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TERRORISTS OR LEGITIMATE INSURGENTS? THE TALIBAN STATUS UNDER INTERNATIONAL LAW

Abstract

The term terrorism is not subject to a universally accepted definition. However, it is generally used to describe the use of violence against civilian targets to spread fear and distress and thereby achieve ideological and/or political objectives. Specific acts of terrorism, whether national or international, have been proscribed by respective laws. The Taliban's return to power in Afghanistan after Kabul's collapse in August 2021 has raised an important question: are the Taliban different from other terrorist organizations (e.g., al Qaeda, ISIS)? This debate is significant because the groups share ideological similarities and execution practices; and at present, the Taliban face challenges of both intent and capability *vis-à-vis* ceasing acts of terror and ending ties with other terrorist organizations. This paper argues that the lack of a universally agreed definition of terrorism may not affect the investigation and prosecution of the Taliban's terrorist offenses. In this regard, this paper critically appraises three factors—accountability, ties with terrorist organizations, and the inclusion of Taliban members' names in the global sanctions regime. It also demonstrates why the international community is obligated to take both legal and 'non-legal' actions against the Taliban to avoid the normalization of terrorism.

Keywords: Afghanistan, Taliban, al-Qaeda, Terrorism, International law, sanction

Introduction

The term 'terrorism' is generally used to describe the use of violence against civilian targets to spread fear and distress and thereby achieve ideological and/or political objectives. Terrorism always harms innocent persons, with its perpetrators making no effort to reduce or avoid such effects, and thus is unjustified. However, those participating in such violent actions view these actions as politically and/or religiously justified.² Possibly, this is due at least in part to a lack of a universally accepted definition of terrorism. As Alex Schmid argues, the absence of a common

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2 Angelo Corlett J., *Can Terrorism Be Morally Justified?*, *Public Affairs Quarterly*, Vol. 10, No. 3, University of Illinois Press, 1996, pp. 163-184.

definition encourages the continuation of double standards and a definition of terrorism may not solve the underlying problems, but a lack of definition is perceived widely as being one of the factors likely to encourage future terrorism.³

Although the basic question of whether or not a definition of terrorism exists under international law has itself been a vexing problem, for purposes of this analysis, this study indicates that the search for a single and authoritative legal definition of terrorism under international law has gone on for several decades without reaching its goal. Despite this failure, the construction of legal mechanisms that can be used to suppress and define terrorism has proceeded by focusing on a specific approach.

Generally, the international community has worked on two comprehensive treaties to define and suppress terrorism. The League of Nations' 1937 Convention for the Prevention and Punishment of Terrorism never entered into force and the proposed UN Comprehensive Convention on International Terrorism which has not been finalized yet. However, there are numerous other international and regional conventions, national laws, and court decisions aimed at suppressing and defining terrorism.

For many years, not only has Afghanistan experienced protracted terrorism, but various terrorist groups have also used the country as a staging ground for acts of terror committed in other parts of the world. Thus, terrorism has not only harmed Afghanistan itself but has also posed challenges to regional and global security. This study's focus is primarily on Afghanistan. Specifically, the Taliban's return to power in Afghanistan after Kabul's collapse in August 2021 has raised an important question: are the Taliban different from other terrorist organizations (e.g., al-Qaeda, IS-K)? This debate is significant because the groups share ideological similarities and execution practices; and at present, the Taliban face challenges of both intent and capability *vis-à-vis* ceasing acts of terror and ending ties with other terrorist organizations. This study argues that the lack of a universally agreed legal definition of terrorism may not affect the investigation and prosecution of the Taliban's terrorist offenses. It also demonstrates why the international community is obligated to take both legal and 'non-legal'⁴ actions against the Taliban to avoid the normalization of terrorism.

This study is divided into four parts. Part 1 introduces the topic and provides for a brief overview of the structure of the study. Part 2 examines the definitional problem and argues that a definition of terrorism does exist under international law. To examine the claim, this study critically appraises how terrorism is defined under international treaties, regional instruments, national laws, and respective court verdicts. Part 3 of this study attempts to draw a distinction between acts of terrorism and other permissible insurrections under international law. In this regard, it critically evaluates the legality of the use of force in Afghanistan by the US-led coalition

3 Alex Schmid, *Terrorism - The Definitional Problem*, 36 *Case Western Reserve Journal of International Law*, Vol. 36, No. 8, 2004, pp. 375-419.

4 Such as political, economic, diplomatic actions.

in the aftermath of the 9/11 attacks, and discusses its legitimacy. On a related level, it examines violent actions carried out by the Taliban against the US-led coalition to determine whether it merits the label of a 'national liberation movement' or if it can be characterized as 'terrorism'. Therefore, the study critically appraises three issues—accountability, the Taliban's ties with the other terrorist organizations, and the global and domestic sanction regimes—to articulate whether the Taliban movement is a terrorist organization and whether there are any differences between the Taliban and the other terrorist organizations in committing acts of terrorism. The last part is a concluding segment that summarizes the findings and touches upon the potential implications of those findings.

Defining Terrorism

The term 'terrorism' has French origins, referring not to a well-defined and clearly identified set of factual events.⁵ The term 'terrorism' is a highly politically loaded term and is viewed to lack a universally accepted definition.⁶ However, while there seems to be no single definition for terrorism, scholars in the fields of political science, international law, criminology, psychology, theology, and history have tried to define it. In this section, the term 'terrorism' is examined not as a label which is frequently used in the political context. Instead, this section examines the term's legal dimension, with specific regard to international law.

This section contains three segments. The first deals with the problem of the definition of terrorism and reviews various international conventions, the United Nations (UN) General Assembly instruments, and the Security Council resolutions, and the efforts they have made to address or deter terrorism. I also argue that a definition of terrorism does exist both under international treaty law and international customary law. To examine the claim, this section critically examines the definition of terrorism under international treaties and respective court decisions. In particular, in 2011, the Appeals Chamber of the Special Tribunal for Lebanon determined that a crime of international terrorism was recognized under customary international law. The second segment investigates efforts undertaken to define and suppress terrorism by several regional organizations. For the purposes of this study, three international organizations are considered. The European Union (EU), the Organization of the American States (OAS), and the Organization of Islamic Cooperation (OIC).

The EU is relevant to this analysis since it is one of the institutions that has a variety of instruments at its disposal, and has addressed the question of terrorist offenses' definition before the 9/11 attacks.⁷ Combatting terrorism is a top priority for the EU and its member states, and therefore, the Union participated actively in

5 W. Mallison and S. Mallison, The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values, *Howard Law Journal*, Vol. 18, No. 1, 1973, pp. 12-28.

6 Joseph Lambert, *Terrorism and Hostages in International Law*, Grotius Publications, Cambridge, 1990, p. 13.

7 Dumitriu Eugenia, The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism, *German Law Journal*, Vol. 5, No. 5, Cambridge, 2004, pp. 585-602

the counter-terrorism efforts in Afghanistan in the post 9/11 period. The OAS has adopted various legal regimes for countering terrorism and has struggled to define terrorism in the Americas since 1971. The OIC is the one of the largest inter-governmental organizations, with the membership of 57 Muslim states, covering four continents. The 9/11 terrorist attack by Al-Qaeda sponsored by the Taliban has brought the battle against terrorism to the forefront. This, together with the implicit and sometimes explicit statements associating Islam with terrorism, has led to different forms of response by the Islamic states. Thus, the OIC has been a key entity in framing the efforts and ideas in dealing with terrorism.⁸ In addition to that, the OIC has been engaged in other activities aimed at furthering regional peace and security, including terrorism-related threats.⁹ For example, in 2017 it convened an international meeting of scholars in Afghanistan to discuss peace and security matters aimed at facilitating comprehensive national reconciliation efforts.¹⁰ The final segment of this section considers the definitions of terrorism in domestic jurisdictions, and argues that almost all states have formulated a definition of terrorism under their respective domestic laws to counter terrorism.

