World's Policeman*, N.Y. DAILY NEWS (Feb. 3, 2012), <http://www.nydailynews.com/opinion/nypd-blind-threat-york-terrorism-iran-article-1.1016282>; see also *Protecting America: Are We Doing Enough?*, Interview with Philip Zelikow by & , 11 GEO. J. INT'L AFF. 149, 151, 154-156 (March 5, 2010); *Terrorism: What is the State of Global Terrorism Today, Nearly a Decade After the Sept. 11 Attacks? Foreign Policy Asked the Top Terrorism Experts in the Field. Here's What They Told Us*, 89 FOREIGN POL'Y 96 (2011); , *Solutions for a World in Crisis*, 41 THE FUTURIST 3, 3 (2007).

¹⁹ DEAN C. ALEXANDER, BUSINESS CONFRONTS TERRORISM: RISKS AND RESPONSES 17 (2004).

to defend against or to deter.”²⁰ As one writer has said: “Terrorism is designed to have a lot of people watching, not a lot of people dead. . . . [S]ince terrorism is designed for an audience and not just victims; the media has played a crucial role. . . .”²¹ In fact, terrorism is witnessed by most people through the media.

According to Professors Larobina and Pate of Sacred Heart University: “Terrorism has impacted multiple levels of society across the world community. One of those levels is the business environment.”²² One of the aims of terrorism seems to be to disrupt and destroy ongoing business,²³ providing both a show of victims and an interruption of commerce.²⁴ If that is the case, then the ability of governments to disrupt and destroy terrorism may be essential to the continued growth and expansion of the world economy.

The United States is a frequent target of such attacks, and United States’ business interests are at the front line, so to speak, all over the globe.²⁵ According to one writer, more than two-thirds of the United States’ targets of international terrorism attacks in 1999 were United States’ businesses.²⁶ As a practical matter, of course, companies the world over – and not just those based in the United States – are potential targets.

The World Trade Center was first bombed on February 26, 1993.²⁷ Because of the nature of 9/11, any security preparation that the World Trade Center might have undertaken between the two attacks availed very little. The World Travel and Tourism Council said that terrorist attacks “have dampened short-term demand for Travel & Tourism and created a more uncertain world.”²⁸ In 2003, the Council issued a “Travel and Tourism Security Action Plan” with the aim

²⁰ *What is Terrorism?*, INTERNATIONAL TERRORISM AND SECURITY RESEARCH, <http://www.terrorism-research.com/> (last visited Apr. 13, 2012).

²¹ Luke Howie, *A Role for Business in the War on Terror*, 18 DISASTER PREVENTION MGMT. 100, 101 (2009).

²² Michael D. Larobina & Richard L. Pate, *The Impact of Terrorism on Business*, 3 J. GLOBAL BUS. ISSUES 147, 147 (2009).

²³ *Id.*

²⁴ Krug & Reinmoelle 999). „al Crimesural Stud., International Terrorism, N Counter-Terrorism Treaties, *supra* note 6.

²⁵ Paul R. Pillar, *Is the Terrorist Threat Misunderstood?*, 45 SEC. MGMT. 136, 136 (2001).

²⁶ *Id.*

²⁷ *See World Trade Center Bombed*, HISTORY.COM (Feb. 26, 1993), <http://www.history.com/this-day-in-history/world-trade-center-bombed>.

²⁸ *Travel & Tourism Security Action Plan*, WORLD TRAVEL & TOURISM COUNCIL 1 (2003), *available at* <http://fama2.us.es:8080/turismo/turisonet1/economia%20del%20turismo/mercados%20turisticos/travel%20and%20tourism%20security%20plan.pdf>.

“to limit potential damage wrought by terrorism and ultimately to defeat it.”²⁹

Business facilities worldwide, and executives and employees – both travelling and stationary – are vulnerable.³⁰ Companies must work to reduce the threat of murders, bombings, and kidnappings for ransom (some terrorist organizations finance themselves in this way).³¹ For corporations with a worldwide footprint, problems can occur at any moment as they have in New York in 2001, Madrid in 2004, London in 2005, Mumbai in 2010,³² and Moscow in 2010.³³ In 2005, the Grand Hyatt, Radisson, and Days Inn were attacked by terrorist bombers in Amman, Jordan, killing 60 people and injuring 115.³⁴ In January 2012, Kenyan authorities warned their population of an impending terror threat.³⁵ According to one study, the United Kingdom is at greater risk of terrorist attacks than any other country.³⁶ In February 2012, four British subjects pled guilty to a plot to bomb the London Stock Exchange.³⁷ In January of the same year, two men were sentenced to prison by a court in Oslo, Norway,³⁸ for plotting to attack a Danish newspaper which had printed cartoons of the Prophet Muhammad in 2005.³⁹

Global trade is growing – albeit slowed down by the recession of 2008 and 2009 – and with it non-governmental organizations (“NGO”), for-profit corporations, and the incidents of individual

²⁹ *Id.*

³⁰ Charlene Marmer Solomon, *Global Business Under Siege*, WORKFORCE (Jan. 1, 1997), <http://www.workforce.com/article/19970101/NEWS02/301019961>.

³¹ *Id.*

³² Robert Johnston, *Deadliest Terrorist Strikes, Worldwide*, JOHNSTON'S ARCHIVE, <http://www.johnstonsarchive.net/terrorism/wrip255i.html> (last visited Apr. 13, 2012).

³³ Luke Harding & Mark Tran, *Moscow Bombs Kills Dozens*, THE GUARDIAN (March 29, 2010), guardian.co.uk/world/2010/mar/29/moscow-metro-bombs-explosions-terror.

³⁴ Dean C. Alexander, *Anti-terror Calculations: What's Next?*, SECURITY (March 16, 2006), <http://www.securitymagazine.com/articles/anti-terror-calculations-whats-next-1>.

³⁵ *Britain Warns of Increased Risk of Terror Attack in Kenya*, TIMES OF INDIA (Jan. 8, 2012), <http://timesofindia.indiatimes.com/world/rest-of-world/Britain-warns-of-increased-risk-of-terror-attack-in-Kenya/articleshow/11409453.cms>.

³⁶ *UK at Greater Terror Attack Risk Than Any Other Western Nation: Study*, THE ECON. TIMES (Aug. 4, 2011), http://articles.economictimes.indiatimes.com/2011-08-04/news/29850521_1_terrorism-risk-index-uk-maplecroft.

³⁷ Jennifer Rowland, *Four Plead Guilty to London Stock Exchange Plot*, FOREIGN POLICY (Feb. 3, 2012), http://www.foreignpolicy.com/articles/2012/02/03/the_four_plead_guilty_to_london_stock_exchange_plot. (The Legal War on Terror Brief is a special project of the New America Foundation and Foreign Policy and is published as a series by Foreign Policy).

³⁸ *Id.*

³⁹ *Id.*

travel abroad, thereby increasing vulnerability.⁴⁰ In short, business is at risk. Aside from all other asset-based risks, under the common law, at least, companies owe a duty of care to their employees, meaning the company should take reasonable precautions to protect its employees against foreseeable risk. If they do not, they could be found liable in tort.⁴¹ How do they do that in light of the risks that are being run?⁴² Further, managers must involve themselves in counter-terrorism and in security issues inasmuch as they have the obligation of protecting customers, clients, and the public,⁴³ leading one set of writers to say that “protecting a firm’s resource base against terrorism is as crucial a management task as increasing its asset’s value.”⁴⁴ A study by the Economist Intelligence unit provides that:

Where businesses are the target of terrorism, it is usually because of what they represent, rather than anything they do or don’t do themselves. Global brands can assume symbolic significance for terrorists. The US National Counterterrorism Center’s list of significant terrorist events describes 24 attacks on McDonald’s restaurants between 1993 and 2005 worldwide. Of the minority where responsibility was claimed, motivation for the attacks included nationalism, anti-globalisation, religion and Marxism – but in each case the perpetrators objected to the restaurant as a symbol of America, not a purveyor of products.⁴⁵

How does a corporation prepare for the unknown? According to some security specialists, some companies should not only attempt to reduce risk – since they cannot eliminate it – but they should also have contingency plans for when a disaster strikes.⁴⁶

Risk Management Solutions, a provider of products and services to manage and quantify catastrophic risk, believes that since governments have taken many strides to lower the risk of terrorist attacks against government and military targets, terrorists are more likely to target the commercial or private sector, especially sporting events.⁴⁷

⁴⁰ Rachel Briggs, *Keeping Your People Safe: The Legal and Policy Framework for Duty of Care* 7 (The Foreign Policy Centre, Working Paper No. 1, 2003), available at <http://fpc.org.uk/fsblob/126.pdf>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Howie, *supra* note 21.

⁴⁴ Barbara Krug & Patrick Reinmoeller, *The Hidden Costs of Ubiquity: Globalisation and Terrorism*, ROTTERDAM INST. OF MGMT. 41 (2003).

⁴⁵ Lord Levene, *Under Attack? Global Business and the Threat of Political Violence*, ECON. INT’L UNIT LTD. & LLOYD’S 2, 14 (2007).

⁴⁶ Diane Ritchey, *Going Global*, SECURITY MAGAZINE (Jan. 1, 2011), <http://www.securitymagazine.com/articles/81594-going-global>

⁴⁷ See RISK MANAGEMENT SOLUTIONS, <http://www.rms.com/> (last visited Apr. 14, 2012).

They simply are softer targets. The facts seem to bear this out, and the terrorists of today tend to kill and injure indiscriminately as many as they can, mostly or almost exclusively civilians; they generally choose tourist facilities, hotels, mass transit, and business facilities as targets.⁴⁸ As can be seen from the following chart (Figure 1),⁴⁹ the great majority of attacks in 2010 did not target government or military targets, but rather, the targets were civilians, and included companies and infrastructures.

Figure 1:⁵⁰

Terrorist attacks normally have an effect on stock markets in causing significant negative abnormal returns; that is, stocks lose value.⁵¹ Terrorism can actually have multiple effects on the securities market.⁵² Moody's has downgraded a number of securities because they believed the securities to have inadequate terrorism insurance.⁵³

⁴⁸ Michael R. Czinkota et al., *Terrorism and International Business: A Research Agenda*, 41 J. INT'L BUS. STUD. 826, 829 (2010).

⁴⁹ 2010 Report on Terrorism, THE NAT'L COUNTERTERRORISM CENTER (Apr. 30, 2011), http://www.nctc.gov/witsbanner/docs/2010_report_on_terrorism.pdf.

⁵⁰ *Id.*

⁵¹ Doug McIntyre, *Terrorism's Effects on Wall Street*, INVESTOPEDIA (Mar. 9, 2011), <http://www.investopedia.com/articles/07/terrorism.asp>.

⁵² Dean Starkman, *Moody's Downgrades Securities on Lack of Terrorism Insurance*, WALL ST. J., Sept. 30, 2002, at C.14.

