The Development of a United Nations Counter Terrorism Policy: A pragmatic approach to the problem of a definition of Terrorism

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May 2014
The primary object of this thesis is to propose a pragmatic solution to the legitimacy problems associated with the absence of a definition of Terrorism within United Nations Counter Terrorism Policy. It contends that the attempts to draft such a definition within the Ad Hoc Committee on Terrorism have now come to a political standstill and are unlikely to result in a strong legal definition of terrorism. Any outcome is likely to be a political compromise in nature.

This thesis therefore proposes that the international community should instead be examining other pragmatic alternatives and developments within the already established United Nations Universal Legal Framework against Terrorism. It will suggest that the definition found within Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism 1999, contains a fit for purpose definition of terrorism. This definition has the potential to be used as a tool, to guide States, in the application of United Nations counter terrorism instruments. It also suggests that if this article becomes more widely accepted it has the potential to reach the level of customary international law status as an independent universal definition of terrorism.

The definition itself provides a compromise between groups of States with different outlooks on counter terrorism. It supports the current sectoral approach by containing an Annex, which pays homage to the international community’s early counter terrorism instruments. It also however includes a mini-definition of terrorism that accommodates States who are looking for a more all-encompassing definition that outlines the necessary objective and subjective elements.

The definition makes important reference to the obstacles that have left the Ad Hoc Committee on Terrorism at a standstill, whilst not limiting State sovereignty, leaving contentious issues up to domestic authorities to deal with. The thesis therefore is aiming to demonstrate that this pragmatic approach to the problem of a definition of terrorism is able to aid in increasing the legitimacy of the further development of the provisions within the United Nations counter terrorism policy, allowing it to continue to provide a sustainable successful response to the problem of international terrorism.
# Table of Contents

TABLE OF CONTENTS ........................................................................................................ I  
ABBREVIATIONS ................................................................................................................ II  
SOURCES ............................................................................................................................. III  
BIBLIOGRAPHY ................................................................................................................... VI  

1. INTRODUCTION ............................................................................................................... 1  
2. THE UNITED NATION’S ROLE IN TERRORISM PREVENTION ........................................ 6  
   2.1 THE HISTORIC DEVELOPMENT OF THE UNITED NATION’S APPROACH TO COUNTER  
      TERRORISM ................................................................................................................. 6  
      2.1.1 The League of Nations contribution ................................................................. 6  
      2.1.2 The creation of the United Nations and the beginnings of its counter terrorism policy... 7  
      2.1.3 Terrorism as a threat to international peace and security................................. 10  
   2.2 UNITED NATIONS COUNTER TERRORISM POLICY AFTER SEPTEMBER 11TH 2001 ....... 15  
      2.2.1. The Security Council ................................................................................... 15  
      2.2.2. The General Assembly ................................................................................ 18  
   2.3 CONCLUSIONS ......................................................................................................... 30  
3. INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING  
   OF TERRORISM ............................................................................................................. 31  
   3.1 LEGISLATIVE HISTORY ......................................................................................... 31  
   3.1.1 Agreeing to draft ............................................................................................ 31  
   3.1.2 The drafting process ...................................................................................... 33  
   3.2 SEPTEMBER 11TH 2001 AND THE CONVENTION. ........................................... 37  
   3.3 SPECIALISED PROVISIONS ............................................................................... 40  
   3.4. CONCLUSIONS ..................................................................................................... 47  
4. A PRAGMATIC DEFINITION OF TERRORISM ............................................................ 48  
   4.1 ANALYSIS OF ARTICLE 2(1) (A) AND (B) ......................................................... 48  
      4.1.1 The Annex ...................................................................................................... 49  
      4.1.2 The Mini-Definition of Terrorism ................................................................. 53  
      4.1.3 Supplementary issues ................................................................................... 56  
      4.1.4. Conclusions ............................................................................................... 58  
   4.2 COMPARISON: WHAT HAS EUROPE ADDED? ................................................ 60  
      4.2.1 The Framework Decision Definition ......................................................... 61  
      4.2.2 The comparison conclusions .................................................................... 65  
5. CONCLUSIONS ............................................................................................................. 66
Abbreviations

CTC - Counter-Terrorism Committee
CTED - Counter Terrorism Executive Directorate
EU - European Union
FATF - Financial Action Task Force
IMF - International Monetary Fund
OIC - Organisation of the Islamic Conference
UN - United Nations
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1. Introduction

The United Nations role in counter terrorism has grown significantly over the past half century. The structure of terrorist groups and the form that their attacks take have become increasingly transnational and innovative. This has developed in line with the many technological advances and globalization that the world is currently experiencing. Counter terrorism initiatives, historically, were considered as purely domestic matters. This is however not sustainable in the modern day and an international response is needed. The change in terrorist approaches makes the increased United Nations involvement in counter terrorism initiatives more important. Its mandate and expertise in the areas of security, development and international cooperation allow it to contribute and bring together all aspects that are instrumental to the prevention and eradication of international terrorism. The United Nations counter terrorism initiatives that will be outlined throughout this thesis, provide international guidance on counter terrorism matters and facilitate cooperation, whilst not limiting State sovereignty, therefore effectively utilizing many of the organisation’s best attributes.

Terrorism as an idea and international legal phenomenon has existed for centuries. The first use of the word ‘terreur’ in print is said to have appeared in 1798 during the French Revolution.\(^1\) Therefore international efforts to eliminate such acts started years before the establishment of the United Nations. The extensive history of terrorism and its controversial nature means that it has attracted much academic and legal debate. There are estimated to be over one hundred drafted definitions of terrorism. Laqueur contends that out of these definitions, the only general characteristic agreed upon is that terrorism involves violence and the threat of violence.\(^2\) Despite the many years of consideration and the many different formulations of such a definition, United Nations Member States continue to be unable to come up with a singular definition of ‘international terrorism’.

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In 1996 the General Assembly through Resolution 51/210\(^3\) established an Ad Hoc Committee with the mandate to draft additional international instruments on terrorism. The Committee have successfully negotiated a number of Conventions, including the International Convention against the Suppression of the Financing of Terrorism 1999\(^4\) [hereafter ‘Financing Convention’].

In 2000, the Ad Hoc Committee moved on, to begin negotiations on a Comprehensive Convention against International Terrorism. They have been in session discussing such an instrument for 14 years, with little success. This is due mainly to the international community’s inability to agree upon a definition of international terrorism. The issues raised during the negotiations revolve around three main points relating to the scope of the definition. These are the effect of the Right to Self-Determination, State sponsored terrorism and the applicability of such a definition to a State’s armed forces. These points are raised each year with little or no solution found. Therefore, at present, no comprehensive international convention against terrorism exists.

The lack of such a definition and structured comprehensive instrument is seen internationally as a dent to the legitimacy of any United Nations counter terrorism policy. This can be demonstrated effectively through a statement by the International Peace Academy. It notes that:

‘Action in the absence of an agreed-upon definition exposes the United Nations to the charge of double standards, thus undermining the very legitimacy and universality that are among its most precious assets.’\(^5\)

The purpose of this thesis is to provide a pragmatic, solution-focused approach to resolving these legitimacy issues. It seeks to demonstrate that parallel to the Ad Hoc Committee discussions, a separate, internationally accepted, United Nations counter terrorism policy has developed made up of a global strategy against terrorism along with a framework of international counter terrorism Conventions and Security Council Resolutions. These instruments are respected by States and have resulted in the streamlining of domestic

\(^3\) United Nations General Assembly Resolution 51/210, 17 December 1996
counter terrorism policies, allowing for effective international cooperation in counter terrorism matters, despite no agreement being made within the Ad Hoc Committee. The policy has also received much support from a number of technical assistance initiatives. These include the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime, which has created a legal training curriculum that strengthens the capacity of States to implement the policy. The policy does not however contain an independent definition of international terrorism, an element that has the potential to limit its success and legitimacy. This thesis therefore seeks to suggest a possible solution to this problem. It aims to highlight that the definition of terrorism found within Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism 1999 could be utilised as a general definition of terrorism, to fill this void and provide clarity and legitimacy to the United Nations counter terrorism policy as a whole. It will contend that this definition is general enough to serve as a general definition of terrorism and could be used as a tool, to guide States in the application of the international counter terrorism instruments. It also has the potential, if it becomes more accepted, to reach customary international law status as an independent universal definition of terrorism.

The first Chapter of this thesis will seek to provide the background to this discussion. It will examine the development of United Nations counter terrorism policy, starting from the organizations inception in 1945. This will provide an overview of its accomplishments and failings, whilst also shedding some light upon the development of the powerful political considerations that influence the topic.

The first Chapter will begin, in section one, by providing the main historical analysis, examining the work of the United Nations from 1945 to the September 11th attacks in 2001. This will frame the further discourse, allowing for an understanding of how these historical factors influence present day decision-making.

The discussion will then move on, focusing in detail on the post September 11th counter terrorism initiatives developed by the United Nations. It will examine both the Security Council and the General Assembly’s contributions. In particular it will focus upon the General Assembly’s development of the Global Counter Terrorism Strategy and the

associated Universal Legal Framework against Terrorism. This Framework is important for this thesis’ discussion. It contains 18 international Conventions, Protocols and Amendments on international terrorism, along with 6 Security Council Resolutions. Each Convention is based upon a common framework, and then additionally contains a number of specialised provisions, covering a different element and aspect of international terrorism. Included and embedded in one of these Conventions (the International Convention for the Suppression of the Financing of Terrorism 1999), this thesis contends, there is a definition of international terrorism.

These two important General Assembly initiatives, form the most current and comprehensive strategies on counter terrorism to exist internationally. This first Chapter will therefore provide the foundations for the thesis, highlighting relevant elements of the United Nations counter terrorism policy and the factors that influence its development and interpretation.

The second Chapter will then move on to examine in more detail the International Convention for the Suppression of the Financing of Terrorism 1999. This Convention is one of the 18 instruments found within the Universal Legal Framework Against Terrorism. It is also the only United Nations led Convention in force that includes a definition of an act of international terrorism. This thesis intends to take this specific definition of terrorism, found within Article 2(1) of the Convention, out of the financing context. The second Chapter therefore aims to provide the background for the thesis’ main claim by examining the definition’s current context and the affects that this may have upon its ability to be applied as a general definition of international terrorism. It also seeks to add further legitimacy to the definition by praising and critiquing the Convention that it is taken from, analysing why this Convention has gained such a high level of international acceptance.

The second Chapter will therefore begin by analysing the Convention’s drafting history and the controversies that have arisen during its negotiation process. It will then move on to examine the effect, upon the Conventions ratification rate, that September 11th 2001, especially Security Council Resolution 1373, has had. The September 11th attacks transformed the Convention from an instrument having little international acceptance, to one that has the highest number of State parties of all of the universal framework counter terrorism conventions. It has also resulted in a number of technical assistance initiatives being developed to support its implementation.
The second Chapter will then conclude with a brief discussion on a number of the Conventions specialised provisions. This will outline in more detail how the definition is currently applied and the effect that this unique context could have upon the definitions ability to be applied more generally.

Overall, the second Chapter’s discourse seeks to highlight the strong international support for the Financing Convention as a whole and demonstrate why it holds a privileged position within United Nations counter terrorism policy. It will therefore attempt to add further legitimacy to the definition proposed and highlight whether its current context is likely to considerably affect its ability to be applied as a wider more general definition of terrorism.

The third and final Chapter of this thesis then moves on to look in detail at the Financing Conventions definition of terrorism. It will begin by examining in detail the definition’s different objective and subjective elements, evaluating their effectiveness and purpose. This Chapter will then move on to compare the definition, with Europe’s regional definition of terrorism, found within the European Council’s Framework Decision on Combating Terrorism. This definition, although regional, was one of the first definitions of terrorism to be drafted post September 11th 2001 and provides an example of a more general and comprehensive definition of terrorism, which seeks to streamline European Union Member States domestic law. The purpose of such a comparison is to both praise and critique the Financing Convention’s definition. It seeks to prove that the many similarities between the definitions, especially in regards to their formulation, supports this thesis’ claim that the Financing Conventions definition could be applicable in a more general context, to terrorist acts outside of the financing context.

The thesis will have therefore overall have demonstrated that the absence of a definition within United Nations counter terrorism policy can be resolved pragmatically through the use of the Financing Convention’s definition of terrorism, thereby alleviating the challenges to the legitimacy of the United Nations counter terrorism action.

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2. The United Nation’s role in terrorism prevention

This Chapter will begin the thesis analysis by introducing the United Nations counter terrorism policy. It will provide a historical background to the issues, shining some light upon the strong political considerations that affect the topic and through this attempt to provide some clarity as to why a definition of international terrorism has not been adopted. It will highlight in particular, the strength of the General Assembly’s contribution, through its negotiations within the Ad Hoc Committee on Terrorism and its adoption of the Global Counter Terrorism Strategy and the Universal Legal Framework against Terrorism.

2.1 The historic development of the United Nation’s approach to Counter Terrorism

2.1.1 The League of Nations contribution

The international community have been grappling with the consequences of acts of terrorism for centuries, and international efforts to combat such acts started a number of years before the establishment of the United Nations. The League of Nations [hereafter ‘the League’], the United Nations predecessor, was actively engaged in the area. In 1934, in Marseilles, a Croatian extremist assassinated the King of Yugoslavia and the French Minister of Foreign Affairs. 8 The League was called upon to respond to such acts, establishing a Special Committee that aimed to make recommendations on international cooperation for the suppression of terrorism. 9 The Committee attracted some of Europe’s finest international jurists, who discussed the creation of a codified definition of terrorism and ways in which to punish acts of political terrorism. 10

The result of these deliberations was the Draft Convention for the Prevention and Punishment of Terrorism, which was published by the Committee in 1937. The draft Convention aimed to encourage the incorporation of the crime of terrorism into domestic legislation. It provided a definition, which stated that terrorist acts were, ‘all 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.’ 11

10 ibid
11 19 League of Nations Official Journal 23 (1938)
This definition provides little guidance on what criminal acts it intends to cover, which as the later discussion will highlight, is the reverse of what is seen today in international counter terrorism policy.\textsuperscript{12}

Despite these efforts, the Convention never came into force, mainly due to the outbreak of the Second World War two years later and the demise of the League. It is however, still consulted today, as a template, for the creation of a Comprehensive Convention and still represents one of the few drafted international definitions of terrorism.\textsuperscript{13}

\textbf{2.1.2 The creation of the United Nations and the beginnings of its counter terrorism policy}

During the Second World War, discussions began that would lead to the creation of the United Nations. The Allied leaders met to devise a plan for a post war era of peace and security. The leaders wished to prevent such a war from reoccurring by being forward looking, assessing potential threats of the future.