Definition of Terrorism in International Conventions

At the international level, the search for a single and authoritative legal definition of terrorism has been ongoing for several decades without much success.¹¹ Despite this state-of-affairs, the construction of legal mechanisms that can be used to suppress and define terrorism has proceeded by focusing on specific categories of a criminal act—which is also called the inductive approach, or building from the bottom—to fill the lacunae for an overarching deductive definition.¹² The international community has, therefore, adopted what Andrea Gioia prescribes as a ‘sectoral’ approach to identifying the offenses and focusing on the wrongful nature of terrorist activities rather than intent.¹³ Following this approach, most of these treaties work with an assumption that some offenses can in themselves be considered as wrongful acts of international concern, irrespective of any terrorist intent or purpose.¹⁴

Mainly, the international community has worked on two comprehensive treaties to define and suppress terrorism: the League of Nations' 1937 Convention for

8 Mahmoud Hmoud, “The Organisation of the Islamic Conference”, in: *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Nesi Giuseppe (ed), Ashgate Publishing, Burlington, 2006, p. 161.

9 Katja Samuel, “The Legal Response to Terrorism of the Organization of Islamic Cooperation”, in: *Research Handbook on International Law and Terrorism*, Saul Ben (ed.), Edward Elgar Publishing Limited, Massachusetts, 2020, p. 645.

10 “Secretary-General: New Plans to Develop Cooperation with International Parties Concerned with Combating Terrorism and Extremism”, OIC, available at: https://www.oic-oci.org/topic/?t_id=20062&t_ref=11495&lan=en (accessed March 26, 2022).

11 Geoffrey Levitt, *Is Terrorism Worth Defining?*, *Ohio Northern University Law Review*, Vol. 13, No. 1, 1986, pp. 97-116.

12 *Ibidem*.

13 Andrea Gioia, “The UN Convention on the Prevention and Suppression of International Terrorism”, in: *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Nesi Giuseppe (ed.), Ashgate Publishing, Burlington, 2006, p. 4.

14 Sunday Didam Audu and Michael Adam Eteete, *A Legal Response to Global Terrorism for the Attainment of World Peace*, *Journal of Law, Policy and Globalization*, Vol. 54, No. 21, 2016, pp. 21-27.

the Prevention and Punishment of Terrorism which never entered into force, and the proposed UN Comprehensive Convention on International Terrorism, which has not yet been finalized.¹⁵ However, there are a number of international and regional conventions aimed at suppressing and defining terrorism.

The initial concerted international attempts to develop a legal definition of terrorism were engendered by the increase in terrorist activity following World War I (WWI), in the late 1920s and early 1930s.¹⁶ As an early manifestation of this concern, a series of meetings were held under the auspices of the International Conference for the Unification of Penal Law in a number of European capitals.¹⁷ The term 'terrorism' was expressly used for the first time in an international penal instrument at the Third (Brussels) International Conference for the Unification of Penal Law in 1930.¹⁸ Moreover, the pre-war efforts to define and prohibit terrorism intensified with the assassination of King Alexander of Yugoslavia and Mr. Louis Barthou in October 1934.¹⁹ The Council of the League of Nations subsequently passed a resolution and decided to establish a Committee of experts to study this question and to draw up a preliminary draft of an international convention.²⁰ These efforts culminated in the 1937 Convention for the Prevention and Punishment of Terrorism. However, it never entered into force because of the approach of war.²¹ Article 1(2) of this Convention defines acts of terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."²²

After World War II (WWII), international concerns about terrorism re-emerged. During the late 1960s, there was a significant increase in the numbers of aircraft hijackings which resulted in the conclusion of three conventions that touch upon this aspect of terrorism: the Tokyo Convention of 1963,²³ the Hague Convention of 1970,²⁴ and the Montreal Convention of 1971.²⁵ However, none of them addressed the aspect of a legal definition of 'terrorism'.²⁶

Furthermore, the Declaration on Principles of International Law Concerning

15 Ibidem.

16 Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001*, Ashgate Publishing, Burlington, 2009, p. 49.

17 The first conference was held in Warsaw (1–5 November 1927); the second in Rome (21–25 May 1928); the third in Brussels (26–30 June 1930); the fourth in Paris (27–31 December 1931); the fifth in Madrid (14–20 October 1934) and the sixth in Copenhagen (31 August–3 September 1935).

18 UN Doc. A/C.6/418 (1972) at 11–12.

19 Thomas Franck and Bert Lockwood Jr., Preliminary Thoughts Towards an International Convention on Terrorism, *American Journal of International Law*, Vol. 68, No. 1, 1978, pp. 69–90.

20 "Proceedings of the International Conference on the Repression of Terrorism", League of Nations, Doc. C.94.M.47.1938.V (1938.V.3), pp. 49–50.

21 The Convention is reproduced in: Manley Hudson, *International Legislation – A Collection of the Texts of Multipartite International Instruments of General Interest*, Oceana Publications Inc, Vol. VII, New York, 1972, pp. 862–878.

22 Geoffrey Levitt, *Is Terrorism Worth Defining?*... p. 10.

23 "Convention on Offenses and Certain Other Acts Committed on Board Aircraft", Doc. 3 UST 2941, TIAS No. 6768, (1969)

24 "Convention for the Suppression of Unlawful Seizure of Aircraft", Doc. 22 UST 1641, TIAS No. 7192, (1971)

25 "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation", Doc. 10 ILM 1151, TIAS No. 7570, (1971).

26 Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001*... p. 15, p. 52

Friendly Relations and Cooperation between States in 1970 was a pivotal step, under which each State was obligated with a “duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such act.”²⁷ Along similar lines, in December 1972, the UN General Assembly decided to establish an Ad Hoc Committee on Terrorism on the recommendation of the Sixth Committee.²⁸ The objectives of the Committee were to define international terrorism, study the causes of terrorism, and agree on recommendations for an international document to prevent terrorism.²⁹ However, differences of opinion emerged between various factions within the Ad Hoc Committee. The Non-Aligned Group proposed a definition of terrorism that included an inalienable right to self-determination and independence of all peoples under colonial and racist regimes, implying that the use of force could be justified in some cases.³⁰ On the other hand, the US introduced a Draft Convention that embraced the neutral phrase ‘offense of international significance’ instead of the word ‘terrorism’.³¹ After an inconclusive general debate, the Ad Hoc Committee faced political hurdles and due to the convergent views on a definition of ‘terrorism’, it failed to produce a comprehensive convention.³²

The 1990s saw the adoption of four relevant UN conventions: the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection,³³ the 1994 Convention on the Safety of United Nations and Associated Personnel,³⁴ the 1997 International Convention for the Suppression of Terrorist Bombings,³⁵ and the 1999 International Convention for the Suppression of Financing of Terrorism.³⁶ As none of these conventions provided a comprehensive definition of terrorism to find consensus, in April 2005, the UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism, in a bid to fill a gap in the international anti-terrorism legislation. In this regard, Daniel O’Donnell contends that there is a tendency to consider all these treaties as establishing a sort of evolving code of terrorist offenses.³⁷ Even though these instruments do not expressly provide for a

27 “UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Between States in Accordance with the Charter of the United Nations”, GA Res. 2625 (XXV) of 24 October 1970, UN Doc. A/8028 (1971).

28 Regarding the Sixth Committee’s recommendations to establish an Ad Hoc Committee on Terrorism, see UN Doc. A/8969 (1972).

29 For a detailed account of the Ad Hoc Committee’s study of international terrorism, see: Thomas Franck and Bert Lockwood Jr., Preliminary Thoughts Towards an International Convention on Terrorism... p. 18.

30 The ‘Non-Aligned Group’ included the Arab states, China and a block of African states.

31 “Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism (Draft Convention to Prevent the Spread of Terrorist Violence)”, UN Doc. A/C.6/L.850 (1972).