⁵³ *Id.*

Further, one analysis of shareholder returns following the 9/11 attacks indicates that the market value of publicly-traded companies with a high percentage of foreign sales fell disproportionately immediately following the attacks, and those same companies continued trading at a discount one year later.⁵⁴

Terrorist violence is a global risk, and it affects the worldwide economy and financial markets in general. We know that the immediate effect of such attacks is an immediate aversion for risk on the part of investors. Investors in stock markets, as mentioned above, and consumers in the intermediate and longer term also lose confidence and become risk averse, so that consumption and investment are both lowered. This effect spills over not only to stock markets, but also to fixed-income market yields, currency, and commodity markets. The result is an adverse effect on economic activity, in general, often triggering an economic slowdown, maybe even a recession.⁵⁵

Stock markets around the world negatively reacted to the terrorist attacks in New York on 9/11, as evidenced in the following chart (Table 1).

Table 1 – Stock Reactions to Terrorist Attacks on 9/11/2001:⁵⁶

Country	Symbol	Exchange Name	Closing price on 09/10/01	Closing price on 09/17/01	Recovered to closing price from 09/10/2001 on... at...
United States	DJI	Dow Jones Industrial Average	9,605.51	8,920.70	11/09/2001 9,608.00

⁵⁴ Michael Hergeil, *The Effect of Terrorist Attacks on Shareholder Value: A Study of United States International Firms*, 21 INT'L J. MGMT. 25, 25 (2004).

⁵⁵ G. Andrew Karolyi, *The Consequences of Terrorism for Financial Markets: What Do We Know?* 1 (Fisher College of Bus. at Ohio State Univ., Working Paper, May 7, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904398.

⁵⁶ DJI – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EDJI+Historical+Prices> (last visited Aug. 1, 2012); IXIC – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EIXIC+Historical+Prices> (last visited Aug. 1, 2012); DAX – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EGDAXI+Historical+Prices> (last visited Aug. 1, 2012); FTSE – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EFTSE+Historical+Prices> (last visited Aug. 1, 2012); IBEX – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EIBEX+Historical+Prices> (last visited Aug. 1, 2012); N100 – Historical Prices, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=%5EN100+Historical+Prices> (last visited Aug. 1, 2012).

United States	IXIC	NASDAQ	1,695.38	1,579.55	10/11/2001 1,701.47
Germany	DAX	Frankfurt Stock Exchange	4,670.13	4,243.68	10/11/2001 4,718.46
United Kingdom	FTSE	London Stock Exchange	5,033.70	4,898.90	10/05/2001 5,036.00
Spain	IBEX	BME Spanish Exchanges	7,678.70	7,094.80	10/17/2001 7,918.60
Belgium, France, Holland, Portugal	N100	Euronext	759.13	710.99	10/23/2001 761.86

The train bombings in Madrid on March 11, 2004 had a negative effect on European markets, as can be seen from the following chart (Table 2).

Table 2 – Stock Reactions to Madrid Train Bombings on 03/11/2004.⁵⁷

Country	Symbol	Exchange Name	Closing price on 03/10/04	Closing price on 03/17/04	Recovered to closing price from 03/10/2004 on... at...
Germany	DAX	Frankfurt Stock Exchange	4,044.70	3,896.89	04/05/2004 4,048.60
United Kingdom	FTSE	London Stock Exchange	4,545.30	4,456.80	04/16/2004 4,537.30
Spain	IBEX	BME Spanish Exchanges	8,292.90	7,948.10	04/07/2004 8,294.80
Belgium, France,	N100	Euronext	643.48	626.45	04/05/2004 644.16

⁵⁷ *Id.*

Holland, Portugal					
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Tourism, airline travel, and stock markets suffered nearly unprecedented declines after the attacks of 9/11 and the Madrid train bombings, but they appear to have recovered thereafter.⁵⁸ Such recovery may have given rise to some level of complacency, as will be seen below. Some believe that the price of gold has soared because of the terrorist threat.⁵⁹

How do we measure the cost of the effects and risks presented by terrorist attacks? Paul Krugman, the Nobel Prize winning, Princeton economist, has said that:

We can say that the economic costs of terrorism are similar, in principle, to the economic costs of crime. As surveys like Glaeser (1999) point out, these costs can be divided into the direct losses from criminal acts; the costs of spending on law enforcement; and the costs of distorted individual decisions because of fear of crime.⁶⁰

In other words, the costs are diffused with effects spreading over a broad spectrum of society. What do terrorist attacks cost us? What does the fear of terrorist attacks and increased security cost businesses? According to the Office of the Comptroller of New York City, the aftermath of the September 2001 terrorist attack cost New York City \$27 billion during the first 15 months following the event.⁶¹ By 2010, the Transportation Security Administration had spent \$40 billion screening passengers since September 2001.⁶² The lost time because of waiting for security checks at airports – since “time is money” – is measured in the billions.⁶³

In 2009, the insurance payouts after the 9/11 attack – according to the Bureau of Labor Statistics – was \$39.4 billion, which accounts for payouts in a variety of insurance lines, as set forth in the following

⁵⁸ Larobina, *supra* note 22, at 147; *see also* DEAN C. ALEXANDER, BUSINESS CONFRONTS TERRORISM: RISKS AND RESPONSES 17 (2004).

⁵⁹ Banamber Mishra & Matiuur Rahman, *The Dynamics of Bombay Stock, U.S. Stock and London Gold Markets*, 4 INDIAN J. ECON. BUS. 151 (2005).

⁶⁰ Paul Krugman, Professor, Econ. & Int’l Affairs, Princeton Univ., Address at The Nexus of Terrorism & WMDs: Developing a Consensus at Princeton University, The Cost of Terrorism: What Do We Know? (Dec. 12-14, 2004), *available at* http://www.i20.org/publications/9_7Q_wmd_krugman.pdf (citing E. Glaeser, *An Overview of Crime and Punishment*, WORLD BANK (1999)).

⁶¹ Matthew Bandyk, *What Airport Security Costs You*, U.S. NEWS & WORLD REPORT (Jan. 11, 2010), <http://money.usnews.com/money/business-economy/articles/2010/01/11/what-airport-security-costs-you>.

⁶² *Id.*

⁶³ *Id.*

chart (Figure 2).⁶⁴ However, this does not take into account all of the losses for New York City, which appear to be around \$95 billion.⁶⁵

⁶⁴ Claire Wilkinson & Robert P. Hartwig, *Terrorism Risk: A Reemergent Threat*, INSURANCE INFORMATION INSTITUTE 3 (Apr. 2010), http://www.iii.org/assets/docs/pdf/TerrorismThreat_042010.pdf.

⁶⁵ Daniel Indiviglio, *The Economic Cost of Terrorism*, THE ATLANTIC (Dec. 28, 2009), <http://www.theatlantic.com/business/archive/2009/12/the-economic-cost-of-terrorism/32650/>.

Figure 2:⁶⁶

After the 9/11 attacks, insurance companies either increased their rates for terrorism coverage or dropped such coverage altogether.⁶⁷ The biggest impact of insurance hikes has been felt in the aviation industry, in addition to other industrial sectors.⁶⁸ It is estimated that overall insurance premiums have increased by an average of thirty percent, with certain assumed targets experiencing higher increases.⁶⁹ A terrorist attack is intentional, and therefore, it is difficult to predict with any accuracy the frequency or severity of such attacks. This has made some insurance industry analysts question whether the risk is insurable at all.⁷⁰

Generally, insurance exists to alleviate the insured's potential losses and create profit for the insurer. This twofold objective is achieved in great part by calculating measurement costs, that is,

⁶⁶ Wilkinson & Hartwig, *supra* note 64.

⁶⁷ OECD, *Economic Consequences of Terrorism*, 124 OECD ECONOMIC OUTLOOK 71 (2002), available at <http://www.oecd.org/dataoecd/11/60/1935314.pdf>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Wilkinson & Hartwig, *supra* note 64.

the probability that a risk will materialize and the magnitude of the loss in case of the materialization. Insurance coverage and profitability rest on the accuracy of this calculation. Terrorism, on the other hand, exists to create a perpetual threat and chronic fear of unpredictable, future risks of losses. In essence, the concepts of insurance and terrorism are diametrically opposed. Ultimately, terrorism renders risk probability and loss magnitude nearly incalculable, consequently decreasing the insurance market's profitability and hence its coverage.⁷¹

Companies have had to purchase enhanced insurance coverage, which is often not available, and certainly not for the prices of the past.⁷² Travelling employees and executives have to be protected; company facilities have to be turned into hardened targets. Different states take different attitudes toward terrorism insurance, some requiring it and some helping in its provision.⁷³ Further, states consider that the international food supply could be a target.⁷⁴ Of course, it is mostly multinationals who produce, store, and transport food.⁷⁵ The maritime industry is also considered vulnerable.⁷⁶

⁷¹ Larobina, *supra* note 22, at 147-56.

⁷² Krug, *supra* note 44.

⁷³ Some prominent examples include the following: Spain requires terrorism insurance and has done so since the 1950s. See Erwann Michel-Kerjan, *Financial Protection of Critical Infrastructure*, INSTITUT VEOLIA ENVIRONNEMENT (Report No. 3), available at <http://www.institut.veolia.org/en/cahiers/protection-insurability-terrorism/> (last visited Mar. 30, 2012). The program is administered by private insurers and backed by a government program. *Id.* After terrorist attacks in London in 1993, insurers announced that they would exclude acts of terror as a covered risk in commercial insurance policies. *Id.* Industry and government discussions then resulted in an insurance pool of insurance companies acting as re-insurers and backed by the government. *Id.* However, the purchase of such insurance is not mandatory. *Id.* The attacks in New York on 9/11 caused the items covered by the pool to be increased. *Id.* Since 1986, French law required terrorism coverage to be included in commercial insurance policies. *Id.* This was also increased after 9/11 when, in December of that year, France created the world's first terrorism insurance pool, guaranteeing coverage of companies, in a public-private partnership of co-reinsurance, backed up by the government. *Id.* Germany does not have mandatory terrorism insurance for companies. *Id.* German law does not require insurers to provide terrorism insurance in their basic contracts. *Id.* Right after the 9/11 attacks, German insurers either refused to write any new policies covering terrorism or if they did, it was substantially reduced from coverage prior to 9/11, and it took 6 months of wrangling with the government for the creation of a public-private partnership, which created a new insurance company, called Extremus, that writes only terrorist insurance. *Id.* Extremus acts as a direct insurer. *Id.* Companies cannot insure one facility only; they must ensure their entire company. *Id.* The coverage is only for incidences occurring in Germany, and has policy limits, so that most companies are under-insured. *Id.*

⁷⁴ John T. Hoffman & Shaun Kennedy, *International Cooperation to Defend the Food Supply Chain: Nations are Talking; Next Step – Action*, 40 VAND. J. TRANSNAT'L L. 1171, 1173 (2007).

⁷⁵ *Id.* at 1176.

⁷⁶ Caitlin A. Harrington, *Heightened Security: The Need to Incorporate Articles 3bis(1)(a) and 8bis(5)(e) of the 2005 SUA Draft Protocol Into Part VII of the United Nations*

What is the world community doing about all of this to protect its companies and its commerce from interdiction or destruction? Do the business enterprises of the world have protection under international law? We know that technology provides for us the unprecedented opportunity for communication, connections, transfers, and a host of other things that increase prosperity for people and for companies, but at the same time, the concentration of intricate networks and assets also provide for a hitherto unprecedented vulnerability for individuals, governments, and corporations.