In 1945 the United Nations was established. The records of the San Francisco Conference show no evidence that terrorism or threats from non-State actors were considered by drafters to be potential future obstacles to international peace and security. Therefore terrorism holds no place within the United Nations Charter. The Charter was however drafted broadly enough that such unforeseeable acts could be addressed through interpretation.\textsuperscript{14}

One principle, which was a clear outlined priority of the drafters, is the right to Self-Determination, enshrined within Article 1(2) of the Charter. The article states that one of the purposes of the United Nations is to ‘develop friendly relations among nations based on respect for the principle of equal rights and Self-Determination of peoples, and to take other appropriate measures to strengthen universal peace.’\textsuperscript{15}

The United Nations has stayed true to such a priority and since its creation has facilitated the independence of more than 80 former colonies comprising some 750 million people.\textsuperscript{16}

\begin{flushleft}
\textsuperscript{14} Comras, V. (2010). Flawed Diplomacy: The United Nations and the War on Terrorism. Potomac Books., At pg 8
\textsuperscript{15} United Nations, \textit{Charter of the United Nations}, 24 October 1945, 1 UNTS XVI art 1(2)
\end{flushleft}
The strong support for this principle has however developed into one of the roots of the organization’s reluctance and inability to draft a comprehensive counter terrorism convention, along with a supporting definition. The fear being that the creation of such an instrument may prevent the ability of peoples to fight against further foreign subjugation and achieve Self-Determination. The phrase ‘one man’s terrorist is another’s freedom fighter’ is a way of describing this dilemma further. This dichotomy can be seen in many situations over the past 100 years. For example, organizations such as the Palestinian Liberation Organisation are viewed by many States as a terrorist organization, but by many others as a body fighting for the freedom of the Palestinian people.

This interplay between the two concepts continues to burden the development of international counter terrorism policy to this day, and is likely to continue into the future. In the United Nation’s early days, there was therefore, a lack of support to internationally develop counter terrorism initiatives or a definition of terrorism. The result of which was that, the Security Council, treated terrorism as a largely localized national problem that in most cases did not constitute a threat to international peace and security. This pushed the fight against terrorism into the hands of national governments and out of the international security domain.

Self-Determination was not the only factor influencing the development of the United Nations counter terrorism policy. Shortly after its creation the United Nations security apparatus was also in the grip of Cold War stalemate. A unanimous agreement on any matter was almost impossible, let alone one as controversial as terrorism.

This can be demonstrated by the Security Council’s actions during the Greek Civil War from 1947-1952. The Security Council had established, through Resolution 15, a Commission of Investigation to assess a complaint made by Greece stating that Albania, Yugoslavia and Bulgaria had been inciting the insurgency in the north of Greece. There was evidence presented that both sides of the conflict were using unlawful tactics including terrorism. Terrorism was placed on the agenda by the Soviet Union but was quickly

rejected by the United States, United Kingdom and France, who all cited that the issue was domestic in nature. The Commission instead recommended a permanent body to monitor the conflict, which was rejected by the Soviet Union. Therefore a stalemate had arisen again, which resulted in the lack of any detailed high-level discussion on counter-terrorism. In result, the Greek complaint was referred to the General Assembly, who established the UN Special Committee on the Balkans. Its mandate was however narrow and it was not empowered to examine the conduct of the parties. There were few useful outcomes from the Committee and it provided no guidance on dealing with terrorism. This demonstrates that in the early period of the United Nations existence, it lacked the ability to deal practically with counter-terrorism issues. As a result, domestic authorities almost exclusively dealt with terrorism during this time. Therefore there was little need for an international definition of terrorism to be drafted.

However, from the 1960’s onwards a number of international Conventions began to develop which targeted specific acts of terrorism. These were created as a response to the rise in plane hijacking incidents throughout the 1960’s and 70’s and the Achille Lauro incident in 1985. The Conventions criminalised specific acts of terrorism such as violence at international airports or at sea and were developed on an ad hoc basis, as international dialogue arose around a specific offence. The Conventions were created by technical organizations such as the International Civil Aviation Organisation (ICAO). These mark the start of a new United Nations approach to counter-terrorism, based on sectoral development. States were able, through this approach, to deal with terrorism, without engaging in any wider controversies.

During this time there were also a number of limited discussions within the General Assembly, specifically by its Sixth Committee, who have remained actively engaged for many years. However, the political organizations, with broader mandates, like the General Assembly, were never successful in their actions and no comprehensive Treaty was ever created.

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24 ibid
Although this demonstrates the beginnings of a United Nations counter terrorism policy, it is important to note, that the Conventions initially saw little ratification. They were not considered a priority for States. They simply mark an international response to an international concern, a specific act of terrorism.

### 2.1.3 Terrorism as a threat to international peace and security

The 1990’s saw the most drastic change in the United Nation’s responses to terrorism. Cold War divisions began to thaw and the organization was able to use its security apparatus more effectively. The Security Council, for the first time, actively discussed terrorism issues. In 1992 the Security Council members ‘expressed their deep concerns over acts of international terrorism and emphasized the need for the international community to deal effectively with all such acts.’

This was followed by a period of economic and diplomatic sanctions imposed by the council, against in particular, State support for terrorism. The United Nations had declared itself competent under its Charter, considering terrorism, for the first time, as a threat to international peace and security.

The first use of such sanctions was in 1992. These were imposed against Libya, as an international response to the Pan Am 103 and UTA 772 airplane bombings. Resolution 731 was passed which demanded that Libya accept responsibility for the attacks and turn over for trial those indicted for the Pan Am 103 bombings.

Libya did not comply with the Resolution and so further punitive action was taken. Resolution 748 imposed air and arms embargoes on Libya. A final Resolution, Resolution 883, was passed in 1993, further strengthening these sanctions. It froze selected Libyan assets abroad and prohibited the export of oil related equipment to the country.

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These set of Resolutions represented a powerful statement that the international community was in agreement that the State support of terrorism violated universally accepted norms, despite the concept not being clearly defined.\textsuperscript{32}

The sanctions regime however resulted in years of deadlock and the Libyan economy suffered with rising inflation and unemployment levels as a result.\textsuperscript{33} The support for the sanctions slowly crumbled and in 1998 the members of the Organization of African Unity stated they would no longer comply, if no solutions were found by the end of that year.\textsuperscript{34} Eventually, after, seven years Libya presented two suspects for trial in The Hague and the sanctions were suspended in 1999. One of the two Libyans was convicted of murder for the bombing of Pan Am Flight 103 and given a life sentence.\textsuperscript{35} The sanctions were deemed as a relative success, with the 1996 US Patterns of Global Terrorism report suggesting, ‘terrorism by Libya has been sharply reduced by UN sanctions’.\textsuperscript{36}

In 1996, similar action was taken against the Sudan. Resolution 1044\textsuperscript{37} called for the country to extradite three individuals suspected of being involved in the failed assassination attempt on former Egyptian President Hosni Mubarak and to refrain from assisting, supporting or facilitating terrorist activities or providing safe haven to terrorist elements.\textsuperscript{38} Sudan, like Libya, failed to comply with such requests. In Resolution 1054, the Security Council stated that such non-compliance constituted a threat to international peace and security and imposed sanctions against the country.\textsuperscript{39} The decision to impose such sanctions was not unanimous. Russia’s representative Sergey Lavrov stated that:

‘The members of the Security Council...have on several occasions come to realize that the arbitrary application of sanctions is essentially flawed when there are no clearly formulated

\textsuperscript{34} T.Weiss, J. &. (2004). \textit{Terrorism and the UN: Before and After September 11}. Indiana: Indiana University Press. At pg 155
\textsuperscript{37} United Nations Security Council Resolution 1044, 31 January 1996
\textsuperscript{39} United Nations Security Council Resolution 1054, 26 April 1996
criteria and conditions governing their imposition and their lifting...we are absolutely in favour of involving the Security Council in a real struggle against international terrorism...but we are against attempts to make use of this in order to punish certain regimes or in order to attain other political goals of one or more Member States.\textsuperscript{40}

China also expressed similar uncertainty with the action.\textsuperscript{41}

The sanctions imposed were weaker, than those implemented against Libya, due to the disagreement within the Council and because of the political and humanitarian situation in the Sudan at the time.\textsuperscript{42} They were diplomatic and required that Member States reduce the number of staff at missions and consular posts in the country and that international and regional organizations refrain from holding any conferences there.\textsuperscript{43} These weak sanctions had little effect and so Resolution 1070 proposed an aviation ban, if within 90 days the country had not bowed to international pressure.\textsuperscript{44} This never came into effect, with many States still opposing the ban because of the humanitarian consequences that may result.

The government involvement in the assassination attempt remains unresolved and the sanctions were more symbolic in nature. In 1996, the Sudanese government did inform the Security Council that it had requested a number of individuals, including Osama bin Laden, leave the country. The sanctions that existed were lifted in 2001, in return for the country’s cooperation in the ‘war against terrorism’.\textsuperscript{45}

The increasing use of sanctions, especially in regard to international terrorism, was becoming more and more controversial. Therefore, in 1999, when the need for a new set of terrorism related sanctions arose, the Security Council attempted to create a more robust, and effective regime. This was aimed at the actions of the Taliban in Afghanistan, and to secure the surrender of Osama bin Laden. It also sent a further general message that the support of international terrorism was no longer acceptable.\textsuperscript{46}

\textsuperscript{40} United Nations Security Council Meeting 3660 April 26 1996 UNSPV 3660, 1996a
\textsuperscript{43} United Nations Security Council Resolution 1054, 26 April 1996
\textsuperscript{44} United Nations Security Council Resolution 1070, 16 August 1996. At pg 2 Para 4
\textsuperscript{45} T.Weiss, J. &. (2004). \textit{Terrorism and the UN: Before and After September 11}. Indiana: Indiana University Press. At pg 156
\textsuperscript{46} ibid at pg 157
Resolution 1267, was adopted unanimously with only a short debate and it imposed the initial sanctions against the Taliban in Afghanistan. This Resolution is significant, as it is the first to deal not only with State sponsored terrorism, but the actions of individuals and groups.\(^{47}\) It established the 1267 Committee, which was tasked with monitoring and ensuring compliance. States were obliged to report to the Committee, outlining the steps they had taken to implement the Resolution. The sanctions included an obligation on States to freeze Taliban assets and deny the permission of Taliban aircraft to depart or land on States territory. These were only to come into effect in November 1999, if the Taliban chose not to surrender Osama bin Laden. This action was not taken so the sanctions came into effect on that day.

The initial sanctions did not result in significant compliance and so the sanctions package was strengthened in 2000 by Resolution 1333. This added an arms embargo and extended the asset freeze and flight ban to those associated with Al Qaeda.\(^ {48}\) This Resolution included an additional committee of experts, who were tasked with recommending how the arms embargo and the closing of terrorist camps should be monitored. They called for total commitment of all Member States; in particular those bordering Afghanistan, who they outlined, should be provided with local support teams. These were however never provided.\(^ {49}\) Although the sanctions regime became increasingly broad it did not seem to influence the Taliban. Some of these sanctions still exist today, despite the US led military campaign in 2001.

There were many reasons for such a failure. The Taliban firstly did not operate within the global economy, with much of their income coming from the black market, specifically the opium and heroin trade. Therefore, any economic sanctions had little effect. Arms were also already plentiful, so the arms embargo did little to remove them. The Taliban was able to remain almost immune to outside influence.\(^ {50}\)

These various sanction regimes throughout the 1990’s demonstrate that the Security Council was becoming more and more engaged in counter terrorism issues. Terrorism had become an act that could be countered through collective international actions, despite its lack of mention within the UN Charter. Chapter VII had been engaged, allowing for more

robust, even military responses to international terrorism. This is significant, since it is still a concept yet to be fully defined.

The sanctions did however, like many international initiatives, suffer from implementation issues, with States unwilling or lacking the resources to implement the Resolutions effectively. The Taliban sanctions regime also demonstrates that this approach is not as effective against non-State entities, which are typically not a functioning part of the international system.

During this period, the General Assembly was also developing its approach. In 1996, through Resolution 51/210, it created a new forum for discussion, establishing an Ad Hoc Committee to elaborate new international conventions on terrorism. These included the International Convention for the Suppression of Terrorist Bombings, the Suppression of Acts of Nuclear Terrorism and the Suppression of the Financing of Terrorism. These Conventions developed the framework of international terrorism conventions into areas that are more wide ranging than previously seen. Despite the Conventions still seeing low implementation rates, their development demonstrates that the United Nations was becoming more open and progressive towards counter terrorism issues during the 1990’s. The Committee still exists today and its mandate is constantly revised and renewed by the General Assembly. The Committee has reported every year since 1997. Since 2000 it has begun to draft a Comprehensive Convention on International Terrorism.

The creation of such an instrument has been strongly supported by a number of Southern Hemisphere States. The Convention’s initial draft was presented to the Committee by the delegation of India, which stressed the need to create a homogenous and all-encompassing legal framework for the prevention, repression, and elimination of international terrorism.

52 United Nations General Assembly Resolution 51/210, 17th December 1996.
in all its aspects. This draft has now formed the basis of all further discussions on the Convention and is constantly being developed.