32 Thomas Franck and Bert Lockwood Jr., Preliminary Thoughts Towards an International Convention on Terrorism... p. 18.

33 UN Doc S/22393/Corr.

34 UN Doc A/Res/49/59.

35 UN Doc A/Res/52/164.

36 UN Doc A/54/109.

37 Daniel O’Donnell, International Treaties against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 853-880.

comprehensive and acceptable definition of 'terrorism', there are certain elements of a definition in all these conventions.

Moreover, the UN General Assembly has undertaken a major step in formulating a universal definition of terrorism by drafting a Comprehensive Convention on International Terrorism.³⁸ The Draft Comprehensive Convention is a revised draft of the version that was submitted by India in 1996.³⁹ One of the main objectives of this convention is to provide a comprehensive definition of terrorism.⁴⁰ However, the Draft Comprehensive Convention has been repeatedly discussed and revised due to considerable difficulty in obtaining an agreement on the text in the Ad Hoc Committee established by General Assembly Res. 51/210 (1996).⁴¹ It is worth mentioning that there is still a need for a clear and concise definition of terrorism. The general hope is that the efforts to develop such a convention have begun and that it will set forth a definition of terrorism on which the international community can agree.⁴²

However, it is also contended that the attempts to formulate a definition of terrorism have already failed due to the absence of consensus on the definition of the main 'offense' regulated by the Comprehensive Convention, the scope of the Comprehensive Convention, and the relationship between the Comprehensive Convention and other 'sectoral' conventions regulating terrorism-related offenses.⁴³ As there is no legal definition of terrorism, therefore, it is difficult to legally characterize an offense or a crime as a terrorist act.⁴⁴ The counter-argument to this argument is that it can be argued that the 'offenses' and 'crimes' incorporated in all these conventions are *per se* terrorist acts⁴⁵ and that therefore, there is a consensus among all states in condemnation of terrorist acts. Meanwhile, the negotiation process for a comprehensive Convention is not yet complete, and in this respect, the endeavors are likely to be sustained until this goal is achieved.

The evolution of international law pertaining to condemnation and suppression of terrorism does not hinge only on the UN General Assembly conventions and resolutions. The Security Council and certain courts like the Special Tribunal for Lebanon have immensely influenced the legal and political behaviors of States in defining and suppressing terrorism. The following sub-sections briefly study the same.

38 UN Doc A/C.6/55/1.

39 Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* . . . p. 15, p. 64.

40 Ben Golder and George Williams, What Is 'Terrorism'? Problems of Legal Definition, *University of New South Wales Law Journal*, Vol. 27, No. 2, 2004, pp. 270-295.

41 UN Doc A/Res/51/210.

42 Islam A. Attia, Do the United Nations' Terrorism-Related Conventions Prohibit and Suppress Terrorism Acts Committed by Terrorists, *Bristol Law Review*, Vol. 5, No. 1, 2018, pp. 171-194.

43 Mahmoud Hmoud, Negotiating the Draft Comprehensive Convention on International Terrorism, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, pp. 1031-1043.

44 Islam A. Attia, Do the United Nations' Terrorism-Related Conventions Prohibit and Suppress Terrorism Acts Committed by Terrorists . . . p. 41.

45 Cherif M. Bassiouni, Legal Control of International Terrorism: A Policy Oriented Assessment, *Harvard International Law Journal*, Vol. 43, No. 1, 2002, pp. 83-103.

The Security Council

While the international legal community has struggled to formulate a universally accepted definition, the UN bodies have exerted significant influence on the actions of member States in this regard.⁴⁶ Historically, the international debate regarding defining terrorism centered on the UN General Assembly. However, the UN Security Council too has adopted a range of measures addressing terrorist threats to peace and security. Since the need for a definition of terrorism increased in the post-9/11 period, the Council played a vital role in adopting several legislative measures against terrorism.⁴⁷ Developments in this regard marked a shift in international law as the Security Council imposed binding resolutions on all member states.⁴⁸

Under the Security Council system, many instruments have proscribed and suppressed acts of terrorism. However, the resolution which tried to define terrorism is the Security Council Res. 1566 (2004) on 'Threats to International Peace and Security Caused by Terrorist Acts.'⁴⁹ According to this Resolution, terrorism is considered a criminal act that has been committed against civilians with the intent to cause death, serious bodily injury, or taking of hostages.⁵⁰ Although the Council's 2004 definition is a step forward, it raises certain challenges. Ben Saul argues that because the Resolution is a non-binding instrument that allows States to preserve their unilateral definitions, it potentially conflicts with multilateral treaty negotiations on defining terrorism. Therefore, the definition of 2004 fails to remedy the serious difficulties caused by the lack of an operative definition in Council practice.⁵¹ On the other hand, it is considered that this Resolution is legally binding because it was adopted under Chapter VII of the UN Charter.⁵²

The Special Tribunal for Lebanon

On 15 February 2005, the President of the Security Council issued a statement condemning what he called the 14 February 2005 attacks, a terrorist bombing in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and 22 others.⁵³ This statement set in motion a process that finally resulted in the creation of a Special Tribunal for Lebanon.⁵⁴ The Tribunal provided a landmark ruling in which it defined terrorism and set a precedent for international courts and the way terrorism should

46 Ben Golder and George Williams, What Is 'Terrorism'? Problems of Legal Definition... p. 39.

47 Ben Saul, Definition of "Terrorism" in the UN Security Council: 1985–2004, *Chinese Journal of International Law*, Vol. 4, No. 1, 2005, pp.141–166.

48 Sunday Didam Audu and Michael Adam Eteete, A Legal Response to Global Terrorism for the Attainment of World Peace... p. 13.

49 UN Security Council Res. 1566 (2004), UN Doc. S/RES/1566(2004)

50 Ibidem.

51 Ben Saul, Definition of "Terrorism" in the UN Security Council: 1985–2004... p. 46.

52 Kebede Henok Bekele, Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem, *Beijing Law Review*, Vol. 12, No. 1, 2021, pp. 619–630.

53 "Statement by the President of the Security Council", UN Doc. S/PRST/2005/4 (2005).

54 Guénaél Mettraux, "The United Nations Special Tribunal for Lebanon: Defining International Terrorism", in: *Research Handbook on International Law and Terrorism*, Saul Ben (ed.), Edward Elgar Publishing Limited, Massachusetts, 2020, p. 588.

be defined.⁵⁵ Furthermore, in its 16 February 2011 Decision, the Appeals Chamber of the Tribunal for Lebanon determined that a crime of international terrorism was recognized under customary international law, and was thus relevant to defining the crime of 'terrorism' provided for in its Statute.⁵⁶

The Chamber further provided a definition by pronouncing that a crime of terrorism is: (i) the perpetration of a criminal act or threatening such an act; (ii) the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.⁵⁷

This extraordinary judicial pronouncement was greeted by a mixture of skepticism and disapproval.⁵⁸ At the same time, it is argued that reaching a generic definition of terrorism may serve to encourage the prosecution of non-state actors in criminal courts.⁵⁹ On the other hand, the Tribunal's method and selectivity of sources are particularly criticized.⁶⁰ It is argued that the way the Tribunal applied international law to domestic law definition goes beyond the use of international law as an interpretative aid to Article 2 of the Tribunal Statute to a direct application of international law on domestic law.⁶¹ Nevertheless, as Antonio Cassese highlights, the Tribunal proposed a workable emerging legal definition of terrorism.⁶² Thus, this can be considered the first-ever authoritative decision of an international tribunal that has accepted the general definition of terrorism under international law.⁶³

Definition of Terrorism in International Regional Treaties

The efforts at the international level to define and suppress terrorism were also reflected in the regional initiatives. Important efforts were undertaken by several regional organizations, including the EU, the OAS, and the OIC. By considering these three organizations, this segment aims to cover all regions without any political, religious, or geographical prejudices. So, it briefly discusses the definition and suppression of terrorism under the aegis of these regional treaties/organizations to articulate how they have tried to fill the gaps in international anti-terrorism legislation.