In a speech at an internet security conference in 2010, FBI Director Robert Mueller said that “[m]ilitant groups, foreign states and criminal organizations pose a growing threat to U.S. security as they target government and private computer networks.”⁷⁷ He believes that groups such as al-Qaeda will use the Internet, not simply as a recruiting and financing tool, but also to make cyber-attacks on the developed world.⁷⁸ Of course, such security problems and threats of attack are also dilemmas for companies and nationals of states other than the United States.

The Pentagon believes that China has developed the ability to infiltrate and manipulate many “secure” governmental systems.⁷⁹ In fact, the Pentagon computer system was hacked into in 2008.⁸⁰ Apparently 24,000 files were stolen,⁸¹ seemingly regarding the new F-35 strike fighter under development.⁸² Cyber-security appears to be a question on the minds of many, and a spirited debate is underway as to what the proper role of government in this area should be.⁸³ For

Convention on the Law of the Sea, 40 PAC. RIM L. & POL’Y J. 107, 108-09 (2007); *Singapore Forms Maritime Special-Operations Unit*, 17 SPECIAL WARFARE 3 (2005).

⁷⁷ Alexei Oreskovic, *FBI Director Warns of Growing Cyber Threat*, REUTERS (Mar. 4, 2010), <http://www.reuters.com/article/2010/03/05/fbi-internet-idUSN0410902320100305>.

⁷⁸ *Id.*

⁷⁹ Julian E. Barnes, *Chinese Hacking Worries Pentagon*, L.A. TIMES, Mar. 4, 2008, available at <http://articles.latimes.com/2008/mar/04/world/fg-uschina4>.

⁸⁰ John P. Mello, Jr., *Pentagon: Yep, We Got Hacked*, TECHNEWSWORLD (Aug. 26, 2010), <http://www.technewsworld.com/story/70699.html>.

⁸¹ Antoine Georges, *Department of Defense Hacked, 24,000 Military Files Stolen*, BLAMZA (July 15, 2011), <http://www.blamza.com/department-of-defense-hacked-24000-military-files-stolen/>.

⁸² Michael Horton, *U.S. Department of Defense Hacked - F-35 Fighter Data Stolen*, TECH FRAGMENTS, (April 21, 2009), http://techfragments.com/news/696/Tech/US_Department_of_Defense_Hacked_-_F-35_Fighter_Data_Stolen.html.

⁸³ Shaun Nichols, *RSA: Experts Clash over Role of Governments to Prevent Cyber Security Attacks*, V3.CO.UK (Feb 28, 2012), <http://v3.co.uk/v3-uk/news/2155899/rsa-experts-debate-role-government-cyber-security>; Josh Smith, *Businesses, Republicans Aim For Cybersecurity Assistance, Not Regulation*, NAT’L JOURNAL (Oct 11, 2011), www.nationaljournal.com/tech/businesses-republicans-aim-for-cybersecurity-assistance-not-regulation-20111011.

example, should government provide security to private networks, or should government require that private networks provide their own security pursuant to mandated standards? As a practical matter, the internet is vast and does not readily lend itself to over-arching security measures by anyone.⁸⁴ The United States Congress appears concerned, and more than thirty Cyber Security bills have been introduced in Congress; now, there seems to be enough momentum to pass one of them.⁸⁵

Weapons technology hackers, cyber-terrorists, or terrorists who wish to cripple a large-area power grid can do so with relative ease.⁸⁶ Individuals and groups have developed the desire and the technical capacity to damage or destroy inanimate objects as well as individuals, and they do.⁸⁷ Our systems and facilities are more and more vulnerable to attacks.⁸⁸ This provides a distinct vulnerability for advanced societies, their facilities and other assets, especially for the companies belonging to those advanced societies.⁸⁹ Companies and governments are spending time and money to learn how to deal with cyber-terrorists.⁹⁰ Some companies are paying considerable sums to learn about intrusion detection, advanced firewalls, public key infrastructure (a framework for the secure exchange of digital information), and forensics, among other things.⁹¹ Some companies also want to make themselves “hard targets” in order to dissuade terrorist attacks.⁹²

A survey by *Security Magazine* showed that after the 9/11 attacks, 87% of corporate security departments took action to re-evaluate their security programs, upgrade, and hire new staff.⁹³ According to Bill Anderson, Director of Global Security for Ryder Sys-

⁸⁴ Dan Lungren, *Cyber Security is a Team Sport*, THE HILL'S CONGRESS BLOG (Feb. 3, 2012), <http://thehill.com/blogs/congress-blog/technology/208579-rep-dan-lungren-r-calif>.

⁸⁵ Gerry Smith, *Cybersecurity Legislation Gaining 'Momentum' In Congress*, HUFFINGTON POST (Feb. 1, 2012), http://www.huffingtonpost.com/2012/02/01/cybersecurity-legislation-congress_n_1247147.htm.

⁸⁶ Thomas Homer-Dixon, *The Rise of Complex Terrorism*, FOREIGN POLICY (Jan. 1, 2002), http://www.foreignpolicy.com/articles/2002/01/01/the_rise_of_complex_terrorism?page=full (last visited March 30, 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 53.

⁹⁰ Linda Tischler, *No Security*, 61 FAST CO. MAGAZINE (July 31, 2002), <http://www.fastcompany.com/magazine/61/security.html>.

⁹¹ *Id.*

⁹² Alexander, *supra* note 19.

⁹³ *Post Sept. 11th, Security Re-evaluates*, SECURITY MAGAZINE (Jan. 3, 2002), <http://www.securitymagazine.com/articles/post-sept-11th-security-re-evaluates-expects-impact-through-2002-1>.

tem Inc.,⁹⁴ “the danger of an attack involving the international transportation system remains high.”⁹⁵

Although business is now more aware of its vulnerability than ever before, except for an early post-9/11 spurt, corporations neither appear to have greatly increased their security expenditures nor to have hired large numbers of security personnel after 9/11.⁹⁶ Most small businesses simply cannot afford to.⁹⁷ However, some large corporations have now hired chief security officers – with law enforcement backgrounds rather than business – and a few business and transportation industry terrorism task forces have been formed to focus on the issue.⁹⁸ One industry that appears to have trouble adjusting to the post-9/11 world is the insurance industry, since the Federal support plan for terrorism risk insurance,⁹⁹ which was supposed to have been a stop gap, temporary program to aid the insurance industry to adjust, has been extended twice, most recently for seven years.¹⁰⁰

Terrorism is not new, and the risk of terrorist attacks to multinationals was not heralded in only by the events of September 11, 2001.¹⁰¹ As early as 1993, some commentators were worried that “virtually every multinational organization and its visible management team are at least theoretically susceptible to terrorist attack.”¹⁰² It was estimated that IBM spent \$100 million on its worldwide security in 1993.¹⁰³ Data show that most terrorist attacks since the 1960s are directed at people, business, and infrastructure related to business.¹⁰⁴ However, *The Economist* has warned that American businesses are

⁹⁴ Ryder System, Inc., a Fortune 500 transportation services company, considers itself a “provider of leading-edge transportation, logistics and supply chain management solutions.” *About Us*, RYDER SYS., http://www.ryder.com/aboutus_home.shtml (last visited Mar. 30, 2012).

⁹⁵ Bill Anderson, *Strengthening Global Supply Chain Security*, SECURITY MAGAZINE (June 17, 2008), <http://www.securitymagazine.com/articles/strengthening-global-supply-chain-security-1>.

⁹⁶ Larobina, *supra* note 22, at 147.

⁹⁷ Rachel Emma Silverman, *Workplace Security (A Special Report) – Changing Workplace – Under the Radar: For Most Small Business, Increased Security Seems Like an Unnecessary Cost*, WALL ST. J. (Mar. 11, 2002).

⁹⁸ Larobina, *supra* note 22, at 152.

⁹⁹ Terrorism Risk Ins. Act Of 2002, Pub. L. No. 107-297, 116 Stat 2322 (2002).

¹⁰⁰ Terrorism Risk Ins. Extension Act of 2005, Pub. L. No. 109-144, 119 Stat 2660 (2005); Terrorism Risk I Program Reauthorization Act of 2007, Pub. L. No. 110-160, 121 Stat 1839 (2007).

¹⁰¹ *Corporate Terrorism: A New Global Threat*, 79 MGMT. REV. 39 (1990); Robert S. Fleming, *Assessing Organizational Vulnerability to Acts of Terrorism*, 63 S.A.M. ADVANCED MGMT. J. 27 (1998).

¹⁰² Barton Laurence, *Terrorism as an International Business Crisis*, 31 MGMT. DECISION 22 (1993).

¹⁰³ *Id.*

¹⁰⁴ Czinkota, *supra* note 48, at 826-43.

not taking the dangers posed by potential terrorist attacks seriously and have not sufficiently bolstered their defenses since 9/11.¹⁰⁵

A variety of studies show that many businesses are not spending what some feel they should for security,¹⁰⁶ and some industry officials, such as the healthcare industry, in particular, fear that more should be spent in this area.¹⁰⁷ According to the Conference Board,¹⁰⁸ the spending that has been done has not been evenly-distributed across industries.¹⁰⁹ Perhaps, primarily because most believe they will not be a target and that the odds are on their side. After all, terrorists only have the means to make so many attacks. Small companies spend the least, both as a finite number and as a percentage of revenues.¹¹⁰ However, despite the fact that the majority of international or multinational enterprises may not directly suffer from terrorist attacks, they will likely suffer indirectly.¹¹¹ Such indirect impact takes the form of declines in buyer demand; increased international business transactions costs; interruptions in international supply chains; and government policies, regulations, and procedures enacted to deal with terrorism that hamper the flow of business and cause declines in foreign direct investment.¹¹²

The random nature of attacks – no one can predict them – and the willingness or the desire to inflict great numbers of non-combatant casualties has made modern-day terrorism more “terrifying.”¹¹³

¹⁰⁵ *Business: Homeland Insecurities; Business and Terrorism*, THE ECONOMIST NEWSPAPER, Aug. 23, 2003, at 52.

¹⁰⁶ *Id.*; Karen Halm, *Study: Stunted Security Management*, 69 J. PROP. MGMT 1 (Nov.-Dec. ed., 2004); *Who's Scared? No Boom In Corporate Security Spending*, ISHN NEWS (Aug. 8, 2003), <http://www.ishn.com/articles/who-s-scared-no-boom-in-corporate-security-spending> (last visited Mar. 30, 2012).

¹⁰⁷ *Benchmarks: Overall Security Spending*, INST. OF FIN. & MGMT. (2011), <http://www.iofm.com/content/resources/OverallSecuritySpending1.pdf> (last visited Mar. 30, 2012).

¹⁰⁸ *See About Us*, CONFERENCE BOARD, <http://www.conference-board.org/about/> (last visited Mar. 30, 2012).