2.2 United Nations counter terrorism policy after September 11th 2001

The September 11th 2001 attacks had a devastating impact on the world and led to an overhaul of attitudes and a permanent change in the position of the United Nations in regards to terrorism prevention.

United Nations Secretary General Kofi Annan articulated the world’s feeling at the time stating, ‘A terrorist attack on one country is an attack on humanity as a whole. All nations of the world must work together to identify the perpetrators and bring them to justice.’

Terrorism was therefore now fully on the world stage. This led to an increase in counter terrorism initiatives being produced by the United Nations. Developments have been seen both within the Security Council and the General Assembly. This section will discuss each of these United Nations’ organs post September 11th contributions to the United Nations counter terrorism policy.

2.2.1. The Security Council

The Security Council reacted immediately to the September 11th attacks, requiring States to undertake wide-ranging and comprehensive measures against terrorism.

Resolution 1368 was passed on 12th September 2001. In this Resolution the Security Council recognised the inherent right of individual or collective self-defence as a legitimate response to terrorist actions. This is highly significant, as it implies that the attacks triggered self-defence provisions, despite the Security Council, at the time, not being aware who had perpetrated the attacks. It has been used for example, by Russia to justify pre-emptive actions against Chechen rebels in Georgia in 2012. Further, the Resolution stated that the international community should ‘redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of

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60 ibid
the relevant international anti-terrorist Conventions and Security Council Resolutions.\textsuperscript{63} This represents full Security Council support for the Conventions developed by the General Assembly and Technical Organisations.

Following this, the Security Council passed Resolution 1373\textsuperscript{64}, which is hailed as the most significant of them all.\textsuperscript{65} The Resolution is far reaching and contains a number of obligations, binding on all Member States, that could easily also be found within an international Convention. The Resolution calls upon States to prevent the commission of terrorist acts and deny safe haven to terrorists and their supporters. It additionally requires that States prosecute and punish terrorists, cooperate with other States in criminal and investigative proceedings involving terrorism, improve effective border controls, suppress recruitment and prevent the attainment of weapons and explosives.\textsuperscript{66} It also outlines that States should criminalize terrorist fund raising, freeze assets of terrorists and prevent terrorists and their supporters from using financial institutions.\textsuperscript{67}

Many of the elements of the Resolution are found in the International Convention for the Suppression of the Financing of Terrorism 1999. This Convention had not entered into force pre-September 11, being ratified by only four States.\textsuperscript{68} However, since Resolution 1373, many of its articles had now become binding on all United Nations members without their consent.\textsuperscript{69} The effect of this will be considered in the later Chapters of this discussion. The Resolution itself is legislative in nature, but not drafted in a manner as meticulous as an international Convention. Many elements are left undefined, which allows States to interpret the Resolution at a domestic level, but also leads to international ambiguity. For example, this issue can be demonstrated in regards to the criminalization of terrorist financing. States are able to fund organizations, deemed legitimate by their domestic

\textsuperscript{63} United Nations Security Council Resolution 1368, 12 September 2001
\textsuperscript{64} United Nations Security Council Resolution 1373, 28 September 2001
\textsuperscript{66} United Nations Security Council Resolution 1373, 28 September 2001
\textsuperscript{67} ibid
definition or own political goals. Other States may however criminalise the same entities.\textsuperscript{70} This prevents uniformity of actions.

Another point to note is the Resolution’s lack of definition, or common criteria regarding terrorist acts. Terrorism is simply approached as a self-explanatory concept.\textsuperscript{71} The Resolution imposes far-reaching obligations on States, but this key definition was left to each State to establish domestically.

This demonstrates the difficulty that the international community has had in drafting a definition of international terrorism, with even the universally condemned events of September 11th not leading to any further clarification on the concept. In addition to these definitional problems, the obligations within Resolution 1373 are costly to implement, and many States do not have the resources to carry out the requirements, or do not wish to do so. Many of these States are those that are most likely to attract terrorist organizations, either due to their lack of governmental control or lack of cohesion with the international community.\textsuperscript{72}

In order to monitor the implementation of such a comprehensive and controversial Resolution, the Security Council established the Counter-Terrorism Committee [hereafter CTC].\textsuperscript{73} The Committee obliges States to report on their implementation of the Resolution. The CTC in 2005 also began to undertake country visits, focusing on the Resolution’s implementation and evaluating any assistance that States may need to improve this.\textsuperscript{74} The CTC is assisted by its Executive Directorate [hereafter CTED]. This body produces preliminary implementation assessments that are able to provide a snap shot of the counter terrorism situation in each country, based on information reported by the country, other international organizations and public sources.\textsuperscript{75}

\textsuperscript{70} ibid at pg 162
\textsuperscript{72} T.Weiss, J. &. (2004). \textit{Terrorism and the UN: Before and After September 11}. Indiana: Indiana University Press. At pg 12
\textsuperscript{73} See http://www.un.org/en/sc/ctc/aboutus.html for more information
\textsuperscript{74} Implementation of the UN Global Counterterrorism Strategy. (2007, June). \textit{42nd Conference on the United Nations of the Next Decade}. Stanley Foundation.at pg 14
The CTC does not however have the resources or capabilities needed to comprehensively monitor or carry out its entire mandate across all 193 Member States.\textsuperscript{76} It is seen as a more analytical body, which helps to establish a network of information sharing and cooperative executive action.\textsuperscript{77} There is still considerable effort required before all Member States implement the Resolution and all its elements fully.

The Resolutions, outlined within this section, demonstrate that since September 11th, the United Nations Security Council has been active in developing a number of comprehensive measures to combat terrorism, being more involved than ever before. However, despite this increased involvement, the Security Council has not yet agreed upon an international definition of terrorism. Therefore leaving the Council open to continued criticism.

\textit{2.2.2. The General Assembly}

Left in the wake of this extensive Security Council action has been the General Assembly. This United Nations organ has been active for decades discussing counter terrorism matters. Its first extensive dealing with the topic began in 1996 with the establishment of an Ad Hoc Committee on international terrorism through Resolution 51/210. Since 2000, this Ad Hoc Committee has been negotiating a Comprehensive Convention on International Terrorism. The discussion will now move on to look in more detail at these negotiations. Following on from this it will then outline the General Assembly’s most essential contributions to the United Nations counter terrorism policy; the Global Counter Terrorism Strategy and the Universal Legal Framework against Terrorism.

\textbf{Comprehensive Convention on International Terrorism}

Since 2000, the Ad Hoc Committee has been negotiating the Comprehensive Convention on International Terrorism, with discussions still ongoing. The September 11\textsuperscript{th} attacks impacted significantly upon the discourse, increasing the need for such an instrument to be successfully drafted, in order to rationalise the increasing number of Conventions and Resolutions that were being developed as a result of the ‘War on Terror’.

\textsuperscript{76} T. Weiss, J. &. (2004). \textit{Terrorism and the UN: Before and After September 11}. Indiana: Indiana University Press. At pg 163

Despite this, at the time of writing, 14 years after discussions began within this committee, an internationally agreed upon comprehensive convention and accompanying definition of terrorism is yet to be adopted.

The Committee does currently have a draft definition of terrorism. This draft has gone through various changes since negotiations began, reflecting the different positions of United Nations Member States. It is not necessary for the purpose of this discussion to go through all such formulations, it will instead simply outline the most recent.

As of the 2013 session of the Ad Hoc Committee the definition of terrorism within draft Article 2, stood as follows:

‘Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.’

This definition is also supported by draft Article 3 that provides for a direct recognition of the ‘rights, obligations and responsibilities of States, peoples and individuals under international law’ and excludes ‘the activities of armed forces during armed conflict’ from the definition’s scope.

These two articles are closely related, with draft Article 2 covering the positive acts of terrorism and draft Article 3 providing for the necessary exclusions.

The definition takes a number of its different elements from other Conventions, in particular those formulated by the Ad Hoc Committee itself, including the Financing Convention.

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79 ibid
The negotiations within the Committee are still however impacted by a number of reoccurring obstacles that are likely to halt any further development or the adoption of the above mentioned definition.

The first obstacle is the position within the definition of the Right to Self-Determination. A number of delegations participating in the Comprehensive Convention negotiations have stressed, that any definition of terrorism needs to distinguish clearly between acts of terrorism and the legitimate struggle of peoples under foreign occupation and colonial or alien domination in the exercise of the Right to Self-Determination.\textsuperscript{80} Mainly the members of the Organization of the Islamic Conference [hereafter OIC] argued for this inclusion. Traditional western powers and India opposed this idea, stating that all terrorist acts should be deemed as unjustifiable.\textsuperscript{81}

The attacks of September 11\textsuperscript{th} 2001 only sought to entrench these strong views. States that had been victims of terrorist attacks fought more forcefully against such an exception. Islamic countries on the other hand feared that the new ‘War on Terror’ might jeopardize the fights of those seeking refuge from alien domination within countries such as Palestine and Kashmir.\textsuperscript{82}

During the most recent meeting of the Ad Hoc Committee in 2013, the issue was raised again. The representative of Egypt, speaking on behalf of the OIC, stated that the Organization supported a comprehensive strategy to combat terrorism that addressed the root causes of terrorism, including unlawful use of force, foreign occupation, and denial of the right of people living under foreign occupation to Self-Determination. It also included political and economic injustices, and political marginalization. He reiterated the need to make a distinction between terrorism, and the exercise of the legitimate right of peoples to resist foreign occupation.\textsuperscript{83}

This right also affects the discussion on what any armed forces caveat within the definition should outlaw. States in favor of the inclusion of a Self-Determination exception wish for the actions of occupiers, which clearly violate International Humanitarian Law, to be provided for under the Convention and so excluded from such a caveat. This was not a plausible inclusion for States such as the United States of America.\textsuperscript{84}

\textsuperscript{80} ibid
\textsuperscript{82} ibid
\textsuperscript{83} Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention 49\textsuperscript{th} Meeting: Press document. L/3209. Found at http://www.un.org/News/Press/docs/2013/l3209.doc.htm
\textsuperscript{84} Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17th December
In addition to the Self Determination debate, some delegations maintain that terrorism should not be associated with any particular religion, race, faith, theology, value set, culture, society or group. The representatives of Iran and Egypt highlighted this issue in recent discussions, on behalf of the Non-Alignment Movement and the OIC respectively. It seems that such a debate currently has little chance of ending, either with a compromise or a strong legal definition of terrorism.

The delegations basic positions on these obstacles continue to be reiterated at all Ad Hoc Committee and General Assembly Working Group meetings. States stress the importance of the creation of the Convention but seem to have lost hope of any positive conclusion. These positions are also heavily influenced by political tensions and standpoints, especially since the September 11th attacks. These consistently bog down the success of this negotiation process and are unlikely to be eradicated any time soon. The Ad Hoc committee set out on a ‘quest to find a common understanding of terrorism’ but no such understanding has been found within its current discussions.

This thesis therefore proposes that the international community should instead be looking at other pragmatic alternatives and developments within the United Nations systems that allow for such an understanding, in lieu of any agreement within this committee. These alternatives will now be outlined and it will be demonstrated that throughout these years of negotiations, other, more comprehensive instruments have been created by the General Assembly outside of these Ad Hoc Committee Comprehensive Convention discussions.

Global Counter Terrorism Strategy

The Global Counter Terrorism Strategy is the first essential instrument developed by the General Assembly after September 11th 2001. The idea of this Strategy was first discussed at the high-level panel on threats, challenges and change, in 2004. The panel drew attention in its report, entitled ‘A More Secure

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85 ibid
World- Our Shared Responsibility’ to the eroding of human rights and the rule of law by the ongoing war on terrorism. It suggested the idea of a comprehensive strategy that addresses the roots of terrorism, whilst still allowing these elements to be protected. This would maintain a broader outlook than the coercive measures that had been so commonly used.

Following this report, on the anniversary of the Madrid train bombings, the then Secretary General Kofi Annan, launched his proposals for such a strategy, outlining five main elements. The first being to dissuade groups from choosing terrorism as a tactic to achieve their goals, the second to deny terrorists the means to carry out their attacks, the third to deter States from supporting terrorists, the fourth to develop State capacity to prevent terrorism and the fifth to defend human rights in the struggle against terrorism. The aim of such a strategy was to help sustain the political will of States to maintain the fight against terrorism on the global agenda. It also aimed to provide a practical outline to assist States in their counter-terrorism efforts, whether nationally, regionally or globally.

Following this speech, there was an increased international impetus to streamline actions. For the first time, at the World Summit in September 2005, all Member States agreed on a clear and unqualified condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes. They also agreed to make every effort to create a Comprehensive Convention on combating international terrorism, along with a common definition within the Ad Hoc Committee. The States additionally encouraged the General Assembly to further develop the elements of a Global Strategy, to promote coordinated, consistent and comprehensive responses to counter terrorism at all levels.

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88 Report of the Secretary-General’s High-Level panel on threats, challenges and change: “A more secure world: Our shared responsibility” United Nations Department of public information 2004
89 ibid pg 48
90 Secretary-General keynote address to the closing plenary of the international summit on democracy, terrorism and security, “A Global Strategy for Fighting Terrorism” Madrid Spain, 10 March 2005, accessible at <http://www.un.org/sg/statements/?nid=1345?>
In response, the Secretary General released a report entitled ‘United Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy’. Each of the previous five elements were refined and additional measures suggested. These additional measures related specifically to the improvement of the United Nations, to internally strengthen and develop its capacity to deal with the threat of international terrorism.

Using this as a basis for discussion, on the 11th May 2006 the General Assembly began consultations. These resulted in the adoption of the United Nations Global Counter Terrorism Strategy on the 8th September 2006.

The final strategy is comprised of a comprehensive Resolution and an annexed plan of action. It condemns terrorism in all its forms and manifestations, reiterating much of the World Summit and Secretary General’s discussions.