55 Emmanuela Mylonaki, *Defining Terrorism: The Contribution of the Special Tribunal for Lebanon, Jura: A Pecsí Tudományegyetem Állam- és Jogtudományi Karának Tudományos Lapja*, Vol. 2012, No. 1, 2012, 78-81.

56 Antonio Cassese and N. Yasmin, "Terrorism as an International Crime", in: *Enforcing International Law Norms against Terrorism*, Bianchi A. (ed.), Bloomsbury Publishing, London, 2004, p. 214.

57 "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging", UN Special Tribunal for Lebanon, Case No STL-11-01/I, 16 February 2011 [85], [147].

58 Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, *Leiden Journal of International Law*, Vol. 24, No. 3, 2011, pp. 677-700.

59 Emmanuela Mylonaki, *Defining Terrorism: The Contribution of the Special Tribunal for Lebanon*. . . p. 54.

60 Guénaél Mettraux, "The United Nations Special Tribunal for Lebanon: Defining International Terrorism". . . p. 53, 58.

61 Emmanuela Mylonaki, *Defining Terrorism: The Contribution of the Special Tribunal for Lebanon*. . . p. 54.

62 Antonio Cassese and N. Yasmin, "Terrorism as an International Crime". . . p. 55, pp. 214-215.

63 Kebede Henok Bekele, *Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem*. . . p. 51.

The European Union

Although there were earlier attempts at a pan-European response to terrorism, the first significant cooperation took place in 1977 in the form of an international Convention on the Suppression of Terrorism.⁶⁴ The 1977 Convention identifies certain terrorist offenses and calls upon states to extradite or prosecute those offenses.⁶⁵ The response to the 9/11 attacks has brought out a tendency among European states to strengthen the legal mechanism against terrorism, which resulted in the addition of a protocol to the 1977 European Terrorism Convention, incorporating further offenses to those that were already subject to the prosecution or extradition principle.⁶⁶ Furthermore, in 2005, a new Convention on the Prevention of Terrorism was agreed upon.⁶⁷ It calls upon states to criminalize the provocation of terrorism, recruitment for terrorism, and terrorism training.⁶⁸ Complementing the 2005 Convention on the Prevention of Terrorism is the Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism which was agreed upon in 2005. These echoed the general post 9/11 trend to treat money laundering and terrorist financing as two phenomena that can be subject to the same regulatory framework.⁶⁹ So, the EU has responded to terrorism and terrorist attacks by adopting many measures and action plans which may help national parliaments to understand the objectives of the EU and to facilitate their plans at a legislative level in developing a comprehensive counter-terrorism policy in Europe.⁷⁰

The Organization of the American States

The OAS, presently comprised of 35 member states, has taken several steps to counter the manifestations of terrorist violence in the Americas, across three broad phases. The first phase began with the response to the multiple episodes of the kidnapping of diplomats and the adoption 1971 of the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance.⁷¹ The second phase began in the 1990s, when the Summit of the Americas in 1994 responded to terrorism. Furthermore, the two high-level conferences that were held in Lima and Montevideo in

64 "European Convention on the Suppression of Terrorism", Doc. 1137 UNTS 93

65 Cian C. Murphy, "The Legal Response to Terrorism of the EU and Council of Europe", in: *Research Handbook on International Law and Terrorism*, Saul Ben (ed.), Edward Elgar Publishing Limited, Massachusetts, 2020, p. 615.

66 "Protocol amending the European Convention on the Suppression of Terrorism", adopted 15 May 2003, CETS No. 190.

67 "Council of Europe Convention for the Prevention of Terrorism", Doc. ETS No. 196 (entered into force 1 December 2009), arts 5–7 respectively.

68 Cian C. Murphy, "The Legal Response to Terrorism of the EU and Council of Europe" . . . p. 64, p. 617.

69 "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism", Doc. 2659 UNTS 91

70 Egeria Nalin, "The European Union and the Human Rights", in: *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Nesi Giuseppe (ed.), Ashgate Publishing, Burlington, 2006, p. 231.

71 UN Doc. 194 UNTS 1438.

1996 and 1999 to prevent, combat, and eliminate terrorist acts and activities can be counted as an achievement in this regard.⁷² The third phase began with the 2002 Inter-American Convention on Terrorism, which is a direct result of the 9/11 attacks against the US.⁷³ Concerning a definition of terrorism, the OAS Convention 2002 follows a 'sectoral' approach and the model of Article 2(1)(a) of the Terrorist Financing Convention. Thus, the offenses under Article 2 of the Convention are based on a list of the existing UN anti-terrorism treaties.⁷⁴

The Organization of the Islamic Cooperation

The OIC is one of the largest Islamic intergovernmental organizations whose member states come from different regions of the world.⁷⁵ The OIC has been a key entity in dealing with terrorism and has produced both 'soft' and 'hard' laws.⁷⁶ In this regard, action taken by the OIC on terrorism has taken three forms. Political statements—such as the declarations and resolutions of OIC summits and conferences—are non-binding.⁷⁷ The Code of Conduct for the fight against terrorism—endorsed by the 1994 Islamic Summit held in Casablanca includes three main principles: terrorism cannot be justified and must be condemned regardless of its origins, causes, and purposes; there must be a commitment by all members to combat terrorism and to take firm and effective bilateral and collective steps to prevent such acts; and members should take measures to ensure the protection, security, and safety of diplomatic and consular missions by the relevant conventions.⁷⁸ The last and most important form of action is the 1999 Convention of the Organization of the Islamic Conference on Combating Terrorism, which entered into force on 7 October 2002.⁷⁹ The Convention has two main aspects. It defines terrorism and terrorist crimes, and it sets out areas of cooperation between OIC members in combating terrorism.⁸⁰

Definition of Terrorism in Domestic Jurisdictions

The term 'terrorism' is now widely deployed in both political and legal discourses, and thus is referred to in an array of national regimes, besides its international

72 Mirko Sossai, "The Legal Response of the OAS in Combating Terrorism", in: *Research Handbook on International Law and Terrorism*, Saul Ben (ed.), Edward Elgar Publishing Limited, Massachusetts, 2020, p. 627.

73 Renan Villacis, "The Organisation of American States", in: *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Nesi Giuseppe (ed.), Ashgate Publishing, Burlington, 2006, p. 149.

74 Mirko Sossai, "The Legal Response of the OAS in Combating Terrorism" . . . p. 632.

75 Katja Samuel, "The Legal Response to Terrorism of the Organization of Islamic Cooperation" . . . p. 639.

76 Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilisations' in the New World Order*, Hart Publishing, Oxford, 2005, p. 210.

77 Dinah Shelton, Normative Hierarchy in International Law, *American Journal of International Law*, Vol. 100, No. 2, 2006, pp. 291-323.

78 "Code of Conduct for the member states of the Organization of the Islamic Conference on Combating International Terrorism", Annex to Res. 43/22-P.

79 "Convention of the Organization of the Islamic Conference on Combating International Terrorism", Annex to Res 59/26-P.