The Conference Board is a global, independent business membership and research association working in the public interest. [Its] mission is unique: To provide the world's leading organizations with the practical knowledge they need to improve their performance and better serve society. The Conference Board is a non-advocacy, not-for-profit entity holding 501 (c) (3) tax-exempt status in the United States.

¹⁰⁹ Thomas E. Cavanagh, *Corporate Security Measures and Practices: An Overview of Security Management Since 9/11*, CONFERENCE BOARD (Special Report, 05-01-SR), http://www.neweraassociates.com/downloads/conference_board.pdf (last visited Mar. 30, 2012).

¹¹⁰ Ellen M. Heffes & Jeffrey Marshall, *Security: Middle Market Firms Split on Spending*, FINANCIAL EXECUTIVE, at 10 (Oct. ed., 2004).

¹¹¹ Czinkota, *supra* note 48.

¹¹² *Id.* at 827, 831, 834.

¹¹³ Quin Li & Drew Schaub, *Economic Globalization and Transnational Terrorism*, 48(2) JOURNAL OF CONFLICT RESOLUTION 230, 240, 252-53 (2004).

Religiously inspired terrorists may be especially dangerous. Religious terrorists [which many of the al-Qaeda claim themselves to be] often feel engaged in a struggle of good against evil. Most undertake violent behavior to please the perceived commands of a deity, which can make them relatively unconstrained by secular laws or values. Religious terrorists are often alienated from the existing social system, which they seek to eliminate rather than improve. They typically receive popular support from people and organizations in countries and cultures around the world.¹¹⁴

The trading nations of the world are increasingly vulnerable to international terrorist activities, as are – because they are on the front line, so to speak – the companies that conduct the business between those trading nations.

More than \$1 billion USD in goods cross the Mexican border daily.¹¹⁵ In 2003, ships unloaded 18 million 40-foot cargo containers filled with goods at United States' ports.¹¹⁶ This is what happens close to home for Americans. A similar increase in cargo-shipping activity has taken place worldwide.¹¹⁷ The United States Customs and Border Protection service has implemented a container security program that thousands of importers, carriers, and freight intermediaries have signed up for.¹¹⁸ Such programs cost money and if the overseas exporter does not want to be troubled by the requirements, a small United States importer has little power to change its mind, though large companies like Wal-Mart have little trouble in forcing compliance.¹¹⁹

This enormous amount of traffic gives rise to multiple targets for interdiction or destruction. Further, the number of containers and trucks crossing borders provides multiple opportunities for terrorists to smuggle themselves and their weapons, hidden in trucks or containers, into target countries.¹²⁰ Likewise, world financial markets have seen an enormous increase in cross-border fund transfers such that the daily turnover in the foreign exchange markets is now almost

¹¹⁴ *Id.*

¹¹⁵ *Trading across the Border: The United States and Mexico's \$1 Billion per Day Relationship*, U.S. DEP'T OF COMMERCE (Oct. 31, 2011), <http://commerce.gov/blog/2011/10/31/trading-across-border---united-states-and-mexico-s-1-billion-day-relationship>.

¹¹⁶ Li & Schaub, *supra* note 113, at 240, 252-53.

¹¹⁷ *Id.*

¹¹⁸ R.G. Edmonson, *Security Challenge*, JOURNAL OF COMMERCE ONLINE (Oct. ed., 2006), <http://www.tradeinnovations.com/Documents/News/ML%20KW%20Security%20Challenge%2010-2006.pdf> (last visited Mar. 30, 2012).

¹¹⁹ *Id.*

¹²⁰ Li & Schaub, *supra* note 113, at 231.

\$2 trillion USD per day.¹²¹ This exceeds the value of traded goods. With such a large number of financial transactions taking place, those who wish to monitor fund transfers and find and intercept funds going to finance terrorist activities find themselves confronting a daunting task.¹²²

The impact on air travel across the United States and around the world has been enormous – between 9/11 and 2009, airlines lost \$55 billion.¹²³ In the months after 9/11, airline revenues were down worldwide, causing roughly 100,000 airline workers to lose their jobs around the world.¹²⁴ And, of course, four fully-loaded, fully-fueled commercial aircraft were destroyed in the attacks of 9/11.¹²⁵ Nearly 18,000 businesses were disrupted, relocated, or destroyed as a result of the attack in New York, and the Gross City Product of New York City was reduced by over \$27 billion during the remaining months of 2001 and 2002.¹²⁶ According to Douglas A. McIntyre, the editor of *24/7 Wall St.*, a financial commentary website, the typical terrorist targets are “strategic assets, like oil fields and financial institutions.”¹²⁷

III. TERRORISM UNDER INTERNATIONAL LAW

Law is considered to be an instrument of social control.¹²⁸ The idea is that society attempts to achieve uniformed behavior by generally describing behavior that is prohibited.¹²⁹ The desired behavior is then encouraged by discouraging the undesired behavior through punishment.¹³⁰ The populations of many states today consider themselves to be living under the rule of law.¹³¹ They believe that the rule of law bestows upon them, as citizens, the advantages of the preven-

¹²¹ *Id.*

¹²² *Id.*

¹²³ Ben Steverman, *Renewed Terrorism Threat Rattles Airlines*, BLOOMBERG BUSINESSWEEK (Dec. 30, 2009), http://www.businessweek.com/investor/content/dec2009/pi20091229_644479.htm.

¹²⁴ Shane Hall, *The Effects of Terrorist Attacks to the Airline Industry*, EHOW.COM (Mar. 9, 2011), http://www.ehow.com/facts_5011704_effects-terrorist-attacks-airline-industry.html.

¹²⁵ Nat'l Comm'n On Terrorist Attacks Upon The U.S., *THE 9/11 COMMISSION* (Aug. 21, 2004), http://www.9-11commission.gov/report/911Report_Exec.htm.

¹²⁶ John London, *The Effects of 9/11 on the Economy*, EHOW.COM (Feb. 11, 2011), http://www.ehow.com/info_7923249_effects-911-economy.html.

¹²⁷ McIntyre, *supra* note 51.

¹²⁸ CLARK & MARSHALL, *A TREATISE ON THE LAW OF CRIMES* 1-3 (Marian, Quinn, Barnes eds., 7th ed., 1997).

¹²⁹ *Id.* at 3-4.

¹³⁰ *Id.* at 64.

¹³¹ Andrew Altman, *ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 18 (Peter Adams et al. eds., 2d ed., 2001).

tion of arbitrary and corrupt government, the restraint of vengeance, and the provision of individual liberty and economic prosperity.¹³²

Some of the very first principles of the concept of the rule of law are that a law must be made public and must be reasonably clear and specific in meaning and in what it prohibits.¹³³ And, of course, it must be applied equally to all, that is, without discrimination.¹³⁴ The rule of law is considered an essential element of a functioning democracy and a functioning economy.¹³⁵ This sentiment has been echoed time and again by many,¹³⁶ including the United Nations itself, which said:

Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission. Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the effective protection of human rights, and to sustained economic progress and development. The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the United Nations work.¹³⁷

Another principal tenet of the rule of law is that government should maintain peace and order, for the most part through a system of laws or rules that specify both violations and their corresponding sanctions accruing to violators, leading at least one set of writers to point out that: “Liberal democracies are especially susceptible to terrorism because elected officials are expected to protect the lives and property of their electorate or face defeat in a subsequent election.”¹³⁸ This leads to the notion that no act can be regarded as a crime, unless there is a specific law prohibiting it, and no one can be punished, unless they have committed an unlawful act described as a crime. Legal scholars refer to these concepts as *nullum crimen sin lege* (“no crime without a law”) and *nulla poena sin crimine* (“no punishment without a crime”).¹³⁹ In other words, crimes must be clearly defined.¹⁴⁰

¹³² *Id.*

¹³³ O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, AM. BUS. L. J. (2001), available at <http://www.allbusiness.com/legal/3484583-1.html>.

¹³⁴ Altman, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ UNITED NATIONS & THE RULE OF LAW, <http://www.un.org/en/ruleoflaw/index.shtml> (last visited Feb. 11, 2012).

¹³⁸ Walter Enders & Todd Sandler, *Is Transnational Terrorism Becoming More Threatening?: A Time-series Investigation?*, 44 J. CONFLICT RESOLUTION 307, 309 (2000).

¹³⁹ Altman, *supra* note 131, at 5.

Their world has no international crime of “terrorism” in the sense of a *delicta juris gentium*. Further, terrorism, in and of itself, is neither a war crime nor a crime against humanity.¹⁴¹

With no international definition of terrorism,¹⁴² can one call international terrorism a crime with any authority? Can one be prosecuted under a crime that has no definition? In this context, what is the role of the rule of law that we all espouse? I suggest that if the international community is serious about stopping international terrorism under color of law, then a definition is needed.

In 1926, Romania suggested that the League of Nations promulgate a treaty to outlaw and provide sanctions to those who engage in terrorist activities.¹⁴³ In the 1930s, the international community wished to set up a unified regime regarding international crimes, and terrorism was discussed at a number of international conferences during the early years of that decade.¹⁴⁴ The first important modern attempt to define terrorism as an international crime was undertaken by the League of Nations,¹⁴⁵ resulting in the 1937 Convention on the Prevention and Punishment of Terrorism.¹⁴⁶ Even though it was adopted by the League¹⁴⁷ and signed by twenty-four states,¹⁴⁸ it was only ratified by one state¹⁴⁹ and did not enter into effect.¹⁵⁰ It failed to gain traction,

¹⁴⁰ *Id.*

¹⁴¹ *Frequently Asked Questions: International Law Aspects of Countering Terrorism*, U.N. OFFICE ON DRUGS AND CRIME at 41 (2009), <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>.

¹⁴² Lord Carlisle of Berriew, *The Definition of Terrorism: A Report by Lord Carlisle of Berriew Q.C. Independent Reviewer of Terrorism Legislation* at 3 (Mar. 2007), <http://www.statewatch.org/news/2007/mar/uk-definition-of-terrorism.pdf>.

¹⁴³ Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. INT’L CRIM. JUST. 78, 80 (2006), available at <http://ssrn.com/abstract=915777>.

¹⁴⁴ George Sliwowski, *Legal Aspects of Terrorism*, in INTERNATIONAL TERRORISM AND WORLD SECURITY 69, 72 (David Carlton & Carlo Schaerf eds., 1975).

¹⁴⁵ At the end of the First World War, an intergovernmental organization was created, the League of Nations, whose purpose was to prevent all future wars. The Covenant of the League of Nations established an assembly and a council whose job was to settle disputes, enforce sanctions, and implement peaceful settlements. KAREN MINGST, *ESSENTIALS OF INTERNATIONAL RELATIONS* 37, 231 (2d ed. 2003).

¹⁴⁶ Convention on the Prevention and Punishment of the Crime of Terrorism, *opened for signature* Nov. 16, 1937, League of Nations Doc. C.546.M.383 1937 V (1938).

¹⁴⁷ Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 315 (2003).

¹⁴⁸ Thomas M. Franck & Burt B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT’L LAW 69, 70 n.5 (1974).

¹⁴⁹ ILIAS BANTEKAS, SUSAN NASH, & MARK MACKAREL, *INTERNATIONAL CRIMINAL LAW* 229 (2001).