The Plan of Action contains a number of steps that States have resolved to take, in order to better combat international terrorism. The 60th General Assembly President Jan Eliasson stated that:

“The Plan of Action sets out a number of practical and operational measures that will enhance our efforts to fight terrorism. These include the call for Member States as well as the United Nations system to step up their efforts and strengthen their counter terrorism measures in a number of concrete areas.”

This includes instructing Member States to become parties to the many international Conventions and Resolutions against terrorism.

Additionally, the strategy establishes four pillars of action.
The first outlines measures to address the conditions conducive to the spread of terrorism.
This includes resolving to continue to use and strengthen the capacities of the United Nations to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions.

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The second pillar outlines measures to be taken to prevent and combat terrorism. States through this have resolved to refrain from encouraging terrorist activities and increase their international cooperation in the apprehension and prosecution of perpetrators.

The third pillar outlines measures to build State’s capacity to prevent and combat terrorism and to strengthen the role of the United Nations in terrorism prevention. It additionally encourages Member States to make more voluntary contributions to United Nation’s counter-terrorism cooperation and technical assistance projects.

The fourth and final pillar involves measures to ensure respect for human rights and the rule of law. It recognises that effective counter terrorism measures and human rights are not conflicting goals but are complimentary and mutually reinforcing. It also includes the promotion of the rights of victims of terrorism, something, which is a strong theme throughout the strategy.97

Following its development, the framework has been reviewed periodically. The first review was on the 8th September 2010. In another Resolution adopted by consensus, Member States reiterated their condemnation of international terrorism and reaffirmed their responsibility in implementing the strategy. The second followed in 2012 with similar success. 98

This continuing approval of the strategy by all 193 Member States is extremely important to add much-needed legitimacy to United Nations counter terrorism policy. It also allows for greater opportunities for the United Nations to work together with regional organizations, civil society and the private sector in their efforts, resulting in a synthesized international approach.99

Despite the Strategy representing a great commitment by States, there is undoubtedly still a gap between international rhetoric and the reality of a States practice domestically. The Strategy does not have the authoritative status of an international Treaty, and although States resolve to adopt it, it is not binding and there is little enforcement in place.

It additionally does not contain an independent definition of international terrorism. It does however make reference to the United Nations international counter terrorism instruments, which as this thesis contends includes such a definition, within Article 2(1) of the

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97 United Nations General Assembly Resolution 60/288, 8 September 2006
98 United Nations General Assembly Resolution 10/977, 8 September 2010
International Convention for the Suppression of the Financing of Terrorism. The recognition of such a definition could further strengthen the Global Strategy and increase its legitimacy.

The approach of the strategy is also “one size fits all” and although there was international consensus, there is a feeling that such a strategy is very northern hemisphere focused. This is despite most of the casualties of terrorism being from the southern hemisphere. These countries may not have the capacity to establish such a strategy. For example, to prevent the financing of terrorism, many rigorous and costly financial controls need to be put in place. This demonstrates a lack of understanding of the cultural differences and needs of Member States.

There is therefore still a long road forward to ensure global implementation of the Strategy. This should not however diminish the success of the General Assembly. The Strategy represents the first international agreement on comprehensive matters of counter terrorism and demonstrates that States, although reluctant, are beginning to realise that an international, United Nations led way forward is important in the future fight against terrorism.

**Universal Legal Framework against Terrorism**

The Strategy also importantly makes reference to another essential General Assembly initiative. It requires that States will ratify or implement the Conventions and Resolutions included in the Universal Legal Framework against Terrorism. This Framework is significant to this thesis’ main claim, as it contains the only definition of international terrorism in force, within one of its Conventions.

The Universal Legal Framework against Terrorism is not a legal phenomenon but is a set of instruments, adopted at the global level, which contain a series of legally binding standards for States to prevent and counter international terrorism. These were discussed briefly within this Chapter, and have developed from 1963 onwards and cover a multitude of different terrorism related areas.

100 ibid pg 2
101 ibid
In this context the term ‘universal’ does not intend to mean that each Convention is uniformly binding. It instead seeks to describe that such agreements are open to all Member States of the United Nations or affiliated Agencies, rather than being restricted regionally or aimed at specific groups.\(^{103}\)

The Framework itself includes a variety of elements which all aim to increase international cooperation and promote the rule of law, through a criminal justice approach to terrorism prevention. It is made up of two distinct categories, six Security Council Resolutions\(^{104}\) binding on all Member States, and 18 Conventions, Protocols and Amendments\(^{105}\) binding on those who are parties.

The Conventions demonstrate the sectoral approach taken by the United Nations and each belong to different thematic areas, reflecting a number of varied terrorist offences. These include transport related matters, chemical, biological, radioactive and nuclear terrorism and terrorism financing. This approach demonstrates the political sensitivity of the international approach towards terrorism, as presented above in the historical overview.

The Conventions are all built upon a common structure, which is then moulded by specific offences reflecting each thematic area.

The jurisdictional scope of the 18 Conventions has been open to debate. They are used to prosecute the acts of non-State agents, but State terrorism is not directly discussed. The Conventions adopted after 1999 include a preamble outlining that the Member States of the United Nations reaffirm their ‘unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable wherever and by whomever committed.'\(^{106}\) This could suggest that acts of State terrorism can be prosecuted and that the status of the perpetrator is irrelevant. However, they also provide provisions outlining

\(^{103}\) ibid pg 1
\(^{104}\) United Nations Security Council Resolutions 1267, 1373, 1456, 1540, 1566 and 1624.
that the Convention shall not affect other rights, obligations and responsibilities of States and individuals under international law. In particular this refers to the purposes of the United Nations, International Humanitarian Law and other relevant Conventions. Some of these provisions provide immunity from prosecution for certain State agents. The scope is therefore still open to interpretation, dependent on the particular case.\textsuperscript{107}

The common structure that all Conventions are built upon includes a number of different mechanisms that reflect the criminal justice aspects of terrorism prevention.

This includes, limiting each Convention to transnational cases, demonstrating the support for international cooperation. For example, Article 3 of the Financing Convention states that “This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has the basis…to exercise jurisdiction.”\textsuperscript{108}

The Conventions also include common mechanisms on jurisdiction. One of the most important elements is the principle of \textit{aut dedere aut judicare} or extradite and prosecute. This provides that those who commit any of the terrorist crimes included in the Conventions are either brought to trial by their own Governments, or are extradited to a country that is willing to bring them to trial.\textsuperscript{109} The State should, if not extraditing, submit to prosecution without exception. The aim of such a provision is to deny terrorists safe havens and make the world inhospitable to them and their supporters. This principle needs to work jointly with the other jurisdictional mechanisms included in the Convention, such as mutual legal assistance. This is important to facilitate the exchange of information, necessary for such procedures, such as providing evidence to the prosecuting State.

This common structure of the Framework is then supplemented by the specific terrorism offence that the Conventions cover. The offence of terrorist financing will be discussed in more detail in the following Chapter.


The outlining of these offences makes each Convention unique, whilst their common framework ties them together.

This thesis intends to suggest, that such a common framework should be developed further to include the definition of international terrorism found within Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism 1999. This has the potential to add clarity and legitimacy to the framework as a whole.

The General Assembly’s Global Strategy and a number of Security Council Resolutions call for the ratification of all of these 18 Conventions. Some States have been reluctant to do so for numerous reasons; the most prominent being that States do not see all 18 Conventions as specifically relevant to themselves. A landlocked State, for example may not feel the need to implement maritime obligations. Technical assistance and monitoring bodies such as the CTC, suggest that such States take note of the international cooperation elements of each Convention. They contend that a national of a landlocked State may commit a maritime crime outside the country or may become victim to such a crime. Therefore all Conventions are deemed by the United Nations to be necessary and relevant to all Member States.

This demonstrates the importance of developing the monitoring capability and technical assistance, provided for States, in order to implement the framework. This is outlined in the Global Counter-Terrorism Strategy in paragraph III-7 of the Plan of Action. It empowers the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime with the task of providing States with technical legal assistance on the implementation of the framework. This intends to aid all nations with the implementation of such a framework, building capacities and abilities of legal officials and governments. It is important that such a strategy has underpinning support as it helps narrow the gap between southern and northern nation’s capabilities. It is able to highlight the importance and benefits to each State, encouraging ratification and universal acceptance.

Six Security Council Resolutions then compliment these Conventions. These, as stated above, are binding on all United Nations Member States. They therefore send a strong message that international terrorism is wrong and that mechanisms should be put in place to cooperate internationally. Each Resolution however does not provide much detail on how this can be achieved.

This demonstrates the importance of the creation of the Universal Framework, allowing all United Nations counter terrorism instruments to be seen together, mutually reinforcing one another. This could be strengthened further if such a framework included a definition of international terrorism.

The Framework is of course still dependent upon national implementations, relying on each State to have stable national institutions for full implementation and to have appropriate policies in place to allow for full international cooperation. The criminal code/policy of each State and their legal traditions dictates how each Convention or Resolution is implemented and how each crime is prosecuted.

This is a necessary evil as there is no international tribunal that can prosecute terrorist actions. The International Criminal Court is granted jurisdiction over many crimes, including genocide and war crimes, but terrorism, probably due to its controversial nature and lack of definition was rejected during Rome Statute negotiations. Therefore international law takes the position of a guide rather than an adjudicator in international counter terrorism policy. This inevitably results in differing implementation and some lack of uniformity.

The Universal Framework is an important instrument in order to aid in the organization of the United Nations counter terrorism Conventions and Resolutions. In place of having a Comprehensive Convention, this framework is able to provide an alternative that reflects the historical roots of United Nations counter terrorism policy and allows for States to have sovereignty on the topic and its implementation. As this thesis will later demonstrate, it may also include a definition of terrorism, fit for purpose, to provide legitimacy to the Framework and policy as a whole.

113 United Nations Security Council Resolutions 1267, 1373, 1456, 1540, 1566 and 1624.
The use of such a tool is, at present, the best way forward in lieu of international cohesion on the Comprehensive Conventions definition within the Ad Hoc Committee.

2.3 Conclusions

This Chapter has outlined the growth of the United Nations role in counter terrorism over the past half century. Today, the United Nations is more involved than ever, and its policies are becoming increasingly important to the counter terrorism considerations of all States. Its mandates and expertise in security, development and its facilitation of international cooperation, allow it to contribute to and bring together all important aspects in the eradication of international terrorism. The increased acceptance by Member States, through the creation of the Global Counter Terrorism Strategy and the Universal Framework Against Terrorism, demonstrates a realization that cross-border cooperation is now necessary to deal with a cross-border crime such as terrorism. An international compromise has developed between State’s political, legal and cultural reservations on the definition and scope of terrorism, when applying and developing this Global Strategy and Universal Framework. This Chapter has demonstrated that such ability to compromise is lacking within the Ad Hoc Committee discussions, which have been increasingly bogged down by political considerations.

The General Assembly’s strong alternative policy, outlined above, needs now to be strengthened further, through increased international recognition for the potential definition of terrorism that it contains.

The Next Chapter will examine in more detail the International Convention for the Suppression of the Financing of Terrorism 1999. This Convention is found within the Universal Legal Framework and includes the only international legal definition of terrorism.
3. International Convention for the Suppression of the Financing of Terrorism

The thesis will now move on to examine in more detail the International Convention for the Suppression of the Financing of Terrorism 1999 and a number of its important provisions. This Convention forms a part of the Universal Legal Framework against Terrorism. It is also the only counter terrorism Convention in force that contains a definition of an act of terrorism. This definition will be analyzed in depth within Chapter four, where it will be applied to a wider context and proposed as a practical option for an independent United Nations definition of terrorism.

The current Chapter however, aims to first provide the context and background for the next Chapters discussion. It will examine the development of the Financing Convention and how the definition is applied within its current context. It seeks to add further legitimacy to the definition by praising and critiquing the Convention that it is taken from, analysing why this Convention has gained such a high level of international acceptance.

3.1 Legislative history

3.1.1 Agreeing to draft

In the early 1990’s the financing of terrorism became a topic of interest on the world stage. States were beginning to realise that in order to end international terrorism, preventing its financing was a necessary step forward. Financing is the lifeblood of any organization and strengthening its international regulation could prevent further large-scale attacks and the growth of international terrorist organizations.\(^\text{115}\)

Anne Clunan suggests that terrorist financing includes two sets of financial activities.\(^\text{116}\)

The first is the purchase of items such as food, transport or goods like mobile telephones used in the preparation of bombs or for communication. These are perfectly legal until linked to a specific criminal act. The second represents intangible funds, used in the support of terrorist operations, training and propaganda. These can be raised through illegal means such as drug trafficking or arms smuggling but also legitimately through charities or humanitarian groups.


These two areas of funding cover a diverse range of activities that need to be adequately addressed by any countering terrorist Financing Convention.

A number of different international and regional organizations began discussions on preventing terrorist financing during this period. They include the United Nations Security Council and General Assembly, the European Union and the G-8.\(^\text{117}\)

In 1996 the General Assembly established, through Resolution 51/210,\(^\text{118}\) an Ad Hoc Committee that was tasked to further elaborate the international counter terrorism conventions and eventually to develop a comprehensive legal framework dealing with international terrorism and its accompanying definition of terrorism. The Resolution stated that Member States should ‘take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect.’\(^\text{119}\) Financing was therefore initially left for States to deal with domestically. The Ad Hoc Committee’s mandate was instead focused upon developing Conventions on other areas of counter terrorism.