80 Ibidem.

perspective.⁸¹ Many countries have come up with Suppression of Terrorism Acts to fight terrorism. In this regard, countries such as the United States of America, the United Kingdom, France, Canada, India, etc. will serve as examples, each with a definition of terrorism.⁸²

To conclude, the two main drafting methods used to define terrorism are the general and the specific approaches. The UN and some specialized or related agencies adopting a specific approach have produced several piecemeal or 'sectoral' instruments dealing with specific aspects of terrorism. In adopting the specific approach, international law has adapted itself to the predominant form of terrorist action at any given time and has attempted to sidestep the political sensitivity of the broader definitional question.⁸³ In this regard, Andrew Byrnes argues that the 'sectoral' conventions share three principal characteristics. First, they all adopted an "operational definition" of a specific type of terrorist act that was defined without reference to the underlying political or ideological purpose or motivation of the perpetrator of the act. Second, they all focused on actions by non-State actors and the state was seen as an active ally in the struggle against terrorism. Finally, they all adopted a criminal law enforcement model to address the problem, under which states would cooperate in the apprehension and prosecution of those alleged to have committed these crimes.⁸⁴ Moreover, the regional organizations have shown that a comprehensive definition of terrorism is conceivable. Since 9/11, the OAS, the EU, and the OIC have adopted new treaties to define and suppress terrorism. At the same time, many countries have come up with 'Suppression of Terrorism Acts' to fight against terrorism under respective domestic laws.

Therefore, this study argues that a definition of terrorism does exist both under international law and domestic law. In this regard, Cassese argues that the disagreement on the definition of terrorism is only on the exception rather than the general remark, and thus the existence of international law and national laws on terrorism, as well as court decisions by different states, can be good examples.⁸⁵ Accordingly, various international treaties and national laws outlawed terrorism, which is a clear indication of having consensus on the general notion of terrorism. Additionally, the main disagreement between states on the definition of terrorism is only on the aspect of whether freedom fighters can be considered terrorists. The opposition in this regard is primarily from post-colonial developing countries, as discussed earlier.

To elaborate on the latter, the next part of this study draws a distinction between acts of terrorism and other permissible insurrections under international law. As a case study, it examines the international community's intervention in Afghanistan and discusses whether it was legitimate. Appertaining to this, it scrutinizes the

81 Ben Golder and George Williams, What Is 'Terrorism'? Problems of Legal Definition. . . p. 39.

82 Gaswaga Duncan, The Definition of Terrorism, *The International Journal of Ethical Leadership*, Vol. 2, No. 1, 2013, pp. 136-156.

83 Ben Golder and George Williams, What Is 'Terrorism'? Problems of Legal Definition. . . p. 39.

84 Andrew Byrnes, "Apocalyptic Visions and the Law: The legacy of September 11", available at: <https://openresearch-repository.anu.edu.au/handle/1885/41104> (accessed April 27, 2022).

85 Cassese Antonio, Yasmin N., *Supra* p. 55, pp. 214-15

Taliban's violent actions against the US-led coalition, to answer whether it merits the label of a national liberation movement or if it can be characterized as 'terrorist'.

The Taliban's Insurgency: A Legitimate Struggle or an Act of Terrorism?

Following the 9/11 terrorist attacks, in October 2001, the United States of America initiated airstrikes on Afghanistan, followed by a ground offensive called Operation Enduring Freedom, together with an anti-Taliban coalition called the Northern Alliance of Afghanistan,⁸⁶ to topple the Taliban-run *de facto* regime and drive out Al-Qaeda forces hosted by the Taliban in Afghanistan.⁸⁷ The US had based its armed intervention in Afghanistan on its inherent right of self-defense as confirmed by Article 51 of the Charter, a legal position that was mainly unchallenged.⁸⁸ However, the Taliban claimed that because they were not directly involved in the armed attacks unleashed by al-Qaeda against the US on 9/11, the US' exercise of forcible response in self-defense was not permitted under international law. The Taliban regrouped across the country after their ouster in 2001 by the US-led coalition forces and waged a war against the coalition forces and an elected government in Afghanistan. By August 2021, the Taliban had captured most major cities, including the capital of Kabul.

This section attempts to draw a distinction between acts of terrorism and other permissible insurrections under international law. It further examines the international community's intervention in Afghanistan and debates whether it was legitimate. Appertaining to this, it also scrutinizes the Taliban's violent actions against the US-led coalition to ascertain whether it merits the label of a national liberation movement or if it can be characterized as 'terrorist'. Thus, this section comprises two segments. The first segment scrutinizes the legality of the use of force in Afghanistan by the US-led coalition in the aftermath of 9/11. The second segment examines three issues—accountability, the Taliban's ties with the other terrorist organizations, and the global and domestic sanction regimes—to articulate whether the Taliban movement is a terrorist organization and whether there is any difference between the Taliban and the other terrorist organizations in committing acts of terrorism.

The Legality of the Use of Force in Afghanistan

Shortly after the 9/11 attacks in the US, then US President George W. Bush, addressed a Joint Session of the US Congress and outlined his government's decision to conduct a 'War on Terror' against Al-Qaeda and the regime that harbored them.⁸⁹

86 Dinstein Yoram. Terrorism and Afghanistan, *International Law Studies US Naval War College*, Vol. 85, No. 1, US Naval War College, 2009, pp. 43-58.

87 Bella Annysa, Giacca Gilles, and Stuar Casey-Maslen, International Law and Armed non-State Actors in Afghanistan, *International Review of Red Cross*, Vol. 93, No. 881, 2011, pp. 47-79.

88 Hans-Peter Gasser, Acts of Terror, Terrorism and International Humanitarian Law, *International Review of Red Cross*, Vol. 84, No. 847, 2002, pp. 547-570.

89 "George W. Bush, Presidential Address to a Joint Session of Congress", September 20, 2001. Available at: <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (accessed April 27, 2022).

The administration declared that attacks amounted to an "armed attack" against the US, and thus invoked article 51 of the UN Charter in self-defense and took military action against those who had committed the attacks and those who sheltered them.⁹⁰ The US position was formally communicated to the UN in a letter dated 7 October 2001.⁹¹ Similarly, then NATO Secretary-General, Lord Robertson, affirmed the 9/11 attacks as an "armed attack" against the US and stated that those attacks were directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.⁹² Soon after, in Resolution 1368, the UN Security Council condemned the attacks and under Chapter VII, the Council regarded such acts, like any act of international terrorism, as a threat to international peace and security.⁹³ However, the sanctions regime was still in place when the US was attacked on 11 September 2001.⁹⁴ Moreover, earlier, the Council had adopted a series of resolutions demanding that the Taliban should refrain from harboring, providing sanctuary for, and training terrorists, and cooperate in bringing indicted terrorists to justice.⁹⁵ Following non-compliance, later resolutions imposed further diplomatic, military, aircraft, and travel sanctions on the Taliban.⁹⁶ In its landmark Resolution 1373 on 28 September 2001, the Council further demanded States, under Chapter VII, to suppress terrorism, implicitly approving earlier General Assembly recommendations.⁹⁷ And so all States showed uniformity and rapidity in acceptance of the obligations in Resolution 1373 indicating agreement on Charter norms through State practice.⁹⁸ Moreover, the international community viewed the US' actions in Afghanistan as legitimate acts of self-defense and therefore there was no real objection to the military campaign initiated on 7 October 2001, which can implicitly be regarded as support for the US.⁹⁹ However, it is also claimed that the Taliban were not directly involved in the armed attacks unleashed by al-Qaeda against the US on 9/11. Thus, the US exercise of forc-

90 Pierre-Richard Prosper and Michael A. Newton, *The Bush Administration View of International Accountability*, *New England Law Review*, Vol. 36, No. 4, 2002, pp. 891-902.

91 Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946, (2002).

92 "Secretary General Lord Robertson, Statement at NATO Headquarters", October 2, 2001. Available at: <https://www.nato.int/docu/speech/2001/s011002a.htm> (accessed April 27, 2022).

93 UN Doc. S/RES/1368(2001), para 1.

94 Bardo Fassbender, "The UN Security Council and International Terrorism", in: *Enforcing International Law Norms against Terrorism*, Bianchi Andrea (ed.), Hart Publishing, Oxford, 2004, p. 83.