¹⁵⁰ MINGST, *supra* note 145.

because war was coming,¹⁵¹ and as some have suggested, because a number of states believed the definition of terrorism was too broad.¹⁵²

In those days, terrorist acts were, more often than not, attacks or attempted assassinations of heads of state, royalty, or political figures, not normally against large civilian groups.¹⁵³ The circumstances surrounding the drafting of the 1937 Convention concerned the assassination in 1934 in Marseille, France of the visiting King Alexander I of Yugoslavia.¹⁵⁴ In that attack, the Foreign Minister of France was also killed, simply as collateral damage, when a French police officer shot him accidentally in the ensuing melee.¹⁵⁵ As we all know, terrorist attacks have become more violent since that time.

In the twenty-first century, terrorists have changed tactics and targets. The United Nations Security Council Resolution of 2001 told all states to issue legislation that would make terrorist acts a crime.¹⁵⁶ Such statutes were to include financing, planning, preparation, and support for terrorism and the commission of acts of terrorism in such crimes.¹⁵⁷ Because the resolution was issued under Chapter VII of the charter, it was mandatory on all states and not merely precatory.¹⁵⁸ However, the resolution did not define terrorism.¹⁵⁹ Apparently, states were to fend for themselves and define terrorism as they wished, if they could.

With no definition – and no comprehensive treaty – the United Nations is concerned that the organization cannot “develop a comprehensive strategy against terrorism, . . . and . . . [t]his prevents the United Nations from exerting its moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes”¹⁶⁰ Roberta Arnold, an international lawyer, scholar, and former legal adviser to the Swiss Department of Defense also believes that, without a comprehensive treaty, bringing responsible parties to justice is a recurring problem,¹⁶¹ and

¹⁵¹ World War II 1939 - 1945.

¹⁵² MINGST, *supra* note 145.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Alexander I of Yugoslavia*, NEW WORLD ENCYCLOPEDIA (Feb. 24, 2009), http://www.newworldencyclopedia.org/entry/Alexander_I_of_Yugoslavia.

¹⁵⁶ *Id.*

¹⁵⁷ S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁵⁸ VICTOR V. RAMRAJ, MICHAEL HOR & KENT ROACH, *Introduction to GLOBAL ANTI-TERRORISM LAW AND POLICY* 133 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2009).

¹⁵⁹ MINGST, *supra* note 145.

¹⁶⁰ Thalif Deen, *The Most Elusive Word*, INTER PRESS SERV. (Dec. 1, 2005), <http://ipsnews.net/news.asp?idnews=31267>.

¹⁶¹ ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR INTERNATIONAL TERRORISM* 1-3 (2004).

cites, among others, the failure to arrest Abu Abbas, the leader and person responsible for the 1985 *Achille Lauro* high jacking, until the United States' invasion of Iraq in 2003.¹⁶²

Many acts considered to be acts of international terrorism are separate crimes under the laws of various states.¹⁶³ Further, many states have attempted to define terrorism, and a variety of definitions appear in their statutes.¹⁶⁴ However, what is considered terrorism in one country – whether they use that definition for their own domestic legal purposes or for international legal purposes – is not considered terrorism in another.¹⁶⁵ Definitions vary to a considerable degree and “[s]panning several continents, an international network cynically exploits national differences in the tolerance of foreign terrorists, in the liberality of laws of asylum and extradition, and in the preservation of civil liberties.”¹⁶⁶ Some international lawyers currently believe that the recent attempts by liberal democracies to make counterterrorism laws have even gone too far,¹⁶⁷ and conclude that “no State can legally adopt strategies aimed at combating international terrorism if those strategies simultaneously derogate from established international human rights norms.”¹⁶⁸ The Security Council has also voiced this concern; for example, in Security Council Resolution 1624, a 2005 anti-terrorism resolution required states to: “ensure that any measures taken to implement this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.”¹⁶⁹

Attempts at definitions have taken one of, at least, two approaches.¹⁷⁰ One is a generic definition, self-inclusive into which presumably all – or most – terrorist acts would fit.¹⁷¹ Some call this a “top-down” or deductive approach.¹⁷² The other approach uses a va-

¹⁶² *Id.* at 2.

¹⁶³ Gordon Woo, *Quantitative Terrorism Risk Assessment*, RISK MGMT. SOLUTIONS LIMITED, http://www.rms.com/NewsPress/Quantitative_Terrorism_Risk_Assessment.pdf (last visited

Apr. 13, 2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Michael Head, *Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights*, 26 MELB. U. L. REV. 666, 666-69 (2002).

¹⁶⁸ Joseph Isanga, *Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary Internal Law From U.N. Resolutions*, 37 DENV. J. INT'L L. & POL'Y 233, 233-34 (2009); see also Michael J. Beloff, *The Concept of Deference in Public Law*, 11 JUD. REV. 213, 213, 215, 222 (2006).

¹⁶⁹ S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

¹⁷⁰ Geoffrey Levitt, *Is “Terrorism” Worth Defining?*, 13 OHIO N. U. L. REV. 97, 97 (1986).

¹⁷¹ *Id.*

¹⁷² *Id.*

riety of clearly and narrowly defined categories of acts that, when taken together, make up an open-ended framework for defining – often only implicitly – and suppressing terrorism.¹⁷³ This is known as a “ground-up” or inductive method,¹⁷⁴ something Rohan Perera, Chairman of the United Nations Ad Hoc Committee to Eliminate Terrorism, called an “operational approach,” one much like that taken by traditional criminal law.¹⁷⁵

The governments of many states have taken the deductive approach by attempting to make a catch all definition.¹⁷⁶ For example, Title 22 of the United States Code defines terrorism as follows:

(d) Definitions

As used in this section—

(1) the term “international terrorism” means terrorism involving citizens or the territory of more than 1 country;

(2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;

(3) the term “terrorist group” means any group, or which has significant subgroups which practice, international terrorism;

(4) the terms “territory” and “territory of the country” mean the land, waters, and airspace of the country; and

(5) the terms “terrorist sanctuary” and “sanctuary” mean an area in the territory of the country—

(A) that is used by a terrorist or terrorist organization—

(i) to carry out terrorist activities, including training, fundraising, financing, and recruitment; or

(ii) as a transit point; and

(B) the government of which expressly consents to, or with knowledge, allows, tolerates, or disregards such use of its territory and is not subject to a determination under—

(i) section 2405(j)(1)(A) of the Appendix to title 50;

(ii) section 2371 (a) of this title; or

(iii) section 2780 (d) of this title.¹⁷⁷

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Thalif Deen, *U.N. Unable to Define Terrorism*, PRAVDA (Jan. 12, 2010), http://english.pravda.ru/opinion/columnists/01-12-2010/116016-UN_unable_to_define_terrorism-0/.

¹⁷⁶ Head, *supra* note 167, at 109.

¹⁷⁷ 22 U.S.C. § 38 ¶ 2656f(d) (2006).

As can be seen, under this United States statute, state terrorism is not included in the definition of international terrorism since only “subnational groups” or “clandestine agents” can commit terrorism.¹⁷⁸ Another United States definition of terrorism is found in the Code of Federal Regulations: “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”¹⁷⁹ It may surprise people to know that “almost every agency of the United States government that deals with the threat of terrorism maintains its own definition of that phenomenon.”¹⁸⁰ It should not be surprising that other states have trouble with a uniform definition.¹⁸¹

The United States Federal Bureau of Investigation defines terrorism as:

Domestic terrorism is the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or Puerto Rico without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives.

International terrorism involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.¹⁸²

Some have made the definition a catch-all that can be used not only to protect the populace but also to suppress political dissent. Such an example is the Arab Convention for the Suppression of Ter-

¹⁷⁸ *Id.*

¹⁷⁹ 28 C.F.R. § 0.85(l) (2010).

¹⁸⁰ “Terrorism:” *Why the Definition Must Be Broad*, 24 WORLD POL’Y J. 47, 47 (2007).

¹⁸¹ *Id.*

¹⁸² U.S. Dep’t of Justice, *Terrorism 2002-2005*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05#forward (last visited Apr. 13, 2012).

rorism entered into by the League of Arab States.¹⁸³ This group defines terrorism as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a [sic] national resources.¹⁸⁴

This, of course, is an international – though not universal – definition.¹⁸⁵ It is a very broad definition and does not appear to require any political or ideological motive, so what in some countries would be a traditional crime, could be considered terrorism under this definition. Russia's 2006 law, called *On Counteraction to Terrorism*, defines terrorism as “‘practice of influencing the decisions of government, local self-government or international organizations by intimidating the population or using other forms of illegal violent action’ as well as the ‘ideology of violence.’”¹⁸⁶ The notion of “other forms of illegal violent action” seems broad indeed.

Terrorism is a word charged with emotion and one which is often used as a propaganda tool by governments.¹⁸⁷ For example, the Kurdistan Workers Party says the Turkish government paints the Kurdistan Workers Party as a terrorist group for internal political purposes.¹⁸⁸ The United States State Department publishes annual reports

¹⁸³ The members of the League of Arab States are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen. *Member States*, ARAB LEAGUE ONLINE, <http://www.arableagueonline.org> (follow “Member States” hyperlink) (last visited Apr. 13, 2012).

¹⁸⁴ The Arab Convention for the Suppression of Terrorism, Art. 1, § 2, Apr. 22, 1998 (adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice), *available at* <http://www.al-bab.com/arab/docs/league/terrorism98.htm>.

¹⁸⁵ See ARAB LEAGUE ONLINE, *supra* note 183.

¹⁸⁶ Mariya Y. Omelicheva, *Russia's Counterterrorism Policy: Variations on an Imperial Theme*, 3 PERSP. ON TERRORISM 1, 9 n.5 (2009), *available at* <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/61/html>.

¹⁸⁷ Noam Chomsky, LANGUAGE AND POLITICS 473 (2d ed., 2004).

¹⁸⁸ Xende Biradosti, *Who Is The Terrorist?*, KURD NET (Nov. 2, 2012), <http://ekurd.net/mismas/articles/misc2012/2/turkey3756.htm>; *see also* Michael Loadenthal, Asymmetric Labeling of Terrorist Violence as a Matter of Statecraft Propaganda: Or, Why the United States Does Not Feel the Need to Explain the Assassination of Osama Bin Laden, 1 ANARCHIST DEV. CULTURAL STUD. 113, 124 (2011), *available at* <http://anarchist-developments.org/index.php/adcs/article/view/42>.

on terrorism and keeps track of terrorist incidents worldwide,¹⁸⁹ but the definitional problem has caused London's *The Guardian* to question whether such statistics are meaningful,¹⁹⁰ and to suggest that "any classification of terrorist groups is fundamentally motivated by self-interest."¹⁹¹ One problem with defining anything is that of distinguishing it from what it is not. Terrorism appears to be no exception. Most definitions include the ideas of involving violence and sowing terror or fear within a population; and do not provide any exemption for struggles for self-determination.¹⁹² Of course, a government's counterterrorism activities would also likely include violence, and as most statutes respecting the prevention of crime, would also likely be designed to strike fear in the hearts of would-be "terrorist[s]," rather than "innocent" populations.¹⁹³ Therefore, some clarification appears necessary in any definition. Further, as Professor Ruth Blakeley of the University of Kent in Canterbury, England, points out, even democracies, sometimes engage in terrorism or sponsor terrorism.¹⁹⁴ Should an exception be made, that is, should state-sponsored or state terrorism be excluded from the definition? This generates troublesome sticking points for many states in arriving at a consensus on a definition.¹⁹⁵ Totalitarian states are often loath to closely define state terrorism or state-sponsored terrorism.¹⁹⁶ Former colonies, developing countries, and many states in the Middle East want to clarify that any definition should exclude struggles for self-determination or violent actions taken to push out an occupying force.¹⁹⁷ Relations among states are dominated by the self-interest of sovereign states,¹⁹⁸ and

¹⁸⁹ See *United States Department Bureau of Counter Terrorism*, DEP'T OF STATE, <http://www.state.gov/j/ct/> (last visited Apr. 13, 2012); *Country Reports on Terrorism*, DEP'T OF STATE, <http://www.state.gov/j/ct/rls/crt/index.htm> (last visited Apr. 13, 2012).