Despite this, in 1998 the French delegation introduced the concept of the Financing Convention into the international domain. The Foreign Minister of France, Mr. Hubert Védrine, called upon the General Assembly to adopt an instrument to prosecute those who finance and instigate terrorist attacks.\(^\text{120}\) The movement to negotiate the Financing Convention was supported by a number of high profile delegations including the United States, Russia and the European Union.\(^\text{121}\)

Following this action, the General Assembly through Resolution 53/108 of 1999 decided that the Ad Hoc Committee ‘should elaborate a draft International Convention for the Suppression of Terrorist Financing to supplement related existing international instruments.’\(^\text{122}\)


\(^{118}\) United Nations General Assembly Resolution 51/210, 17 December 1996

\(^{119}\) General Assembly Resolution 51/210, 17 December 1996 at 13 (f)


\(^{122}\) United Nations General Assembly Resolution 53/108, 26\(^{\text{th}}\) January 1999 at para 11
The Financing Convention was one of three Conventions to be produced by the Ad Hoc Committee. The first was the International Convention for the Suppression of Terrorist Bombings adopted by the United Nations in 1997 and second was the International Convention for the Suppression of Acts of Nuclear Terrorism adopted in 2005. These all have a place within the Universal Legal Framework Against Terrorism and are based upon the same common framework. The widening of the mandate of the Ad Hoc Committee to cover the Financing Convention was however somewhat controversial. The Committee’s original mandate was intended to address first the Terrorist Bombings Convention, then the Nuclear Terrorism Convention and then be completed by the negotiation of a Comprehensive Convention on International Terrorism. The development of a Comprehensive Convention has its foundations in a proposal supported by India and championed by much of the southern hemisphere. The French introduction of a Financing Convention sought to disrupt this mandate and further the already extremely sectoral approach taken by the United Nations. India however was willing to concede, providing that immediately after the creation of the Terrorist Financing Convention, discussions on a Comprehensive Convention would be taken on a priority basis.

3.1.2 The drafting process

Therefore, General Assembly Resolution 53/108 had set the stage for the Financing Convention’s drafting and the Ad Hoc Committee started its considerations in March of 1999. France had highlighted that the aim of the Convention was to fill the gap in international law by creating an international convention that countered the acts of those who supplied funds or sponsored terrorist acts. The draft convention was intended to punish those financing terror acts but also to prevent such financing through increased international cooperation, specifically through mutual legal assistance. For an international problem such as terrorism an international solution was considered essential. France’s original text,

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drafted primarily by domestic lawyers, was then submitted to the Committee to be further elaborated through the discussion process.126

The Committee’s discussions included a more diverse mix of States than previous negotiations had seen. Financial transaction hubs, whose interests may be directly affected by such a Convention, were especially active. This included Switzerland, who at the time was not a member of the United Nations and was granted observer status to participate in the Committee’s negotiations.127

The drafting discussions were unique in that they focused not on the Financing Convention as a whole but on its specialised articles. The common structure of the Universal Framework Against Terrorism had been discussed in detail many times before and by this Committee itself in its drafting of the Terrorist Bombing Convention.128 Therefore detailed negotiations on this area were not considered necessary. The negotiations instead focused upon the various definitions central to the Convention, including that of funds and that of terrorism itself. It also included factors relating to the criminalization of financing as an offence, the liability of legal entities, the freezing and seizure of funds and international cooperation in relation to financial matters.129

During this drafting process some States questioned whether such a Convention was needed, suggesting that individuals who financed terrorism could be considered accomplices and dealt with as ancillary offenders under the other Universal Framework Conventions.130

The International Monetary Fund [hereafter IMF], in its publication ‘Suppressing Financing of Terrorism’,131 counteracts these concerns by suggesting a number of reasons why counter terrorism financing measures are necessary and relevant. The IMF highlight that terrorism itself has a unique character and is based upon the promotion of certain

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126 ibid
128 International Convention for the Suppression of Terrorist Bombings 1997
ideologies. All counter terrorism conventions should focus on the need to prevent the development of extremist groups and the promotion of these ideologies. This is the case regardless of the actual planning of a physical terrorist act, especially as finance could be provided for actions such as recruitment or training. A principal physical act such as hijacking may not be attempted or realized for a significant amount of time. This represents a problem to those who promote the use of ancillary offences to deal with terrorist financing, especially since the Universal Framework Conventions give much sovereignty in application to State parties and their domestic laws. In many domestic jurisdictions, for example, ancillary offences can only be tried when the principal act is at least attempted.\textsuperscript{132} This may not be the case in many terrorism financing offences. In addition, the offence of conspiracy, that deals with planning and preparation, often necessitates that more than one actor be involved. However, modern day technology allows one lone individual to finance terrorism.\textsuperscript{133} These scenarios demonstrate the importance of such a Convention. It allows for the discovery of the planning or preparation of large-scale terrorist acts and cuts off the organization behind them.

Koh provides another argument for adoption of the Financing Convention. He suggests that terrorist groups that have strong financial infrastructures alter the concept of harm. These groups, such as Al-Qaeda, can develop harm from being sporadic and local to being continuous and broad. Strong financing can develop an organization’s influence and expand its scope of activities.\textsuperscript{134} The development of a Convention to deal with such offences is therefore considered an international accomplishment and strong addition to the Universal Legal Framework.

Following elaboration by the Ad Hoc Committee, the Working Group of the General Assemblies Sixth Committee was given the draft to further elaborate in late September 1999. After further negotiations, a final text was presented, which was recommended for adoption by the General Assembly’s Sixth Committee. This text of the Convention was initially rejected by Cuba, Lebanon, Libya and Syria. These delegates believed that the Convention should define terrorism in all its forms and

\textsuperscript{132} ibid. At pg 50
\textsuperscript{133} ibid. At pg 51
\textsuperscript{134} Koh, J.-m. (2006). \textit{Suppressing Terrorist Financing and Money Laundering}. Berlin, Germany: Springer. At Pg 66
manifestations and it should not be adopted until there was general agreement on that issue. As a compromise, the Chairman allowed the Working Group to submit the draft Convention to the Sixth Committee not for adoption but for further discussion and consideration. It was therefore submitted as part of the Working Group’s report. The Ad Hoc Committee chairman introduced the report at the Sixth Committee’s annual debate on international terrorism. He suggested that the Financing Convention had been supported by most delegations and that it should be adopted, stating that the text should not be reopened for further deliberation since it ‘represented a delicate balance of interests.’ This kind of compromise has not been seen within the current Comprehensive Convention negotiations. A number of delegations such as the European Union and the Rio Group supported such an adoption. The United States even deemed its drafting as ‘excellent’. There were still however reservations, especially by the Syrian and Lebanese delegations, who wished for the Convention to go further in its definition of the offence. In bilateral discussions with these delegates a compromise was agreed upon. This resulted in a strong restatement of the Right to Self-Determination being included in the preamble of the draft Resolution, which would supplement the Convention. This was in the form of a cross-reference to the 1991 General Assembly Resolution on Terrorism, a Resolution that had been adopted by consensus. These two States were moderately happy with this result, and the Sixth Committee was then able to adopt the Financing Convention without a vote and submit it to the plenary of the General Assembly for final approval. The plenary adopted the instrument on the 9th December 1999, through Resolution 54/109, and requested that the Secretary General open the Convention for signature.

The negotiations of the Convention were deemed to be relatively successful. It took only 16 months from the first introduction of the draft by the French delegation for the Convention to be adopted by the General Assembly. This is remarkable compared to the seven years it had taken the same Ad Hoc Committee to create the Nuclear Terrorism Convention adopted in 2005.

During this drafting time the Security Council was also actively engaging in countering financing of terrorism activities and in October 1999 it adopted Resolution 1267. This, as described in the previous Chapter, was directed against the Taliban and Al Qaeda’s actions in Afghanistan. It included many financial sanctions aimed at these organizations. It set the stage for having targeted financial sanctions as a way of dealing with international terrorism and paved the way for the adoption of the Financing Convention two months later, which was able to add further clarity to this sanction regime.144

The Convention however, despite the increased international support for counter terrorist financing actions, was slow to enter into force. This is the burden of all Universal Framework Conventions due to their controversial nature. The Financing Convention did not do so until 10th April 2002.145

3.2 September 11th 2001 and the Convention.

The entry into force of the Financing Convention was influenced substantially by the international surge in counter terrorism efforts following the attacks of September 11th 2001. Before this, from 1999 to 2001, only Botswana, Sri Lanka, the United Kingdom and Uzbekistan had ratified the Convention.146 This is despite it being drafted with relative ease. Now in 2014, 15 years later, it is the most ratified counter terrorism convention, within the Universal Framework, having 185 parties, this is in part due to the issue of

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terrorist financing and the Financing Convention itself being of particular importance in post September 11 rhetoric.147

The previous Chapter highlighted the importance of Security Council Resolution 1373 in the development of United Nations counter terrorism policy. This Resolution encouraged States to ratify all of the Universal Framework Conventions, but singled out the Financing Convention and financing in general as a particular focus of international actions. The text of the Resolution mirrors many of the specific requirements within the Financing Convention but is binding on all United Nations Member States. The Resolution however, as opposed to the Convention, represents a quick immediate attempt to respond to international terrorism. It requires States to freeze without delay funds and other financial assets or economic resources of suspected terrorists. It does not however seek to establish strong domestic structures to do so. It also delves into the wider aspects of terrorist financing such as its links with organised criminal groups.148 The Financing Convention provides a more long-term solution with many much needed definitions and clarifications. This may explain its increase in popularity, with States looking to its provisions for more guidance on what the Resolution’s implementation entailed.

The increase in ratification of the Convention was not necessarily solely due to Resolution 1373. The September 11th attacks led to an increase in international awareness and willingness to deal with counter terrorism issues. This resulted in a substantial growth in technical assistance measures, especially in regards to counter terrorist financing. The G8, for example, funded much of the United Nation’s technical and financial aid in the area.149 The Security Council also engaged organizations to cooperate in bilateral and multilateral aid and assistance in order to achieve the new ambitious counter terrorism objectives.150 Resolution 1373 itself established the CTC, which, as outlined above, is a permanent body that ensures compliance with the Security Council’s Counter Terrorism Resolutions.

150 ibid
The CTC prioritises Counter Terrorism Financing measures when reviewing State’s implementation reports. It is found within Stage A of the reviewing process when considerations are made on the developing State’s executive machinery. All other counter terrorism considerations are found within the Stage B.\textsuperscript{151} This demonstrates that establishing financial processes provided for by the Convention is a key priority.

The Financing Convention also finds support through the Financial Action Task Force [hereafter FATF] Special Recommendations. These comprise 40 recommendations on money laundering and nine on terrorist financing that have been developed by the FATF. The first eight recommendations on terrorist financing were added in October 2001, shortly after the September 11 attacks and a ninth was added in 2004. The first of these recommendations advises States to adopt and implement the Financing Convention and the United Nation’s financing Resolutions.\textsuperscript{152} The further recommendations cover the offences that are criminalised in the Financing Convention itself.

The FATF in addition to making such recommendations conducts evaluations in order to ensure their members are following the outlined guidelines. States that are not in compliance with such measures are put on a non-compliance list and required to make the necessary changes. These are an excellent way to ensure and monitor the compliance of States with the Financing Convention and its definition of terrorism.\textsuperscript{153}

The actions of the United Nations, post September 11, had a great influence on the counter terrorist financing movement especially with Resolution 1373 obligating reluctant States to take on financial controls without their consent. The provisions of the Financing Convention were used by States to add much needed clarity to the legally binding elements within the Resolution, including the elements of a definition of an act of terrorism.

Since this growth in ratification there have been approximately $147 million in assets frozen and many countries have legislated to freeze assets associated with Al Qaeda and the Taliban, with 170 Member States passing legislation against the financing of terrorist groups in general.\textsuperscript{154}

\textsuperscript{151} Koh, J.-m. (2006). \textit{Suppressing Terrorist Financing and Money Laundering}. Berlin, Germany: Springer. At pg 90
\textsuperscript{152} See Financial Action Task Force http://www.fatf-gafi.org/topics/fatfrecommendations/ for more detail
The above sections have outlined the negotiation process of the Financing Convention by the Ad Hoc Committee on Terrorism and have importantly drawn attention to the effect that September 11th has had upon its adoption. This has also led to a number of strong technical assistance mechanisms prioritising its proper implementation. The above sections aim to demonstrate the strength of the Convention as an instrument that adds clarity to State’s international obligations. The international support the Convention attracts is also significant as this Convention includes the only international definition of terrorism currently in force, and this thesis aims to suggest that this definition has the potential to have a wider scope of applicability. It would not be as successful in this respect, if the Convention as a whole did not have such strong international support.

3.3 Specialised provisions

This section will examine and analyze in more detail some of the unique provisions included within the Financing Convention. It seeks to provide a general overview of the Convention articles and why its adoption is important to the countering terrorist financing movement and to the United Nations counter terrorism policy as a whole. The aim of this analysis is to provide context to the detailed discussion in the next Chapter on the definition of terrorism, found within Article 2(1) of the Financing Convention. This section will examine how this definition is applied within the context of financing of terrorism.

The Convention is built, like the other Universal Framework Conventions, upon a common structure, which as outlined in the previous chapter includes measures that facilitate international cooperation such as mutual legal assistance and the requirement to extradite or prosecute. To supplement this, each Convention then has its own specialized provisions, unique to their subject matter. The Financing Convention includes different provisions that aim to outlaw the financing of terrorism.

The Convention stands out from the rest of the Universal Framework as it targets an intangible process rather than a physical act committed by an individual or a group of individuals. The movement of finances, in the modern day, is most likely carried out through the electronic services of banks and trusts. Therefore, the drafters of the
Convention had to target these legal entities and regulate their actions, in order to effectively eradicate the financing of terrorism.\textsuperscript{155}

Article 1, is the first article of particular importance to this discussion. This provides various definitions important to the Convention including the definition of funds, provided in Article 1(1). This outlines that funds are ‘assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.’\textsuperscript{156}

This definition is very comprehensive and stretches far beyond ‘funds’ common dictionary meaning. The Convention’s definition would allow for many different items to be covered including buildings or even animals.\textsuperscript{157} Therefore, individuals who, for example, provide a car to be used in a terrorist car bombing, can be found guilty of two separate universal framework offences. They could firstly be liable as an ancillary under the Terrorist Bombing Convention, but also, as a primary actor under the Financing Convention’s definition of funds. The only objects that could plausibly not be considered a fund would be one with little or no monetary value.\textsuperscript{158} It is unlikely however that terrorist groups would have use for any such item.