95 UNSC Resolutions 1193 (1998) para 15; 1214 (1998) para 13; 1267 (1999) para 1; 1333 (2000) para 1, preamble; UNSC President Statements (22 Oct 1999) S/PRST/1999/29; (7 Apr 2000) S/PRST/ 2000/12. 328 UNSC Resolutions 1267 (1999) preamble; 1333 (1999) preamble.

96 UNSC Resolutions 1333 (2000) paras 15–26; 1363 (2001) paras 1–8; 1388 (2002); 1390 (2002); 1452 (2002); 1455 (2003) paras 1–15; 1526 (2004).

97 UN Doc. S/RES/1373(2001), para 1.

98 Nico Krisch, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council", in: *Terrorism as a Challenge for National and International Law: Security Versus Liberty?*, Christian Walter et al. (eds.), Springer, Berlin, 2003, p. 7.

99 Nadya Leila Sadat, *Terrorism and the Rule of Law*, *Global Studies Law Review*, Vol. 3, No. 1, 2004, p. 135-154.

ible response in self-defense was not permitted under international law.¹⁰⁰

That said, it is fully acknowledged that the Taliban had completely failed to comply with their international obligations and disregarded binding UN Security Council resolutions by offering a safe haven to Al-Qaeda.¹⁰¹ And therefore, the Taliban fit the parameters established by the UN Security Council Resolution 1368, in the context of condemning the 9/11 attack on the US, that the responsibility for terrorism goes to "sponsors of these terrorist attacks" including those "supporting or harboring the perpetrators."¹⁰² Moreover, the strikes and subsequent ground campaigns against the Taliban and Al-Qaeda were militarily successful, prompting the abdication of the Taliban, destruction of terrorist infrastructure and personnel, and capture of thousands of fighters.¹⁰³

In this regard, it is worth noting that waging war or other types of group violence like insurrections i.e., against the US-led coalition forces in Afghanistan does not fall under the definition of any acts of war against foreign occupation, anti-colonial rebellions, and other acts of freedom fighting that international law generally accepts as lawful.¹⁰⁴ Because, as argued earlier, the exercise of forcible response by the US was in accordance with Article 51 of the UN charter.¹⁰⁵ Likewise, the use of violence as an instrument of engagement or insurgency by the Taliban does not amount to an act exercising self-determination, particularly defined under the OIC Convention.¹⁰⁶ This is because the Convention recognizes that an act exercising self-determination has to conform to international law, including international humanitarian law, and that if it does not, then it is illegal and should be criminalized.¹⁰⁷

Moreover, the 1973 UN General Assembly Resolution 3103 entitled 'Basic Principles of the Legal Status of Combatants Struggling against Colonial and Alien Domination and Racist Regimes' seems to be an instrument that provides legitimacy for insurrections and rebellions under international law.¹⁰⁸ It declares that armed conflicts involving the struggle of peoples against colonial and racist regimes are to be regarded as legitimate and the use of mercenaries by colonial and racist regimes is considered to be a criminal act.¹⁰⁹ Taking note of the Resolution's unbinding nature, the Taliban insurgency may not fall under the definition of the national liberation movements struggling for freedom and independence from the yoke of colonialism and the racist regime as prescribed by the Resolution. This is because the era of

100 Leoni Connah, US Intervention in Afghanistan: Justifying the Unjustifiable?, *South Asia Research*, Vol. 41, No. 1, 2021, pp. 70–86.

101 Dinstein Yoram. *Terrorism and Afghanistan*. . . p. 85.

102 Thomas M. Franck, *Terrorism and the Right of Self-Defense*, *American Journal of International Law*, Vol. 95, No. 4, pp. 839-843.

103 Mark A. Drumbl, *Terrorist Crime, Taliban Guilt, Western Victims, and International Law*, *Denver Journal of International Law and Policy*, Vol. 31, No. 1, 2001, pp. 69-79.

104 Alan John Cohan, *Formulation of State's Response to Terrorism and State-Sponsored Terrorism*, *Pace International Law Review*, Vol. 14, No.1, 2002, pp. 77-120

105 UN Charter, Article 51.

106 "Code of Conduct for the member states of the Organization of the Islamic Conference on Combating International Terrorism"... p.78.

107 Mahmoud Hmoud, "The Organisation of the Islamic Conference"... p. 166.

108 Robert A. Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs*, *Case Western Reserve Journal of International Law*, Vol. 13, No. 2, 1981, pp. 281-289.

109 UN General Assembly Res. 3103, UN Doc. A/9030 (1973).

colonialism was over worldwide and there was no racist regime in power in Afghanistan as per the provisions of the Resolution.¹¹⁰

Moreover, the Taliban's continued sheltering and training of terrorists, and planning and perpetrating of terrorist acts in their first term as a *de facto* government of Afghanistan from 1996 to 2001, and thereafter, in their two decades of struggle against the US-led coalition and the legitimate government of Afghanistan, can easily place them on the top of terrorist organizations.¹¹¹ Besides, the Taliban, in particular the Haqqani Network,¹¹² have been formally designated as a 'terrorist' entity and are subject to some form of legal sanctions both under the international law (United Nations and some regional organizations) and the national laws of the US, Canada, and some European countries. Meanwhile, the Taliban face both challenges of willingness and capability in terms of ceasing acts of terror and cutting off its ties with other terrorist organizations.

Are the Taliban Different from the Other Terrorist Organizations?

While coping with the terrorism and its theorization is not an easy task, this section tries to examine three issues—accountability, the Taliban's ties with the other terrorist organizations, and the global and domestic sanction regimes—to ascertain whether the Taliban are a terrorist organization and whether there is any difference between the Taliban and the other terrorist organizations (e.g., al Qaeda, IS-K) in committing an act of terrorism.

The Taliban and the Question of Accountability

Terrorism is a strategy of violence designed to instill terror in a segment of society in order to achieve a power outcome, propagandize a cause, or inflict harm for vengeful political purposes.¹¹³ The terrorist entities—including the Taliban—reject characterizations of them as 'terrorists'. Instead, they regard violence against unarmed civilians as a "manifestation of a just, defensive war."¹¹⁴ They feel no guilt and accountability for their actions in resorting to unlawful means of violence, including targeting civilians and public and private property in violation of international human rights and humanitarian law, and domestic criminal laws.¹¹⁵ Instead, they act in service of inducing widespread fear and reaction among civilians to weaken confidence in incumbent governments and divert money and attention from other concerns.¹¹⁶

110 A. G. Hopkins, *Rethinking Decolonization, Past and Present*, Vol. 200, No. 1, 2008, pp. 211–247.

111 "Global Terrorism Index 2020- Measuring the Impact of Terrorism", available at: <https://visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf> (accessed April 28, 2022).

112 For detail on *Haqqani*, see Vahid Brown and Don Rassler, *Fountainhead of Jihad: The Haqqani Nexus, 1973-2012*, Oxford University Press, 2013.

113 Cherif M. Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*, *Harvard International Law Journal*, Vol. 43, No. 1, 2002, pp. 83-103.