¹⁹⁰ Brian Whitaker, *The Definition of Terrorism*, GUARDIAN (May 7, 2001), <http://www.guardian.co.uk/world/2001/may/07/terrorism>.

¹⁹¹ *Id.*

¹⁹² See Head, *supra* note 167, at 667, 669.

¹⁹³ See "Terrorism: Why the Definition Must be Broad, 24 WORLD POL'Y J. 1, 49 (2007) (quoting an American World War II bomber pilot) (describing state violence and collateral or unintended damage).

¹⁹⁴ Ruth Blakeley, *Bringing the State Back into Terrorism Studies*, 6 EUR. POL. SCI. 228, 229 (2007).

¹⁹⁵ See RAMRAJ ET AL., *supra* note 158; see also Jackson Nyamuya Maogoto, *War on the Enemy: Self-Defence and State-Sponsored Terrorism* 7-9, 18-20 (bepress Legal Series, Working Paper No. 1352, 2006), available at <http://law.bepress.com/expresso/eps/1352>

¹⁹⁶ *Transnational Terrorism, Security and the Rule of Law, Defining Terrorism* (a project financed by the European Commission) (Oct. 1, 2008), <http://transnationalterrorism.eu/tekst/publications/WP3%20Del%204.pdf>.

¹⁹⁷ See Head, *supra* note 167, at 5, 10.

¹⁹⁸ ALEXANDER ZAHAR & GORAN SLUTTER, *INTERNATIONAL CRIMINAL LAW*, at ix (2008).

despite the fact that states have treaty obligations to prosecute international crimes,¹⁹⁹ state sovereignty is a major obstacle to the effective enforcement of international crimes.²⁰⁰

The United Nations General Assembly came close to a working definition in its 1994 declaration, entitled “Measures to Eliminate International Terrorism,” condemning “all acts, methods and practices of terrorism.” It called terrorism:

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.²⁰¹

Even this definition does not say what a “criminal act” is.²⁰² Is it a criminal act under international law (with universal jurisdiction?), or a criminal act under a state’s domestic law? If the Resolution refers to domestic law, that is potentially problematic because, as stated, domestic criminal law definitions vary considerably from state to state.²⁰³ Of course, a General Assembly declaration or resolution does not make or have the force of international law²⁰⁴ though such a declaration can either reflect or eventually give rise to customary international law if it is followed by enough states on a consistent basis and is supported by the subjective effect of *opinion juris*.²⁰⁵

Why have the world community and the United Nations Legal Committee been unable to reach a consensus? Why can they not define terrorism and agree upon a comprehensive convention to eliminate terrorism, approving and ratifying the draft which has languished since 2000? According to Thalif Deen, United Nations Bureau Chief and Inter Press Service Regional Director for North America, there are at least two main sticking points in reaching a consensus defini-

¹⁹⁹ Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, in INTERNATIONAL CRIMES 577, 580 (Nick Passos ed., 2003).

²⁰⁰ *Id.*

²⁰¹ G.A. Res. 49/60 (I), U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

²⁰² *Id.*

²⁰³ See *infra* Table 3.

²⁰⁴ MALCOLM N. SHAW, INTERNATIONAL LAW 114-15 (6th ed. 2008).

²⁰⁵ *Opinion juris* is the second leg of binding customary international law, the first being consistent behavior, and the second being a subjective belief that one is bound by such customary behavior, or that one (a state) has such *opinion juris*. Mere customary practice without the subjective feeling of an obligation or *opinion juris*, would give rise to mere comity and not law. CARLOS ARELLANO GARCÍA, PRIMER CURSO DE DERECHO INTERNACIONAL PÚBLICO 189 (1999); see also S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

tion: the question of state terrorism – or state-sponsored terrorism – and the notion that populations occupied by a foreign power have a right to resist and so a definition of terrorism should not preclude that right.²⁰⁶

According to Deen, the “hard-line position on ‘terrorists,’ ‘state terrorism,’ and ‘freedom fighters,’ have mostly come from Arabs.”²⁰⁷ He said that one Arab diplomat has commented, “there will never be an agreed definition of terrorism as long as the Palestinian issue remains unsettled.”²⁰⁸

It appears that the concept of state terrorism is politically charged. Some consider the United States’ occupation of Iraq as “state terrorism.”²⁰⁹ The United States would not want such a definition to include those activities, but certainly United States’ presidents have used the term state-sponsored terrorism on a variety of occasions without giving it a specific or generic definition.²¹⁰ A number of powerful actors on the world stage may be apprehensive about any definition including state or state-sponsored terrorism, since many have been accused of engaging in the activity.

Although the International Court of Justice did not use the word “terrorism” or “state-sponsored terrorism” in the case *Nicaragua v. United States*, the court found that the United States had engaged in and sponsored activities that many today would consider state-sponsored terrorism.²¹¹ Troops of the United Kingdom were found to have engaged in actions that many objective observers would today call terrorism of the local population in Northern Ireland.²¹²

Belgian activities in Africa,²¹³ French activities in Algeria, and the Russians in Chechnya, all could be considered by some to be state terrorism. The Russians call the Chechen fighters terrorists; the Che-

²⁰⁶ Thalif Deen, *The Most Elusive Word*, INTER PRESS SERV. (Dec. 1, 2005), <http://ipsnews.net/news.asp?idnews=31267>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ At various times, the downing of the Pan Am flight over Lockerbie, Scotland and the activities of Hamas, Syria, Iran, Iraq, Hezbollah, and North Korea have all been considered state or state-sponsored terrorism by American leaders.

²¹¹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 45-51 (June 27).

²¹² Jason Walsh, *Saville Report on Bloody Sunday Massacre Exonerates Victims*, CHRISTIAN SCI. MONITOR (June 15, 2010), <http://www.csmonitor.com/World/Europe/2010/0615/Saville-report-on-Bloody-Sunday-massacre-exonerates-victims>.

²¹³ See, e.g., ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998).

chen fighters say they seek self-determination.²¹⁴ Little wonder that there is so much controversy over the terminology. Some make the argument that there needs to be no new treaty or legal definition that would include state terrorism, since, they argue, international humanitarian law and the law of war (*jus in bello*) together deal with the matter well enough.²¹⁵ Accordingly, as the acclaimed international law professor M. Cherif Bassiouni has said: “[Conventions] . . . only partially addressed the problem, . . . [p]artly because the problem was addressed from the perspective of states seeking to control non-state actors, while failing to control state-committed and state-sponsored terror-violence.”²¹⁶

China has recently lamented the lack of an international definition as well as a domestic laws definition, stating they needed such a definition in their domestic law in order to better combat terrorist activities, which they say are plaguing the country.²¹⁷ In October 2011, China therefore enacted a new anti-terrorism law that defines terrorist acts as:

those intended to induce public fear, to harm public security or to coerce state organs or international organizations by means of violence, damage, threats or other tactics that cause or aim to cause severe harm to society by causing casualties, bringing about major economic losses, damaging public facilities or disturbing social order²¹⁸

The language “or disturbing social order” seems to give the state a very broad scope of defining many acts as acts of terrorism.

States are all over the waterfront in their definitions of terrorism.²¹⁹ Table 3 below is a list briefly outlining a few states’ definitions of terrorism:²²⁰

²¹⁴ Maryann Bird, *Chechnya: The Fight for Rights*, TIME, Jan. 26, 2003, available at <http://time.com/time/magazine/article/0,9171,411387,00.html>

²¹⁵ Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 847, INT’L. REV. OF RED CROSS, 547, 549 (Sept. 2002), available at http://www.icrc.org/eng/assets/files/other/irrc_847_gasser.pdf

²¹⁶ M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001, xxv (2001).

²¹⁷ *China Defines Acts of Terrorism, Allows Funds, Assets to Be Frozen*, BLOOMBERG NEWS (Oct. 29, 2011), <http://www.bloomberg.com/news/2011-10-29/china-lawmakers-vote-to-strengthen-legislation-aimed-at-fighting-terrorism.html>.

²¹⁸ *Id.*

²¹⁹ Lord Carlile, *The Definition of Terrorism*, 9-16 (Mar. 2007), <http://www.official-documents.gov.uk/document/cm70/7052/7052.pdf>.

²²⁰ *Id.*

Table 3, Countries & their domestic definitions of terrorism²²¹

Country	General Description	Comments
Australia	Similar definition to the UK ²²²	<i>See Security Legislation Amendment (Terrorism) Act 2002.</i> An action to advance a political, religious or ideological cause and with the intention of coercing the government or intimidating the public.

²²¹ *Id.*²²² UK Definition: Terrorism: interpretation.

(1) In this Act “terrorism” means the use or threat of action where—

- (a) the action falls within subsection (2),
- (b) the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and
- (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it—

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person’s life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

- (a) “action” includes action outside the United Kingdom,
- (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
- (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
- (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Terrorism Act, 2000, c. 11, § 1, as amended, *available at* <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

Austria	No separate national definition.	Terrorism referred to in the criminal code, but they are not specific terrorism offences.
Canada	Similar definition to the UK. The legislative matrix is complex.	Defined by specific references to UN Conventions and Protocols. Acts intended to intimidate the public or compel a person, a government or a domestic or international organization to do or refrain from doing any act, inside or outside Canada; refers to <i>serious</i> injury or risk to health and safety, and <i>substantial</i> property damage.
China	Extremely broad.	Includes aspects of freedom of speech and association.
Egypt	Very broad, substantially unchanged since murder of President Sadat.	Criticized by UN Human Rights Committee.
France	Broad.	Code refers to disturbance to public order by means of intimidation or terror. Would certainly characterize a serious idiosyncratic criminal (e.g. Thomas Hamilton) as a terrorist.