The drafters may have chosen such a wide definition, in order to allow for the many multifaceted elements of terrorism operations, allowing for training and infrastructure provisions such as food and shelter as well as more obvious items to fall within the scope of the convention.\textsuperscript{159}

Article 8 then supports this definition of funds. It requires the identification, detection and freezing or seizure of any of these funds and the forfeiture of any proceeds derived from them.\textsuperscript{160} This includes a caveat in Article 8(5) that states that this article will be

\textsuperscript{158} \textit{ibid} at 497
\textsuperscript{159} \textit{ibid}
implemented without prejudice to the rights of third parties who are acting in good faith. Therefore if such money is transferred to an innocent party without their knowledge, they will not be subject to forfeiture.\textsuperscript{161} It is also provided that, subject to domestic considerations, such forfeitures should be used to benefit those who are victims of terrorism. This reflects the victim-orientated outlook of the Universal Legal Framework Against Terrorism and the Global Counter Terrorism Strategy.\textsuperscript{162}

This definition of funds covers a wide range of activities. It was therefore important that the Ad Hoc Committee drafted a definition of terrorism for use within this Convention. It is able to designate when such funds are terrorist and therefore considered to be used for illegal purposes. If no such definition was drafted, there would be a significant lack of clarity as to when such activities could be legitimately prosecuted, with much being left to domestic interpretations.

Following on from this, Article 2 provides for the definition of the offence of financing of terrorism, this is the backbone of the Convention. It states that:

‘1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.’ \textsuperscript{163}

Article 2(1) (a) and (b) is of particular note to this thesis and will be considered in more detail in following Chapter. It represents the only definition of terrorism to be agreed upon

\textsuperscript{161} ibid at pg 304
\textsuperscript{163} ibid Article 2(1)
internationally. This section however first focuses on the other elements of Article 2, primarily paragraph one. This provides the context for the current application of the definition and will provide more detail on the primary offence of the Financing Convention.

The offence of terrorist financing within paragraph one of Article 2 can be split into two distinct parts. The first is the physical offence, that is the providing or collecting of funds. These constitute two separate offences. An individual can both collect the funds and then provide the funds to the terrorist groups and be guilty successively of both or simply of one.\textsuperscript{164}

This is then followed by the Mens Rea element of each offence, that there is intention or knowledge that such funds will be used for terrorist purposes. The difference between the knowledge and intention variable is however small. Intention demonstrates a desire that funds will be used whereas knowledge demonstrates some level of certainty. However, when dealing with such organizations a high level of certainty is unlikely.\textsuperscript{165}

The definition of financing of terrorism also includes the term ‘unlawfully’ in order to designate those types of actions that will constitute the offence. This did not appear in the original draft presented by France. It is likely that it was introduced in order to counter the concerns of humanitarian and charitable organizations. During the drafting process, the United Nations High Commissioner for Refugees and the International Committee for the Red Cross, along with a number of other humanitarian organizations, raised concerns that their assistance may result in prosecution under the definition of financing of terrorism.\textsuperscript{166}

They stated that a wide definition would impede the good work of aid workers during armed conflicts. They admitted that during such situations, funds were distributed to thousands of individuals, and as a result some of this assistance may end up in the hands of organized criminal groups including terrorists. They stated that it would be impossible for such an organization to carry out assistance without this inevitable consequence and it was deemed as a necessary evil.\textsuperscript{167} They proposed the inclusion of a disclaimer to cover

\textsuperscript{165} ibid
\textsuperscript{166} Comments by the UNHCR, UN Doc A/C.6/54/WGI/INF/1 and by ICRC at UN DOC. A/AC.252/1999/INF/2.
humanitarian purposes within the Convention. The disclaimer was rejected during the negotiations. As a compromise the definition within Article 2 was made more general and given stronger threshold, so that humanitarian activities could be excluded from the net. This included the requirements that funds be ‘unlawful’. The inclusion of this word however could also lead to diversity in national application, depending on each State’s interpretation of the word ‘unlawful’. National courts may be able to use it in the acquittal of individuals financing terrorism.

The offence of terrorist financing, also poses a general problem, in that it is essentially victimless. Aust points out that due to this it is almost impossible that a sum of money used to finance a particular attack, could be proved, with a high degree of certainty, to be intended for that particular purpose. Therefore, in order to counter this consideration, Article 2(3) outlines that ‘for an act to constitute an offence... it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1.’

It is also important to note in this regard that a terrorist attack is in general not very costly. It is estimated that the large scale September 11th attacks cost only $500,000. This included allowing 19 terrorists to train as commercial pilots, enter and exit the United States numerous times and live adequately for months. Any contribution to this small amount of financing still supports the terrorist’s final aim and so it was necessary that this provision of the Convention cover such an occurrence. This discussion demonstrates the importance of the Mens Rea element to the offence. It allows for legal purchases to be designated as unlawful due to the individual’s intention for their use.

The result of the specificity of such provisions means that the Convention needs direct action for implementation by domestic authorities. It is unlikely that under domestic criminal law, such victimless action would already constitute a general offence.

The Financing Convention is unique in that it keeps terrorism as a core element in all provisions; it is therefore essential that it includes a definition of such an act. This is the opposite of many of the other Universal Legal Framework Conventions that are able to slot

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168 ibid
easily into existing domestic provisions. These other Conventions are also able to cover incidents without terrorist elements. An individual may, for example, bomb a plane in order to gain a life insurance policy, and be prosecuted under the Aviation Convention provisions, even though they lack requisite terrorist intent.172

This demonstrates the importance of the Financing Convention having a definition of terrorism, to ensure that the intended use for such funds is terrorist in nature. The Financing Convention therefore requires a very active implementation process by domestic legal systems. The consultation and development of such processes may be costly and difficult for certain States to achieve.

Other than the criminalization of the financing of terrorism itself, the Convention also includes a number of other important aspects, essential to its operation. First, in order to criminalize the financing of terrorism, it is important that the Convention is able to criminalize the actions of legal entities. The Convention aims to make banks and trusts aware that their active involvement, or the knowledge of actions by their senior personnel, will result in the organizations vicarious liability.173

This is dealt with through Article 5 (1) of the Convention. It states that ‘Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that entity has, in that capacity, committed an offence set forth in Article 2. Such liability may be criminal, civil or administrative.’174

Most of the other Universal Framework Conventions do not have such provisions, as acts are of a tangible nature, committed by individuals and not entities. Under the Financing Convention it is not necessary that the entity should have benefited from the transaction, but a senior employee must commit the offence. This employee will only become liable if the offence is carried out in an official capacity.175 The establishment of this is not an easy

task but for example, it can be presumed that if a bank manager is accessing official computers to transfer illicit funds to terrorists, they are acting in an official capacity. A private individual would not have the access or the knowhow to carry out such a transaction.  

Further to this, it is worthy of note that the article only applies to legal entities located within the particular State’s territory. This suggests that one State would not be able to hold another liable for committing this offence. This raises a number of implications with regards to embassies and governmental offices located in Member States and the legality of their financial transactions.  

This article is also supported by Article 12 that prevents such legal entities from hiding behind the rules of bank secrecy. In addition Article 13 protects the international cooperation mechanisms of mutual legal assistance and extradition by preventing the offence of terrorist financing from being designated as a fiscal offence.  

However, like most other provisions the article includes a caveat in order to protect state sovereignty. It provides States with discretion as to its application within domestic law. At present not all States have integrated systems in order to deal with vicarious liability or they are in a period of development. This leads to diversity in application of a provision at the heart of the Financing Convention operation.  

This section has attempted to provide a general overview of a number of the important provisions included within the Financing Convention. It highlights how the Convention has grown to become the first to truly deal with international terrorism as a core element, requiring a number of important changes to national legal systems. This also demonstrates why it is the only international counter terrorism convention currently in force that includes a definition of international terrorism and how such a definition was so easily drafted.

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176 Ibid


179 See French Nouveau Code Penal 1994 – a newly developed example

The Financing Convention has created innovative provisions, stretching international counter terrorism initiatives to cover intangible acts and legal entities such as banks. Its definition of terrorism has been tailored to add clarity to such unique provisions. The next Chapter will outline the various elements of this definition in a more detailed manner, looking in particular at whether this financing context affects its ability to be treated as a general pragmatic definition of terrorism.

3.4. Conclusions

To conclude; overall this chapter has sought to develop a background to the final Chapter’s discussion on the Conventions definition of terrorism. It has also attempted to demonstrate the importance of the International Convention for the Suppression of the Financing of Terrorism as a centerpiece of the Universal Legal Framework against Terrorism. It represents a strong and innovative approach by the United Nations General Assembly and filled an important gap in its counter terrorism policy.

Its negotiations represent a successful and succinct discussion that demonstrates that innovative Conventions can be developed within the space of a year. The Convention, despite its demanding provisions, holds the highest ratification rate within the Framework. Its provisions are costly to implement but the Convention has the benefit of being supported by a number of technical assistance and implementation programs that ensure that all national legal systems combat the financing of terrorism in cooperation with one another and have the resources and knowledge to do so. It was important to this thesis’ main claim that the current Chapter demonstrated the specific and unique context in which the definition of terrorism was drafted. This aimed to contribute to the debate on whether the Financing Conventions definition can be applied more generally, as a universal definition of terrorism.

The Financing Convention is a strong international effort to eradicate an international problem. It was important for this Chapter to establish the strength of the Convention as a whole, in order to demonstrate the potential that such a definition can have, in providing much needed legitimacy to the United Nations counter terrorism policy.
4. A Pragmatic Definition of Terrorism

The thesis will now move on to analyze in detail the definition of terrorism within Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism 1999. This final Chapter will begin by evaluating this definition, examining in detail its various objective and subjective elements. This is the core of this thesis’ proposal.

The second section will then compare the definition, with Europe’s regional definition of terrorism, found within the European Council’s Framework Decision on Combating Terrorism. The definition, although regional, was one of the first definitions of terrorism to be drafted post September 11th 2001 and provides an example of a general and comprehensive definition of terrorism.

The purpose of such a comparison is to further evaluate the Financing Convention’s definition, to both praise and critique. It seeks to prove that the many similarities between the definitions, especially in regards to their formulation, supports this thesis’ claim that the Financing Conventions definition could be applicable in a more general context, to terrorism acts outside of the financing context.

4.1 Analysis of Article 2(1) (a) and (b)

This section will begin by analyzing the objective and subjective elements of the definition of terrorism within the Financing Convention. This thesis suggests the application of such a definition, as a general definition of terrorism, may pragmatically provide a solution to the United Nations Universal Legal Framework’s legitimacy problems.

The definition states that terrorist financing will occur if an individual collects funds with the purposes of committing:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex or;
(b) Any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in hostilities in a situation of armed conflict, when
the purpose of such act, by its nature or context, is to intimidate a population, or compel a
government or an international organization to do or to abstain from doing any act.\textsuperscript{181}

As highlighted in the previous Chapter, it was necessary that such a definition be included
within the Financing Convention due to the nature of the Convention itself. It is
inconceivable that an offence of terrorist financing could have been developed without a
conception of what acts are being financed or what intention the financers have. Terrorism
was for the first time an essential element within an international convention and so had to
be defined adequately.

It was thought that the drafting of such a definition would be arduous and may halt the
development of the Financing Convention completely.\textsuperscript{182} However, this was not the case;
the article was negotiated with relative ease. This is a huge triumph in the development of
the United Nations counter terrorism policy, especially since the same Ad Hoc Committee
has been in session, at the time of writing, for 14 years discussing such a definition within
a Comprehensive Convention context.

The next paragraphs will therefore examine in more detail the article and its various
important aspects.

4.1.1 The Annex

Article 2 (1)(a) begins with reference to the Financing Conventions Annex.\textsuperscript{183}
The Convention’s Annex includes a list of the nine international counter terrorism treaties
that had been developed since the 1970’s by the United Nations. This list today has been
consolidated within the Universal Legal Framework against Terrorism, something that has
been discussed in depth within Chapter 1.

The offences that are included in the Conventions cover crimes against civil aviation,
diplomatic agents, the taking of hostages, nuclear related offences and maritime offices. It
also includes the International Convention for the Suppression of Terrorist Bombings 1997
that was developed by the Ad Hoc Committee prior to its drafting of the Terrorist
Financing Convention. The drafters wished to limit the Conventions within the Annex to

\textsuperscript{181} United Nations General Assembly, “International Convention for the Suppression of the Financing of
Terrorism,” 9 December 1999, No. 38349 Article 2(1) (a) and (b)


\textsuperscript{183} United Nations General Assembly, “International Convention for the Suppression of the Financing of
Terrorism,” 9 December 1999, No. 38349 Annex to the Convention
those with criminal implications. As a result it does not include the Convention on Offences and Other Acts Committed on Board of Aircraft 1963, as it was thought that it did not meet this particular purpose.\textsuperscript{184}

The definition is not limited to the primary offences within these Conventions; it also embraces ancillary offences such as aiding and abetting.

During drafting, some delegations expressed concern that this may lead to long chains of participation with individuals being charged with a number of different offences that all contributed to the final attack.

This concern did not prevent its eventual inclusion, as delegations were extremely wary of creating a definition with loopholes.\textsuperscript{185} They foresaw a situation arising where an individual, depending upon the State they were in, being absolved of guilt, despite being heavily involved within the planning process of a terrorist attack. This would allow them to continue such activities and would not prevent future acts.\textsuperscript{186} Therefore the provision regarding ancillary offences forms a part of the definition.

The use of this Annex within the definition is important as it allows for recognition of the previous efforts of United Nations Member States in drafting the mentioned Conventions. It provides clarity as to what each offence entails and also ensures States are clear on what offences can constitute a terrorist act.