114 Alan John Cohan, *Formulation of State's Response to Terrorism and State-Sponsored Terrorism*. . . p. 103.

115 Cherif M. Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*. . . p. 44.

116 Alan John Cohan, *Formulation of State's Response to Terrorism and State-Sponsored Terrorism*. . . p. 103.

Since their inception, the Taliban have been overwhelmingly violent and militaristic focusing on the use of violence against civilian targets as a means of spreading fear and distress and thereby achieving their ideological and/or political objectives.¹¹⁷ Although the systematic and widespread abuses of human rights and violations of international humanitarian law committed by terrorist actors have been consistently denounced by international law and international institutions,¹¹⁸ the Taliban, in the formative years, have shown a more ferocious face to the group by deliberately attacking unarmed civilians and targeting political leaders, dissidents, intellectuals, civil society members, and journalists.¹¹⁹ The Taliban's use of bombs and explosives in public spaces and of suicide bombers have resulted in loss of life and property. These are common characteristics the group shares with other terrorist organizations.¹²⁰

In this regard, a clear example of indiscriminate and deliberate targeting of civilians by the Taliban can be seen in the deadliest truck bomb on 31 May 2017 in a central area of Kabul near the presidential palace and foreign embassies, which killed over 150 and injured 413.¹²¹ This incident resembles the Liberation Tigers of Tamil Eelam (LTTE) terrorist suicide truck bombing of the Central Bank of Sri Lanka in January 1996, and the Hezbollah's terrorist suicide truck bomb attack of Beirut in August 1983.¹²² Therefore, a series of terrorist suicide attacks, and the group's perpetuation of mass executions and summary killings, torture, kidnappings, arbitrary detention, recruitment and use of children in hostilities, rape and other forms of sexual violence, as well as attacks on, and destruction of, protected objects such as schools and hospitals, and cultural and religious sites fall under the definition of acts of terrorism and can be considered as serious violations of international human rights and humanitarian law amounting to war crimes, as well as crimes against humanity under the Statute of International Criminal Court (ICC).¹²³ The Taliban, however, justify their inhumane and criminal acts by sticking to a religious interpretation that could provide them a most compelling legitimacy for their actions.¹²⁴ But then again, by addressing their terrorist acts through the prism of international humanitarian and international criminal law, the Taliban can be held accountable and brought to jus-

117 Laura M. Olson, *Prosecuting Suspected Terrorists: The War on Terror Demands Reminders about War, Terrorism, and International Law*, *Emory International Law Review*, Vol. 24, No. 2, 2010, pp. 479-496.

118 Regarding the promotion of accountability for crimes committed by terrorists, see: UN Security Council resolutions 2396 (2017) and 2379 (2017).

119 "Amnesty International Report 2021-22, Afghanistan", available at: <https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/afghanistan/report-afghanistan/> (accessed April 29, 2022).

120 Samuel I. Ibaba, *Terrorism in Liberation Struggles: Interrogating the Engagement Tactics of the Movement for the Emancipation of the Niger Delta*, *Perspectives on Terrorism*, Vol. 5, No. 3/4, 2011, pp. 18-32.

121 "Deadly Bombing in Kabul Is One of the Afghan War's Worst Strikes", *New York Times*, available at: https://www.nytimes.com/2017/05/31/world/asia/kabul-explosion-afghanistan.html?_r=0 (accessed April 29, 2022).

122 Muttukrishna Sarvananthan, *Terrorism or Liberation? Towards a Distinction: A Case Study of the Armed Struggle of the Liberation Tigers of Tamil Eelam (LTTE)*, *Perspectives On Terrorism*, Vol. 12, No. 2, 2018, pp. 1-18.

123 "The International Criminal Court Statute 1998", UN Doc. A/CONF.183/9, Articles, 7&8.

124 Patricia A. Long, *In the Name of God- Religious Terrorism in the Millennium: An Analysis of Holy Terror, Government Resources, and the Cooperative Efforts of a Nation to Restrain its Global Impact*, *Suffolk Transnational Law Review*, Vol. 24, No. 1, 2000, p. 51.

tice. The ICC can be one of the *fora* to support a more comprehensive approach to accountability. Since 1 May 2003, Afghanistan has been a party to the Rome Statute of the ICC and thus, the Court can exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Afghanistan or by its nationals. In this respect, on 5 March 2020, the Appeals Chamber of the Court decided to authorize the Prosecutor to commence an investigation into alleged crimes against humanity and war crimes under the jurisdiction of the Court in Afghanistan.

The Taliban and their Close Ties with the International Designated Terrorist Entities

The Taliban appears to have been both, directly and indirectly, supportive of terrorists by consistently permitting, failing to suppress, and tolerating international terrorists in their use of Afghanistan as a center for training camps, supply, and staging operations.¹²⁵ The Taliban have also aided and abetted terrorists worldwide, including violent groups in Chechnya and Central Asia.¹²⁶ Additionally, there are several regional and international terrorist groups operating in Afghanistan in the aftermath of the Taliban takeover. These include the Tehreek-e-Taliban Pakistan, East Turkistan Islamic Movement, Islamic Jihad Group, Khatibat Imam Bukhari Jamaat, and Islamic Movement of Uzbekistan.¹²⁷ Furthermore, the Taliban's victory has inspired jihadis around the world to felicitate the Taliban's victory and pledge the revitalization of global jihad.¹²⁸ Several Jihadists, including the al-Qaeda leader, Ayman al-Zawahiri who was killed in a US counter-terrorism operation in Kabul on 22 August 2022, returned back to Afghanistan after the Taliban siezed power. The UN Security Council earliar concluded that the terrorist groups enjoy greater freedom in Afghanistan now than at any time in recent history.¹²⁹ At the same time, the US has shown concern regarding the resurgence of a terrorist threat from Afghanistan that could pose a significant threat beyond the country.¹³⁰ Given the historical links and sympathetic approach to international terrorists, the Taliban shares the burden. In other words, to quote President Bush; "If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist."¹³¹

125 Alan John Cohan, *Formulation of State's Response to Terrorism and State-Sponsored Terrorism*. . . p. 103.

126 Lopamudra Bandyopadhyay, *The Taliban and Central Asia : Into the Vortex of Terrorism Beyond Afghanistan*, *Jadavpur Journal of International Relations*, Vol. 14, No. 1, 2010, pp. 40-55.

127 Seth Jones, "Countering a Resurgent Terrorist Threat in Afghanistan", available at: <https://www.cfr.org/report/countering-resurgent-terrorist-threat-afghanistan> (accessed April 29, 2022).

128 Rita Katz, "The Taliban's Victory Is Al Qaeda's Victory", available at: <https://foreignpolicy.com/2021/09/13/taliban-victory-afghanistan-al-qaeda-victory-911/> (accessed April 29, 2022).

129 "UN Security Council Report", UN Doc. S/2022/63.

130 "Statement of General Kenneth F. McKenzie, Jr. Commander, US Central Command before the Senate Armed Services Committee", March 15, 2022. Available at: [https://www.armed-services.senate.gov/imo/media/doc/USCENTCOM%20Written%20Posture%20State-ment%20-%20SASC.pdf](https://www.armed-services.senate.gov/imo/media/doc/USCENTCOM%20Written%20Posture%20Statement%20-%20SASC.pdf) (accessed April 29, 2022).

131 Elisabeth Bumiller, "Bush Says War May Go Beyond Afghan Border", *New York Times*, available at: <https://www.nytimes.com/2001/11/22/us/a-nation-challenged-the-president-bush-says-war-may-go-beyond-afghan-border.html> (accessed April 29,

The Taliban are Subject to Some Form of Legal Sanction

The Taliban have been formally designated as a ‘terrorist’ entity and are subject to some form of legal sanction both under international law and domestic law.¹³² Under international law, the prominent mechanism under which the Taliban have been subject to legal sanction is the UN Security Council Committee established pursuant to UN Security Council Resolutions 1267, 1989, and 2253.¹³³ The 1267 sanction regime was established in October 1999 to impose sanctions against the Taliban for their support and harboring of international terrorists.¹³⁴ The 1267 regime has been amended several times over the last few years.¹³⁵ However, it still relies on specific sanctions (arms embargo, travel ban, freezing of funds) directed against the Taliban as individuals and as an entity.¹³⁶ Moreover, in 2011, the Security Council split the Taliban and Al-Qaida sanctions system into two separate regimes: a country-specific regime imposing sanctions against the Taliban under Resolution 1988,¹³⁷ and the Al-Qaida sanctions regime pursuant to Resolution 1267 and Resolution 1989.¹³⁸ The Security Council further expanded the Al-Qaida sanctions regime in 2015 through Resolution 2253 to include a focus on ISIL/Da’esh and renamed the Committee the 1267/1989/2253 ISIL (Da’esh) and Al-Qaida Sanctions Committee, thereby continuing its move away from territorial sanctions linked to a specific emergency, towards a thematic sanctions regime against individuals.¹³⁹

Given the diversity of potential sanctions, the impact of terrorist designation under domestic law may be more decisive.¹⁴⁰ The Taliban and later the Haqqani Network (since 2012) were designated as a Specially Designated Global Terrorist (SDGTs) under Executive Order (13224) and a Foreign Terrorist Organization (FTO) under section 219 of the Immigration and Nationality Act (INA).¹⁴¹ In addition to designating the group as a terrorist, key members have also been individually designated.¹⁴²

2022).