Russia	Broad in terms of actions, with intention to undermine public security, terrorize the population, or pressurize the authorities to take decisions.	
Spain	Very broad definition of terrorism; also, aggravated form of ordinary crime where intention is to subvert the constitutional order or to effect serious disturbances of public order.	Special court system for dealing with terrorism; procedurally different from other serious crime.
Switzerland	Broad definition comparable to UK.	Statutory defense if intention is to establish or re-establish a democratic regime or the rule of law or to enable the exercise or safeguarding of human rights (Penal Code art. 260, para. 3).
United States of America	USA PATRIOT Act of 2001. Very broad definition Department of State operationally describes terrorism as “ <i>premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents, usually intended to influence an audience.</i> ”	Wide executive powers including access to confidential information about citizens. A pendulum reaction to the events of 9/11.

There are at least three elements of definition that states and international bodies have used in analyzing the inductive and deductive approaches: a substantive element, a jurisdictional element, and an intent-oriented element.²²³ Normally the deductive approach is distinguished by a rather broad substantive element – that is, many actions could be included in the substantive definition – and “a general, politically oriented intent element.”²²⁴ Thus, the deductive method attempts to abstract the general qualities of “terrorism” so that the activities cover a wide variety of criminal conduct, but those activities constitute terrorism only in specific circumstance, namely in those circumstances described in the intent element.²²⁵ Hence, the intent element in the FBI definition of domestic terrorism: “in furtherance of political or social objectives.”²²⁶

The inductive method definition uses a fairly precise definition of the conduct that constitutes the substantive element and leaves out the political intent element that is found in the deductive approach.²²⁷ This is the method that has resonated in the international sphere.²²⁸

Rather than taking the deductive approach and fully deal with a comprehensive definition head on, the international community has chosen instead to take a “sectoral” approach, by means of which certain offenses that are considered activities of terrorists are identified and treaties (or conventions) are negotiated and signed covering those specific categories of offenses.²²⁹

Those sectoral treaties include:

- The 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft²³⁰
- The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft²³¹

²²³ Levitt, *supra* note 170, at 104.

²²⁴ *Id.* at 108.

²²⁵ Levitt, *supra* note 170, at 108-09.

²²⁶ See U.S. Dep’t of Justice, *Terrorism 2002-2005*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05#forward (last visited Apr. 13, 2012).

²²⁷ Levitt, *supra* note 170, at 109.

²²⁸ *Id.*

²²⁹ INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATION IN THE FIGHT AGAINST TERRORISM 4 (Giuseppe Nesi ed., 2006).

²³⁰ 185 countries have either ratified or acceded to the treaty, including the United States. *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, INT’L CIVIL AVIATION ORG., <http://legacy.icao.int/icao/en/leb/Tokyo.pdf> (last visited Feb. 6, 2012).

²³¹ 185 countries have either ratified or acceded to the treaty, including the United States. *Convention on the Suppression of Unlawful Seizure of Aircraft Signed at the Hague*, INT’L

- The 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation²³²
- The 1979 International Convention against the Taking of Hostages²³³
- The 1979 Convention on the Physical Protection of Nuclear Material²³⁴
- The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation²³⁵
- The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation²³⁶
- The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed
- Platforms Located on the Continental Shelf²³⁷
- The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Identification²³⁸

CIVIL AVIATION ORG.,
http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf (last visited Feb. 6, 2012).

²³² 188 countries have either ratified or acceded to the treaty, including the United States. *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, INT'L CIVIL AVIATION ORG., http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf (last visited Feb. 6, 2012).

²³³ 166 countries have either ratified or acceded to the treaty, including the United States. *International Convention against the Taking of Hostages*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/documents/treaties/Special/1979%20International%20Convention%20against%20the%20Taking%20of%20Hostages.pdf> (last visited Feb. 6, 2012).

²³⁴ 145 countries have either ratified or acceded to the treaty, including the United States. *Convention on the Physical Protection of Nuclear Material*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf (last visited Feb. 6, 2012).

²³⁵ 171 parties have either ratified or acceded to the treaty, including the United States. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, INT'L CIVIL AVIATION ORG., <http://legacy.icao.int/icao/en/leb/Via.pdf> (last visited Feb. 6, 2012).

²³⁶ 156 countries have either ratified or acceded to the treaty, including the United States. *Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation*, CENTER FOR NONPROLIFERATION STUDIES, <http://cns.miis.edu/inventory/pdfs/maritime.pdf> (last visited Feb. 6, 2012).

²³⁷ 146 countries have either ratified or acceded to the treaty, including the United States. *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, U.N. OFFICE ON DRUGS AND CRIME, https://www.unodc.org/tldb/pdf/IMO_Updates/Prot88.pdf (last visited Feb. 6, 2012).

²³⁸ 80 countries have either ratified or acceded to the treaty, including the United States. *Convention on the Making of Plastic Explosives for the Purpose of Detection*, U.N. OFFICE ON DRUGS AND CRIME, http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_11.pdf (last visited Feb. 6, 2012).

- The 1997 International Convention for the Suppression of Terrorist Bombings²³⁹
- The 1999 International Convention for the Suppression of the Financing of Terrorism²⁴⁰
- The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism²⁴¹

Five of the foregoing treaties mention terrorism by name – the remaining seven do not.²⁴² A typical preamble in one of the foregoing treaties (that mention terrorism by name) has words to the effect of, “[d]eeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,”²⁴³ but there is no definition of what that terrorism just mentioned, which gives rise to this concern. Apparently, whatever terrorism is, it gives rise to concern. Additionally, terrorism is not defined in any of the foregoing sectoral treaties. So for purposes of those mentioning terrorism – that is, mentioning a concern about it – someone who engages in the prohibited behavior is presumably engaged in an act of terrorism, although the treaties do not expressly say that.

For now, it will be quite difficult for the international community to effectively counter a violent or disruptive act if it does not fall within the foregoing conventions’ narrow definitions of activity.²⁴⁴

Carlos Diaz-Paniagua, involved in coordinating the negotiations of the proposed United Nations Comprehensive Convention on In-

²³⁹ 161 countries have either ratified or acceded to the treaty, including the United States. *International Convention for the Suppression of Terrorist Bombings*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/documents/treaties/Special/1997%20International%20Convention%20for%20the%20Suppression%20of%20Terrorist.pdf> (last visited Feb. 6, 2012).

²⁴⁰ 167 countries have either ratified or acceded to the treaty, including the United States. *International Convention for the Suppression of the Financing of Terrorism*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf> (last visited Feb. 6, 2012).

²⁴¹ 115 countries are signatories to the treaty, 49 of which have ratified or acceded to the treaty. The United States has not ratified the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. *International Convention for the Suppression of Acts of Nuclear Terrorism*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/documents/treaties/Special/2005%20International%20Convention%20for%20the%20Suppression%20of%20Acts%20of%20Nuclear%20Terrorism.pdf> (last visited Feb. 6, 2012).

²⁴² Concise link to summary of above treaties. *International Legal Instruments to Counter Terrorism*, UNITED NATIONS ACTION TO COUNTER TERRORISM, <http://www.un.org/terrorism/instruments.shtml> (last visited Feb. 6, 2012).

²⁴³ International Convention for the Suppression of the Financing of Terrorism, Preamble, Dec. 9, 1999, 2178 U.N.T.S. 197.

²⁴⁴ Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 134 (1986).

ternational Terrorism, believes that we need a precise definition of terrorism in international law, and he has said:

Criminal law has three purposes: to declare that a conduct is forbidden, to prevent it, and to express society's condemnation for the wrongful acts. The symbolic, normative role of criminalization is of particular importance in the case of terrorism. The criminalization of terrorist acts expresses society's repugnance at them, invokes social censure and shame, and stigmatizes those who commit them.²⁴⁵

He goes on to say that such clear and universal criminalization may tend to deter terrorism, as those values become universally accepted.²⁴⁶

We need, in other words, a clear definition of what terrorism actually is before we can implement a regime of criminal sanctions and define the scope of jurisdiction. In its Baku Declaration, the International Progress Organization²⁴⁷ said:

The United Nations Organization should urgently convene an international conference with the aim of establishing a precise and legally sound definition of terrorism. Unless this effort at codification is undertaken, the term "terrorism" will continue to serve

²⁴⁵ Carlos Fernando Diaz-Paniagua, *NEGOTIATING TERRORISM: THE NEGOTIATION DYNAMICS OF FOUR UN COUNTER-TERRORISM TREATIES 41, 1997-2005*, New York University Dissertation (2008).

²⁴⁶ *Id.*

²⁴⁷ The International Progress Organization defines itself as

an international non-governmental organization that enjoys consultative status with the Economic and Social Council of the United Nations and is associated with the United Nations Department of Public Information. The I.P.O. is not affiliated with any political party or organization. It is strictly non-partisan, and not aligned with any government. The I.P.O. cherishes its independence and its reputation for tackling complex international issues with candor, toughness and objectivity. The organization based in Vienna, Austria, sponsors international conferences and research seminars on topics such as democracy, human rights, dialogue of civilizations, conflict resolution, international law, and economic development; monitors elections and the human rights situation in various countries; co-operates with academic institutions and international NGOs on all continents; and publishes the series "Studies in International Relations." The I.P.O. was founded in 1972 in Innsbruck, Austria, by students from Austria, India and Egypt, who were concerned about relations between cultures and civilizations and the growing North-South divide.

What is the International Progress Organization?, INT'L PROGRESS ORG., <http://www.i-p-o.org/description.htm> (last visited Feb. 6, 2012).

only as a tool to justify brute power politics and to obfuscate the superpower policy of double standards.²⁴⁸

At least one influential international lawyer, who has written widely on the subject, is convinced that “[t]he elaboration of a comprehensive convention on international terrorism will effectively contribute to the prevention, control, and supervision of various forms and manifestations of [the problem].”²⁴⁹ The terrorist bombings in London in 2005 prompted then Secretary-General Kofi Annan to call for the UN Member states, through the UN Ad Hoc Committee on Terrorism, and especially the draft UN Comprehensive Convention on International Terrorism, to define, once and for all, the term “terrorism,” inasmuch as the draft convention had been languishing for over 5 years, primarily because of definitions.²⁵⁰ After the UN legal committee failed later that year to reach such a definition, the Secretary-General wanted the world leaders at the Millennium Summit of September 2005 to strongly condemn all acts of terrorism and issue a declaration that, among other things, would say:

We affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance, and we declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to carry out or to abstain from any act, cannot be justified on any grounds, and constitutes an act of terrorism.²⁵¹

This would have gone a long way to providing a road map for an international definition – using the deductive approach – though of course any such declaration at a summit conference would be a political event and not a practical legal solution. Even so, it could have been persuasive, and would at least have tended to lock in those in agreement to a definition for later treaty-making. In the event, the

²⁴⁸ *The Baku Declaration on Global Dialogue and Peaceful Co-Existence Among Nations and the Threats Posed by International Terrorism*, INT’L PROGRESS ORG. (Nov. 9, 2001), http://i-p-o.org/Baku_Declaration.pdf.

²⁴⁹ BASSIOUNI, *supra* note 216, at xxvii.

²⁵⁰ *UN Seeks Definition of Terrorism*, BBC NEWS (July 26, 2005), <http://news.bbc.co.uk/2/hi/americas/4716957.stm>.