Dugard states that ‘It is difficult to imagine a form of terrorism not covered by these Conventions.\textsuperscript{187} The lack of clarity regarding offences was one of the failings of the League of Nations definition of terrorism, outlined in Chapter 1. This definition stated that terrorism includes ‘all 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’\textsuperscript{188}. This does little to provide guidance as to what criminal acts it intends to cover. The reference to the Annex provides the much needed guidance required.

\textsuperscript{185} Ibid
\textsuperscript{188} 19 League of Nations Official Journal 23 (1938)
Additionally, drafters discussed whether the Annex should be open or closed. As outlined in the previous chapters, United Nations counter terrorism policy is extremely fluid and the Universal Legal Framework is often developed as and when the need for new Conventions arises. Since the Financing Conventions inception, three new Counter Terrorism Conventions have been created, all dealing with different areas and offences. Any strong definition of terrorism, if it wished to fit within the current Framework, would need to be able to keep up with such development. It was therefore decided that the Annex should be open.\textsuperscript{189} This provision is found within Article 23 of the Financing Convention.\textsuperscript{190} This allows for the Annex to be amended. Only treaties that are open to the participation of all States, which have entered into force and have been ratified by at least 22 parties of the Financing Convention, can be included within the Annex. Currently, none of the later counter terrorism Conventions have met these requirements.

The Annex is an important part of this definition. It allows for inclusion of different State perspectives. States, who favour the sectoral approach, are able to continue the piecemeal development of treaties, but those who wish for a freestanding definition are also taken into account in the articles further paragraphs.

There are however some downfalls to this approach. First, the Conventions found within the Annex are not universally ratified or implemented by all United Nations Member States. The Universal Framework Conventions tend to have low ratification rates due to their controversial nature. A surge was seen post September 11, but despite this there acceptance is by no means universal. States therefore are able to label different offences as ‘terrorist’ depending upon the Conventions they have adopted.\textsuperscript{191}

It was discussed during drafting whether ratifications of the Universal Framework instruments should be made compulsory. However, many States were concerned that the adoption of such a definition would bring them much wider obligations than they first


envisioned. This issue was therefore likely to impede the Conventions development, so such a provision was left out.\textsuperscript{192}

Additionally, in order to protect State sovereignty, Article 2(2) gives States the ability to make declarations pertaining to the application of the Conventions within the Annex that it is not a party to. Therefore one State may declare it will not apply the offences within the Terrorist Bombing Convention. Such a declaration will cease if the State then chooses to join the Convention in question. The same is said if a State decides to leave a Convention. States are therefore given complete freedom to be bound by what they wish\textsuperscript{193} and in consequence, as to what offences they deem as terrorist.

On the other hand, the Annex may also have a positive impact upon the development of United Nations counter terrorism policy. It may encourage newly participating States to ratify the instruments, therefore decreasing loopholes in its implementation.\textsuperscript{194}

The inclusion of the Annex however, further complicates the task of monitoring the application of the Universal Frameworks’ already vast array of Conventions. The inclusions of both the Annex and its very open nature, results in the need for the monitoring of both the State’s implementation of the offences but also of their position in regards to the definition. Monitoring effectively is made almost impossible, especially since the CTC and other monitoring bodies are already at capacity.\textsuperscript{195}

Therefore Article 2(1)(a) and the Annex, have both positive and negative aspects. However, its inclusion is able to provide States with the domestic freedoms they need and is able to recognise and pay tribute to the past work of the United Nations in the creation of these instruments.

The Annex itself however cannot exist alone as it contains a number of gaps when it comes to possible offences. The Conventions do not cover common criminal acts against the person. Murder for terrorist purposes is for example, only covered if the victim is murdered as a result of a terrorist bombing or is either a diplomat or an international protected person.


4.1.2 The Mini-Definition of Terrorism

Article 2(1)(b) supplements the Annex.\textsuperscript{196} This is considered to be a mini-definition of terrorism, expanding on the offences in the Annex. It covers both additional acts of terrorism and the \textit{Mens Rea} element.

The article begins by allowing for the acts that are missing from the Annex. It states that terrorism will cover ‘any other act intended to cause death or serious bodily injury to a civilian.’ This allows for the offences, such as murder, which are not included within the Annex to be covered by the Convention.\textsuperscript{197}

The formulation of this part of the section is wide and able to cover many different crimes. It was drafted in this way in order to enable the Convention to deal with unforeseeable future events. International Terrorism is constantly developing; today for example, cyber terrorism is an increasing risk and burden to deal with by the international community. The wording of this definition allows for its inclusion.\textsuperscript{198}

It is important to note that it also sets a level of violence required. That is for such violence to be ‘serious’. Some regional conventions, such as the Arab Convention on the Suppression of Terrorism have been criticized for lacking such an element.\textsuperscript{199} This inclusion is able to elevate terrorism to be a crime with significant harm.

The paragraph then follows with a caveat on its application. This is that the offence will not cover those taking ‘an active part in hostilities in a situation of armed conflict.’ This is due to International Humanitarian Law already adequately covering this area. For example, Article 33(1) of the Fourth Geneva Convention\textsuperscript{200} prohibits ‘all measures…of terrorism’ against civilians. These acts are also prohibited if carried out by civilians themselves or by organized groups in a conflict or occupied territory.\textsuperscript{201} The Geneva Conventions however only apply to States during international and non-international armed conflicts and there is

\textsuperscript{200} International Committee of the Red Cross, \textit{Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)} 12 August 1949, 75 UNTS 287
much discussion of their applicability to individual citizen’s offences. The case of Galić\textsuperscript{202} in the International Criminal Tribunal for the former Yugoslavia suggests that such a criminalization exists. It is of note that terrorism is not included in the Statute of the International Criminal Court, in part due to its lack of definition. Cassese states however that enough support of this element can be found within a number of normative developments, including in the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. This, he suggests, demonstrates such individual acts can amount to war crimes. He also highlights that as States could agree upon its inclusion within the Financing Conventions definition, it can exist as an individual crime within international law more generally.\textsuperscript{203}

The armed forces caveat itself includes two different elements. That is that the act exempt from the definition must occur during an armed conflict but also that such participation within the conflict should be active. If both elements are met the result is clear, the acts would not be considered as terrorism to be dealt with under the Convention. However, a situation could exist where just one element is covered. A terrorist act could be carried out during a situation of armed conflict but not by an individual participating directly. For example, attacks by or on off-duty members of the armed forces.\textsuperscript{204} These therefore would be included for the purposes of this definition. The benefit of having these two elements is that there are limited situations where civilians are not protected. The International Committee of the Red Cross petitioned during the negotiations for such an inclusion.\textsuperscript{205} This exclusion was drafted with relative ease, despite it causing a standstill in current Comprehensive Convention negotiations. Therefore, it is important to note in this respect that the context in which negotiations were based is different for this Convention. Within terrorism financing the exemption of the armed forces is a less pressing discussion. International law clearly recognizes that armies

\textsuperscript{202} Prosecutor v Stanislav Galić, Case No. IT-98-29-A International Criminal Tribunal for Yugoslavia
\textsuperscript{204} Koh, J.-m. (2006). Suppressing Terrorist Financing and Money Laundering. Berlin, Germany: Springer. At pg 64
\textsuperscript{205} International Committee of the Red Cross, ‘Replies given on 22 March 1999 to questions asked by the delegations of Belgium and Mexico regarding the implications of art 2(1)(b)’ U.N Doc A/A.C.252/1999/INF/2 (26th March 1999)
are entitled to kill, but also recognizes that this does not allow them the right to finance others to kill.\footnote{Diaz-Paniagua, C. F. (2008). Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties 1997-2005. \textit{City University of New York}, 1-804. At pg 468}

The Convention does not focus in detail upon these objective elements outlined above. This reflects how some of the national definitions of terrorism have been developed. For example, in the Netherlands no such element is needed as terrorism can be prosecuted subjectively based upon the \textit{Mens Rea} alone. This raises a number of issues and Van Sliedregt notes that such an idea may not be in compliance with the important principle of the presumption of innocence.\footnote{Sliedregt, E. V. (2010). European Approaches to Fighting Terrorism. \textit{Duke Journal of Comparative and International Law}, 20 (413), 424-26.}

Following this the article then moves on to the \textit{Mens Rea} elements of the definition. It states that the purposes of an act should be taken from its ‘nature or context’. This creates an objective standard for determining such intention. In most terrorist attacks it is clear what its purpose is. However, in some cases such nature is not indicated. Therefore the following paragraph moves on to providing a clear annunciation of such a purpose that a terrorist act must hold. That is to ‘intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.’ This element of the definition is important, as it is able to separate terrorist acts from other types of violent international crime.

Cassese points out that

\begin{quote}
‘A terrorist act, for instance blowing up a disco, may surely be performed by a single individual not belonging to any group or organization. However, the act is terrorist if the agent was moved by a collective set of ideas or tenets (a political platform, an ideology or a body of religious principles), thereby subjectively identifying himself with a group or organization intent on taking similar actions. It is this factor that transforms the murderous action of an individual into a terrorist act.’\footnote{Cassese, A. (2006). The Multifaceted Criminal Notion of Terrorism in International Law. \textit{Journal of International Criminal Justice}, 4, 933-958. At 937}
\end{quote}

The definition mentions no further levels of intention and so it is confined to this scope.

It however, sets a particularly wide conception of this intention. It would not be difficult for a court, if personal intent could not clearly be inferred from the acts circumstances, to
instead infer that the individual was committing a bombing with the intent of intimidating a population or compelling a government.\textsuperscript{209} It allows for ease of prosecution, as many beliefs are able to fit within this broad framework.

This also demonstrates however why having a more limited range of applicable acts is important, as a wider view may allow for numerous different acts being designated as terrorist, including the acts of protestors.

The above discussion has outlined the main objective and subjective elements of the definition of terrorism contained with Article 2(1)(a) and (b) of the Financing Convention.

\subsection*{4.1.3 Supplementary issues}

In addition, it is of note that this definition does not directly outline who the perpetrator of such an attack could be. It is therefore possible that it could apply to any individual, non-State actors or groups and even States.\textsuperscript{210} The past UN Special Rapporteur on Terrorism and Human Rights notes that there is a degree of consensus that a definition of terrorism not extend to the thorny issue of who can be a potential author of terrorism.\textsuperscript{211} In the Ad Hoc Committee discussions this has been the source of some controversy, particularly in regards to State sponsored terrorism. The delegation of Nicaragua, forming part of the Non-Aligned movement, stated in 2013 that such State terrorism was abominable yet it continued to enjoy international impunity.\textsuperscript{212}

It is also worth consideration, that one of the central problems to the creation of a definition of terrorism, was its implications upon the Right to Self-Determination and whether actions taken during legitimate liberation movements should be considered within any definitions scope. There is little reference directly to Self-Determination within the Financing Convention’s definition of terrorism, aside from its requirement that conduct be unlawful. The Convention does however, under Article 21, state that ‘nothing in this Convention shall affect other rights, obligations and responsibilities of States and

individuals under international law, in particular the purposes of the Charter of the United Nations, International Humanitarian law and other relevant Conventions.\(^{213}\) This is an element also found within the common framework of the Universal Framework Conventions. This is significant as it in effect preserves the Right to Self-Determination but is not a direct reference within the definition itself. The Convention’s attached Resolution also makes reference to Self-Determination.

Such liberation movements may also be considered under the Armed Conflict caveat, in order to ensure the rights protection. In International Humanitarian law, armed conflicts can be classified both as international and non-international. Non-international may be able to cover this action. To support this view, it is interesting to note that the United States included in its ratification instruments a statement that provides that the term ‘armed conflict’ does not include international disturbances and tensions.\(^{214}\)

Despite this dichotomy being a major obstacle in the development of a definition during the Ad Hoc Committees negotiations of a Comprehensive Convention, during the Financing Conventions negotiations the only State to raise a substantial objection was Syria. Despite this, the Financing Convention was still able to enter into force with no reservations that substantially affect the definitions operation. Some States reiterate their support for the Right to Self-Determination and extend the definitions application to foreign resistance movements within reservations to the Convention. \(^{215}\) This type of reservation is however common in such instruments and allows for the definition to be tailored to a State’s domestic preferences.

The adoption of the definition, if anything, demonstrates some international progress. It highlights that the presence of Self-Determination need not always dominate the negotiation process and that agreement is possible under less politically charged circumstances.

In the recent Ad Hoc Committee discussion in 2013, the delegation from the European Union, called upon all States involved in the discussions to ratify and implement without delay all of the existing international Conventions and Protocols on Terrorism. This is


At pg 65

significant as it further demonstrates the international support that such a framework and the definition it possesses.\textsuperscript{216}

\textbf{4.1.4. Conclusions}

In summary, this section of the Chapter has outlined the object and subjective elements of Article 2(1) (a) and (b) of the Financing Convention. This discussion has attempted to demonstrate that the definition represents a viable option to provide guidance to States on how an international definition of terrorism is formulated. It outlines which acts can be considered terrorist for the purposes of the definition, including each offences necessary elements.

It is still important to note however that, as Norberg\textsuperscript{217} points out, this high ratification rate does not necessarily demonstrate full international acceptance of the Financing Convention. The surge in ratification occurred, as outlined in the previous Chapter, as a result of the shock of the attacks of September 11\textsuperscript{th} and due to States being legally required to take such action through Security Council Resolution 1373. The motives of States are therefore not necessarily crystal clear.

States may also find such a definition acceptable simply due to the context in which it appears. It was necessary that the Financing Convention included such a definition and so States were therefore able to negotiate one. However, in the drafting of the Comprehensive Convention, States are pursuing wider, more political aims and so distancing themselves with the previous drafting successes of the other counter terrorism instruments. The delegation of Lebanon demonstrated this by emphasizing, during a Sixth Committee discussion, that the current negotiations were the appropriate place to solve issues that had not been dealt with during the creation of the Universal Framework Conventions, therefore including during the drafting of the Financing Conventions definition.\textsuperscript{218}

Thus a States interest can differ considerably upon context.