- 132 Eric Rosand, Current Development: The Security Council’s Effort to Monitor the Implementation of Al Qaeda/Taliban Sanctions, *American Journal of International Law*, Vol. 98, No. 4, 2004, pp. 745-763.
- 133 UN Security Council Resolution 1267 (1999), UN Doc. S/RES/1267(1999); UN Security Council Resolution 1989 (2011), UN Doc. S/RES/1989(2011); UN Security Council Resolution 2253 (2015), UN Doc. S/RES/2253- (2015).
- 134 Gilbert Guillaume, Terrorism and International Law’ *International and Comparative Law Quarterly*, Vol. 53, No. 3, 2004, pp. 537-548.
- 135 UN Security Council Res. 1333 (19 December 2000); UN Security Council Res 1363 (30 July 2001); UN Security Council Res 1388 (15 January 2002)
- 136 Alexander Marschik, “The Security Council’s Role: Problems and Prospects in the Fight Against Terrorism”, in: *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Giuseppe Nesi (ed.), Ashgate Publishing, Burlington, 2006, p. 70.
- 137 UN Security Council Res 1988 (17 June 2011).
- 138 Lisa Ginsborg, “The United Nations Security Council’s counter-terrorism ISIL (Da’esh) and Al-Qaida sanctions regime”, in: *Research Handbook on International Law and Terrorism*, Ben Saul (ed.), Edward Elgar Publishing Limited, Massachusetts, 2020, p. 557.
- 139 UN Security Council Resolution 2253, UN Doc. S/RES/2253(2015)
- 140 Daragh Murray, “Non-state Armed Groups and Peace Agreements: Examining Legal Capacity and the Emergence of Customary Rules”, in: *International Law and Peace Settlements*, Weller Marc, Retter Mark et al. (eds.), Cambridge University Press, 2021, p. 203.
- 141 Executive Order 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism Notice of September 24, 2001— Continuation of Emergency With Respect to UNITA. Available at: <https://home.treasury.gov/system/files/126/13224.pdf> (accessed April 29, 2022)
- 142 “Counter-Terrorism Guide”, Haqqani Network, available at: https://www.dni.gov/nctc/groups/haqqani_network.html (accessed April 29, 2022).

Likewise, Australia imposes a special sanction regime on the Taliban by incorporating the UN Security Council sanctions into Australian sanctions law.¹⁴³ The EU¹⁴⁴ and Canada¹⁴⁵ also impose certain restrictive measures concerning individuals and entities designated as the Taliban and other individuals, groups, undertakings, and entities associated with them.

Conclusion

Terrorism as any act of violence, or threat thereof, apart from its motives or intentions has been condemned largely by both states and individuals. Terrorism is always unconcerned with the harming of innocent persons and thus is unjustified. However, those participating in violent acts, view the acts as politically and religiously justified. For instance, the Taliban justify their inhumane and criminal acts by sticking to a religious interpretation and acts of war against the foreign occupation that could provide them a most compelling legitimacy for their actions.

This study finds that the Taliban's violent actions and waging war against the US-led coalition do not fall under the definition of any acts of war against foreign occupation, anti-colonial rebellions, and other acts of freedom fighting that international law generally accepts as lawful. The international community's intervention in Afghanistan was justified as a legitimate act of self-defense under Article 51. Likewise, the Taliban's insurgency does not amount to an act of exercising self-determination, particularly as defined under the OIC Convention. This Convention recognizes that an act of exercising self-determination has to conform to international law, including international humanitarian law; otherwise, it is illegal and should be criminalized.

Consequently, this study argues that the Taliban's continued sheltering and training of terrorists, and planning and perpetrating of terrorist acts in their first term as a *de facto* government of Afghanistan from 1996 to 2001, and thereafter, in their two decades of struggle against the US-led coalition and the legitimate government of Afghanistan, can easily place them in category of terrorist organizations. Further, this study demonstrates that the Taliban can be considered a terrorist organization as they do not feel guilt and accountability for their actions in resorting

143 "The Taliban Sanctions Regime", Australian Government, available at: <https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/the-taliban-sanctions-regime> (accessed April 29, 2022).

144 "European Council Decision concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan", (2011/486/CFSP). Available at: <http://data.europa.eu/eli/dec/2011/486/2022-02-05> (accessed April 29, 2022).

145 Canada has implemented its international obligations under three distinct, yet complementary terrorist listing mechanisms: the Regulations Implementing the United Nations Resolutions on the Taliban, ISIL (Da'esh) and Al-Qaida, the Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, and the Criminal Code. Available at: https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/terrorists-terroristes.aspx?lang=eng (accessed April 29, 2022).

to unlawful means of violence, including targeting civilians and public and private property in violation of international human rights and humanitarian law. It can also be regarded as a common characteristic of the group sharing with the other terrorist organizations. Since a series of terrorist suicide attacks and the group's perpetuation of mass executions and summary killings, torture, kidnappings, arbitrary detention, recruitment and use of children in hostilities, rape and other forms of sexual violence, as well as attacks on, and destruction of, protected objects such as schools and hospitals, and cultural and religious sites fall under the definition of acts of terrorism and considered as serious violations of international human rights and humanitarian law amounting to war crimes, as well as crimes against humanity under the Statute of the ICC. This study thus argues that the ICC can be one of the *fora* the international community can support to compel the Taliban to be accountable.

To conclude, the Taliban in their second stint in power in Afghanistan, the group appears to have been both, directly and indirectly, supportive of terrorists by consistently permitting, failing to suppress, and tolerating international terrorists in their use of Afghanistan as a center for training camps, supply, and staging operations. Thus, since the Taliban are a terrorist organization, to prevent the revitalization of global jihad, the international community has to take both legal and non-legal actions against the Taliban to avoid the normalization of terrorism.

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Фавад Поја

ТЕРОРИСТИ ИЛИ ЛЕГИТИМНИ УСТАНИЦИ? СТАТУС ТАЛИБАНА У МЕЂУНАРОДНОМ ПРАВУ

Сажетак

Не постоји универзално прихваћена дефиниција тероризма. Међутим, овај термин се обично користи да опише акте насиља против цивилних мета у циљу ширења страха како би се на тај начин достигли идеолошки и/ли политички циљеви. Терористички акти, било национални или међународни, забрањени су законима. Након повратка Талибана на власт у Авганистану августа 2021. године поставља се важно питање: да ли се Талибани разликују од других терористичких организација, рецимо од Ал Каиде или Исламске државе? Ово је веома важна дебата јер ове групе деле заједничке идеолошке основе и правце делања; док се Талибани тренутно сусрећу са изазовима намере и способности са једне стране и са престанком насиља и кидања веза са терористичких организацијама са друге. У овом раду се тврди да ће Талибани, упрско томе што нема универзално прихваћене дефиниције тероризма, бити мета истрага за своје терористичке акте. У овом раду се посебно бавимо са три фактора – одговорност, везе са терористичким организацијама, и укључивањем чланова Талибана на листе глобалних санкција. У раду се такође показује зашто је међународна заједница у обавези да предузме све акције против Талибана како би избегла нормализацију тероризма.

Кључне речи: Авганистан, Талибани, Ал Каида, тероризам, међународно право, санкције