²⁵¹ *Revised Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly*, Advance Unedited Version, A/59/HLPM/CRP.1/Rev.2 (Aug. 5, 2005), http://www.un.org/ga/59/hlpm_rev.2.pdf.

declaration did not say the foregoing, did not arrive at a definition, but among other things said:

“We strongly condemn terrorism in all its forms and manifestations,” committed by whomever, wherever and for whatever purposes, “as it constitutes one of the most serious threats to international peace and security.”²⁵²

We stress the need to make every effort to reach an agreement on and “conclude a comprehensive convention on international terrorism” during the sixtieth session of the General Assembly.²⁵³

This was no better than any other previous multilateral attempt, using a word to define itself. The sixtieth session of the General Assembly came and went and still we had no comprehensive treaty with a definition.²⁵⁴

Another problem with definition on an international level is how does one deal with strictly domestic “terrorism”? Should it be treated in the same way as international terrorism? In other words, terrorism of the variety that the international community should concern itself with? And if so, should the perpetrators of those acts be subject to universal jurisdiction?²⁵⁵ Should the Europeans be concerned about hunting down and prosecuting an American who bombs the Federal Building in Oklahoma City, or should the Mexicans go after Chechens who assault a Russian schoolhouse? Should any definition in a treaty include violence occurring within a state when perpetrated by nationals of that state with no outside involvement?

There has been a long-standing tradition in international law and United States law that people engaged in certain political violence have the right of asylum and are neither detained nor extradited.²⁵⁶

The process of reaching a consensus is fraught with obstacles, not the least of which is the general political nature of terrorism.²⁵⁷ This likely gives rise to the fact that the international community is attempting to work in a context of both politics and law at the same time; this duality often gives rise to tension and conflict not only be-

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Upendra D. Acharya, *War on Terror or Terror Wars: the Problem in Defining Terrorism*, 37 DENV. J. INT'L & POL'Y 653, 655 (Fall 2009).

²⁵⁵ See text *infra* for definition of Universal Jurisdiction. UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES 4 (Stephen Macedo ed., 2004).

²⁵⁶ See Christopher H. Pyle, *Defining Terrorism*, 64 FOREIGN POL'Y 63, 63-78 (1986).

²⁵⁷ BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 16 (2006).

tween these two issue areas, but also among the various states that have their own take on both of these issues.²⁵⁸

IV. STATES HAVE DIFFERING AGENDAS AND DEFINITIONAL CONCERNS

International law generally works very well, with states respecting and following it on a daily basis, generally without question.²⁵⁹ For example, the rules of the General Agreement of Tariffs and Trade, the World Trade Organization, and the attendant dispute resolution mechanism are highly evolved, respected, and they work effectively.²⁶⁰ Aircraft fly from New York to Paris and around the world; letters are posted to overseas locations; ocean commercial fishermen go about their daily business; billions of dollars worth of goods are bought and sold. All of this happens flawlessly as a result of international law, which governs all of the foregoing and much more. No one even questions whether or not to follow the rules; they just do.²⁶¹

Can international law work in this matter of countering international terrorism? Those areas that are politically charged, such as the law of the use of force, like the law of war or defining an act as terrorism, give rise to considerable difficulties, with one nation justifying what they did under international law, and others condemning the activity as a violation of international law.²⁶² Because areas of international law that are fraught with politics give rise to disputes that are not easily resolved or even at times resolvable, many question the effectiveness of international law. Most international law is not politically charged. It just works.²⁶³

V. JURISDICTION

As seen above, definition is a serious problem. Another is jurisdiction, since for prosecution to take place, jurisdiction is required. We know that in general, the term jurisdiction refers to “a court’s power to decide a case or issue a decree.”²⁶⁴ In order to deal with a terrorist, a court would need personal or *in personam* jurisdiction: the “power to bring a person into its adjudicative process”²⁶⁵ and subject-

²⁵⁸ *Id.* at 16-17.

²⁵⁹ CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW, 4 (2010).

²⁶⁰ Andreas F. Lowenfeld, INTERNATIONAL ECONOMIC LAW 145-146 (2d. ed. 2008).

²⁶¹ *Id.*

²⁶² CONWAY, *supra* note 259.

²⁶³ *Id.* at 4-5.

²⁶⁴ BLACK’S LAW DICTIONARY 707 (Abridged 8th ed. 2005).

²⁶⁵ *Id.* at 709.

matter jurisdiction, that is, “over the nature of the case.”²⁶⁶ As one writer has said:

The usual prerequisite a State needs to satisfy in order to exercise criminal jurisdiction is the demonstration of a link between itself and either the facts in question, the effects thereof, or the authors of the alleged crime: its involvement is justified according to territoriality, personality, or security (the principle of protection).²⁶⁷

There are certain crimes that are deemed to be so heinous and deemed to affect the entire international community that for them there is an exception to the aforementioned specific link.²⁶⁸ The crimes of piracy, crimes against humanity, war crimes, and crimes against peace are such crimes,²⁶⁹ since such crimes are regarded as “particularly offensive against the international community as a whole.”²⁷⁰ Professor Stephen Macedo of Princeton University, an advocate of universal jurisdiction, probably described the benefits of the concept best when he said:

Universal jurisdiction appears as a potent weapon: it would cast all the world’s courts as a net to catch alleged perpetrators of serious crimes under international law. It holds the promise of a system of global accountability - justice without borders - administered by the competent courts of all nations on behalf of humankind.²⁷¹

In light of this, the 2005 resolution of the Institut de Droit International states:

Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.

²⁶⁶ *Id.* at 710.

²⁶⁷ Robert Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law*, 50 *REVUE HELLENIQUE DE DROIT INTERNATIONAL* 43, 58 (1997).

²⁶⁸ *Id.*; see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* ch. 5, (7th ed. 2008).

²⁶⁹ Malcolm N. Shaw, *INTERNATIONAL LAW* 668 (6th ed. 2008).

²⁷⁰ *Id.*

²⁷¹ *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES* 4 (Stephen Macedo ed., 2004).

Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person.²⁷²

At the end of the day, there is a prevailing view, prejudice really, that terrorism is a subjective matter, and that “one person’s terrorist is another person’s freedom fighter.”²⁷³

VI. CONCLUSION AND SUGGESTIONS FOR A WAY FORWARD

Companies have an obligation to protect their employees, their customers, and their shareholders’ wealth. Trade associations and their company members can work to make themselves less attractive targets for terrorist acts.

With respect to a comprehensive treaty and a definition, it can be argued that if a person commits an act that falls between the cracks of the sectoral treaties – even though some would consider the act to be terrorism – and if he or she is arrested for that act pursuant to an International Criminal Court (“ICC”) subpoena or by a country having no connection to the crime, that person would have a very strong argument that: (1) the ICC or the state court has no jurisdiction to act in the matter; and (2) the person committed no crime for which he or she can be prosecuted and should be set free.

According to the United Nations Commission on International Trade Law, trade means faster growth, higher living standards, and new opportunities through commerce.²⁷⁴ The United Nations believes that trade, commerce, and business encourage economic development; economic development brings with it better living standards for the world.²⁷⁵ Economists also believe this.²⁷⁶ Conversely, things that disturb or impede trade, commerce, and business, would therefore likely impede development and development’s concomitant rise in global living standards. Terrorism, as has been discussed, impedes

²⁷² Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes, Resolution, INSTITUTE OF INTERNATIONAL LAW, SEVENTEENTH COMMISSION (Aug. 26, 2005), http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

²⁷³ ARNOLD, *supra* note 161, at 335.

²⁷⁴ Unital, *About Unital*, http://www.uncitral.org/uncitral/en/about_us.html.

²⁷⁵ See, e.g., G.A. Res. 66/94, Report of the Sixth Committee (A/66/471) 66/94, Report of the United Nations Commission on International Trade Law on the Work of its Forty-Fourth Session (Jan. 13, 2012), <http://www.un.org/en/ga/sixth/66/ActionbyGA.shtml> (follow “66/94” hyperlink under “GA Resolutions & Decisions”).

²⁷⁶ See HENDRIK VAN DEN BERG, INTERNATIONAL ECONOMICS ch. 1 (2004).

trade; causes business to slow down; and causes business to spend time and money in security, insurance premiums, and rebuilding after a terrorist attack; they lose business and Foreign Direct Investment is discouraged.²⁷⁷

Yet, there seems to be no real effort on the part of business on a global scale to deal with the problem except on a piecemeal basis. There is no concerted effort, and some multinationals are larger than nation states. They do have some clout. I find no evidence of multinationals lobbying their governments to push for a definition of international terrorism, a crime that concerns us all. I suspect that it may be out of an ignorance of the problem, simply trusting that their governments and the international community, the UN perhaps, has dealt with the issue by now.

International chambers of commerce and other trade and industry groups can and, I suggest, should, on a transnational basis, arrive at a consensus respecting a workable definition. They might be able then to persuade their respective governments to push for international consensus on such a definition.

What should such a definition entail? First, the targets need to be included in any such definition: innocent people, assets, infrastructure, systems, and technology. Violence needs not be a requirement since the attack of a computer system, infrastructure, or a water supply would not necessarily entail violence, but could have a devastating effect.

Second, the motivation should be addressed since general criminal statutes in states' domestic laws deal adequately with the physical acts that most incidents of terrorism entail. Motivations such as religious, ideological, and political should be included. The objective should also be part of a definition: the intention of influencing a group or a government to do or abstain from doing something; to change a policy or implement one through acts designed to cause terror, fear, or apprehension.

Because of the strongly-held beliefs of a variety of people, especially in the non-industrialized world or former colonies, there should be exceptions for struggles of national liberation or defense against occupying powers. This may serve two purposes: to get a fair number of such countries to sign on to such a definition, and to discourage states from the unauthorized use of force, of attacking, attempting to annex, colonize, or otherwise occupy other states. Further, such a

²⁷⁷ Kyeonghi Baek & Xingwan Qian, *An Analysis on Political Risks and the Flow of Foreign Direct Investment in Developing and Industrialized Economies*, 6 *ECON., MGMT. AND FIN. MARKETS* 4, available at <http://buffalostate.edu/politicalscience/documents/baekfdi.pdf>.

definition could perhaps leave out state terrorism and state-sponsored terrorism because those issues are likely fairly well-covered by the Geneva Conventions, international humanitarian law, and customary international law.

In short, the issue of a definition of international terrorism – to include comprehensive treaty or convention outlawing terrorism and providing for its punishment and universal jurisdiction – has not been dealt with and companies large and small should lobby and sponsor educational programs to enlighten the populations of their countries about the problem. Governments must be pressured to act. Only then will we have a definition that the world cannot only live with, but can use adequately and collectively to fight the problem of terrorism.

It must also be remembered that in any attempt to abolish and prevent terrorism, the states of the world must start with the proposition that violence of this nature does not have to be an inescapable reality like hurricanes or floods. Terrorism is not a natural disaster; the murder of innocents is not a natural occurrence like bad weather. Unlike earthquakes, acts of terrorism require motives, planning, and human intention. Accordingly, acts of terrorism are based on a calculated choice to use such acts to attain some end. Terrorism should therefore, be preventable.