In addition, the definition discussed within this Chapter comes from a specific counter terrorism financing context. This, as the previous Chapter outlines, effects how the

\textsuperscript{216} Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention 49\textsuperscript{th} Meeting: Press document. L/3209. Found at http://www.un.org/News/Press/docs/2013/l3209.doc.htm


\textsuperscript{218} Lebanon, ‘Statement’ U.N. GAOR 55\textsuperscript{th} Sess. Sixth Comm. 28\textsuperscript{th} meeting., ¶ 61, U.N. Doc. A/C.6/55/SR.28 (14\textsuperscript{th} November, 2000).
definition was drafted. The Mens Rea element of the offence, for example, is more prominent, due to the importance of identifying whether a particular financial transaction is legitimate or unlawful. The definition has additionally been given a wider draft to allow for humanitarian organizations to be able to continue providing financial aid. These considerations are very specific to its current context and have influenced the way the definition has been drafted, possibly affecting its applicability to a more general context.

The definition would also need to be applied to physical acts of terrorism such as terrorist bombing. Therefore some loopholes may arise during the definition’s interpretation, as it was not drafted with such acts in mind. The other Universal Framework Conventions are also able to cover incidents without terrorist elements. The Financing Convention is unable to do so, with terrorism being an element core to its application. The use of this definition within the wider context may therefore narrow other counter terrorism Conventions and hinder their use and the ease in which they fit into national laws. The downside of this is that it may require further costly and time-consuming national implementation processes.

This demonstrates further the specificity of the context and its effect upon the definition’s ability to be applied more generally. However, despite this, the definition is still a pragmatic way forward as an example of a working definition of international terrorism that contains all of the necessary elements to be applied more generally.

Furthermore, the Conventions within the Universal Framework are certainly, to some extent norm creating, in particular the provisions of the Financing Convention. It has a high ratification rate and is supported by a number of technical assistance programs, which prioritize its proper implementation. This thesis does not however intend to suggest that such a Convention or its definition has been elevated to the status of customary international law. The Universal Framework Conventions do demonstrate the willingness of States to rapidly assume new counter terrorism obligations. Young\(^ {219} \) suggests that the momentum and success that United Nations counter terrorism policy has attracted could even amount to some State practice and emerging opinio juris. The level of disagreement however on a number of elements of such a definition and the high level of State practice

required, makes it unlikely that customary international law would be achieved, at least in the foreseeable future.

This does not however mean that this development doesn’t form an essential and unique part of the Universal Framework. It still should hold a strong position within the Framework and includes a number of positive qualities that can provide important guidance to States. The more acceptance the definition achieves internationally, the more potential it has to reach customary international law status.

The next section of this Chapter will move on to discuss this definition further through a comparison with the regional definition of terrorism in Europe.

4.2 Comparison: What has Europe added?

The previous section has proposed that the United Nations Financing Convention’s definition of terrorism under Article 2 (1) (a) and (b) is able to provide States with some clarity as to the composition of an international definition of terrorism.

The current section will now seek to further support this claim, by comparing the above mentioned definition with the European Union’s regional definition of terrorism found within the European Council Framework Decision on Combating Terrorism of 13th June 2002.220 This definition of terrorism provides an example of a general definition of terrorism, not limited to the financing context. Therefore the discussion seeks to compare the subjective and objective elements of each definition, seeking to both critique and consolidate the Financing Convention’s definition.

It will additionally outline how each definition deals with the controversies that prevent the development of an international definition of terrorism, such as the place of the Right to Self-Determination. The aim of such a comparison is to further support the ability of the Financing Convention’s definition to be taken out of its current context and applied as a general United Nations definition of terrorism.

The European Union definition was chosen for such a comparison as it is largely unaffected by United Nations counter terrorism policy and is one of the first definitions in the world to be proposed following the September 11th attacks. It is however, only a regional definition of terrorism, geographically limited to the European Member States and

therefore it is not able to become a general definition of terrorism internationally, as it was
drafted within regionally limited circumstances.

4.2.1 The Framework Decision Definition

A European Council Framework Decision is created according to Article 31(e) of the
Treaty of the European Union. This provides that such a Decision aims to approximate the
criminal laws of European Member States. The Framework Decision on the Combating of
Terrorism was developed in order to create a common definition of terrorism at the
European Union level and to approximate Member States counter terrorism laws for the
purposes of the European Arrest Warrant. It provides the first definition of terrorism to be
developed at the European level.
The proposal for the Framework Decision was presented for discussion just eight days
after the September 11th attacks on the 19th September 2001.221

The definition within the Framework Decision is found in Article 1. It is built upon a
general definition of terrorism that is supplemented by a large list of applicable offences.
This section will go through the elements of this definition in detail, comparing them to
those found within the Financing Convention Article 2(1).

The Framework Decision begins in Article 1(1) by stating that ‘each Member State shall
take the necessary measures to ensure that the intentional acts referred to below in points
(a) to (i), are defined as offences under national law, which given their nature or context,
may seriously damage a country or an intentional organization…’222
This starts the definition by outlining two objective elements of a terrorist offence. The
first is its incrimination under European Union Member States national law.
The second objective element then provides the context for this offence. It states that such
an act should seriously damage a country or an international organization. These represent
the consequences that stem from an act of terrorism. This elevates the seriousness of a
terrorist act, and sets it apart from other criminal offences. This area of the definition is
similar to Article 2(1)(b) of the Financing Convention.

221 Commission Proposal for a Council Framework Decision on Combating Terrorism, 19 September 2001,
COM (2001) 521
222 Council Framework Decision 2002/475/JHA of 13th June 2002 on Combating terrorism OJ L 164,
22.6.2002, p 1-20 Article 1(1)
The next part of the Framework Decision outlines the subjective intent of the action, what were the terrorist’s aims. It states that acts must be carried out ‘with the aim of seriously intimidating a population, or unduly compelling a Government or International Organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.’

This element closely mirrors the purposes outlined within Article 2(1)(b) of the Financing Convention. It however raises the level of intent by including ‘serious’ intimidation and ‘unduly compelling’. It also adds the additional element of destroying the ‘political, constitutional, economic or social structures of a country or an international organization’. The inclusion of this element has been the subject of criticism and creates a wide perception of what events could be considered terrorist. For example, the riots in Paris in 2005 could be considered as an act that intimidated the population and compels the government of France to act. They also endangered the structures outlined within the article. These however, were not perceived as terrorism either in France or abroad. They could however be considered so for the purposes of this definition. This leads to leeway in how a State chooses to apply such a definition, dependent on political motives. Weigend however, suggests that this paragraph of the Framework Decision instead provides a too high threshold for what is considered a terrorist act. He states that all serious offences do not necessarily damage a whole country’s structures or even an international organization, unless it is the scale of the September 11th attacks, which is unlikely. There is therefore debate as to the scope of the Framework Decisions definition. It can both be considered too narrow and too wide in its application.

In addition, the Framework Decision article is not, within its main text, limited to civilians or those who are not actively participating within an armed conflict. This is unlike the Financing Convention definition, which provides more clarity as to its scope.

225 ibid
The preamble to the Framework Decision however does state that ‘the actions of the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.’ Peers asserts that including such a caveat within the preamble and not the main text demonstrates poor drafting technique. It additionally may demonstrate a weakness when the definition is being applied, as it may be considered as a contradiction to the ordinary meaning of the text; therefore if ever contested its legal effect may be questioned.

The article then moves on to outline a number of acts that could be considered terrorist for the purposes of the definition. The Framework Decision is based heavily upon such acts. The article lists nine offences that the Council has considered can be ‘terrorist’ for the purposes of the definition. These need to be codified within European Union Member States law, pursuant to the earlier paragraph.

The offence within (a) to (i) of the article include many of the offences outlined within the Annex of the Financing Convention and the Universal Framework Against Terrorism. Many however go further and produce wider affects. In particular this is the case in regards to personal scope, especially when prohibiting death and injury and the damage of property. They also include very high thresholds for such acts. Demonstrating again the importance the Council has placed on terrorism being considered a serious crime. Article 1 (d), for example, requires ‘extensive destruction to a Government or public facility…likely to endanger human life or result in major economic loss.’ This is an element not easily met. Pieth suggest however, that its width is a benefit. It allows the Framework Decision to more effectively deal with unforeseen future events, especially when compared with the narrower Financing Convention.

Additionally, it is also worthy to note that the intent element, within the Framework Decision, applies to all the offences that it outlaws. This includes those found within the Universal Framework Conventions. This is not the case with the Financing Convention definition. The offences referred to in the Annex Conventions determine intent subject to their own provisions. The only intent provided for directly by the definition itself, applies to acts that cause death or serious bodily injury.

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The Framework Decision therefore provides a universally applicable definition of terrorist intent, which application is reliant upon no other Conventions. This however raises a number of issues. For example, under the Hijacking Convention, found within the Universal Framework, if an individual hijacked an aircraft solely for monetary gain they would be guilty of an offence. Therefore they could be included within the Financing Convention’s definition of terrorism. However, this action would not necessarily be considered as terrorist under the Framework Decisions scope. It would have to be proved that such funds would be used for terrorism offences, in order to meet the context requirement within the article. The money gained from the hijacking must also be demanded from either an international organization or a government. Its applicability is questionable if such a claim was instead made from the airline or other private actors.\(^\text{231}\) This demonstrates a flaw in the Framework Decisions articles conception. This section of the article is therefore both wider in scope but narrower in application.

In order to ensure that such provisions are not interpreted too widely, Article 1(2) of the Framework Decision outlines the obligation of European Union Member States in ensuring respect for fundamental rights and the fundamental principles found within Article 6 of the Treaty on the European Union.\(^\text{232}\) This prevents its application being extended to effect rights such as the freedom of assembly.\(^\text{233}\) This is similar to the respect for the principles of the United Nations found within the Financing Convention, Article 21.

The Framework Decision also does not explicitly refer to the Right to Self-Determination within the main text. In a non-binding declaration there is reference to the principle by stating that the definition:

‘Cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered ‘terrorist’ acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their

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legitimate rights to manifest their opinions, even if in the course of the exercise of such right they commit offences.'\textsuperscript{234}

Although this is non-binding it does provide an important distinction between the two areas of international law and therefore represents a positive inclusion.\textsuperscript{235} The Financing Convention goes into no such detail.

An amendment to the Framework Decision in 2008, added to the definition of terrorism, further increasing its scope. Article 3 was extended to cover acts including public provocation to commit a terrorist offence and recruitment and training of terrorism.

4.2.2 The comparison conclusions

Therefore, the analysis within this section has attempted to compare the elements within these two definitions. It demonstrates the different priorities and negotiation outcomes in regional and international contexts.

The two definitions are similar in a number of ways. They both provide related terrorist intents and the context in which a terrorist attack is carried out. They additionally are similar in the offences that they cover, though the European Council is much wider in its application.

They also differ in a number of substantial ways. The Framework Decision contains a large number of acts, which can be considered as terrorist and a wider conception of terrorist intent. It also opts for including a number of controversial elements within non-binding areas rather than in the main text. Its main contribution however is the light that it sheds upon the detail of the dichotomy between terrorism and Self-Determination within its non-binding declaration.

In general, the academic community seems divided upon their opinion of the Framework Decisions definition. Some authors see it as being narrow and specific.\textsuperscript{236} It has also however been regarded as overly broad\textsuperscript{237} and vague.\textsuperscript{238} This uncertainty has also resulted in its application beyond a European context being minimal. Its use within the drafting of

\textsuperscript{234} Council of European Union, \textit{Outcome of Proceedings}, 14845/1/01, Rev.1, 7\textsuperscript{th} December 2001 pg 15
further instruments, including within the Comprehensive Convention’s negotiations has also been limited.239

This comparison overall has sought to demonstrate some of the Financing Convention’s failings but also to highlight the success of the international community in drafting such a definition. The definition is able to deal effectively with numerous controversial aspects and create a more balanced definition of terrorism, which is not stretched too wide in its application. It demonstrates a pragmatic, fit for purpose, international compromise, which deserves increased praise and consideration within the international arena. The many similarities to the European definition, which is applied to all terrorist acts not just financing, indicates the Financing Conventions definition’s ability to also be applied successfully within this wider context. This thesis proposes that this definition be considered as an international definition for the purposes of the Universal Framework Against Terrorism and used as such within technical assistance programs.

5. Conclusions

This thesis has demonstrated a number of the key achievements of the United Nations in the field of counter terrorism. Since the September 11th attacks in particular, the world is experiencing much greater regional and international cooperation. Capacity building, intelligence sharing and best practices have also grown internationally.240 States have put aside political differences to progress in these areas. They have recognized, to some extent, that international terrorism needs a strong and progressive United Nations policy, such as the one outlined within this thesis, in order for it to be effectively countered.

The General Assembly has been particularly important in this development, remaining quietly engaged negotiating this United Nations counter terrorism policy over the past 40 years. The recent Global Counter Terrorism Strategy and Universal Legal Framework against Terrorism are a product of its success and represent the most current and

comprehensive strategies on terrorism to exist internationally. Their creation has ensured that the United Nations role in terrorism prevention continues to be developed.

These initiatives have been supported by a number of expert bodies that ensure compliance and proper implementation. They include the Financing Action Task Force, the Counter Terrorism Executive Directorate, the Counter Terrorism Implementation Task Force and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime. This Branch alone since 2003 has trained over 17,200 national criminal justice officials on the implementation of this counter terrorism policy.²⁴¹ This technical assistance has resulted in over 618 new ratifications of Universal Framework Conventions and more than 101 new pieces of counterterrorism legislation being developed domestically.²⁴² This if anything should demonstrate the level of international acceptance the counterterrorism policy attracts, despite there being no Comprehensive Convention against International Terrorism.

The lack of a definition of terrorism within this framework is however a dent to the policy’s overall legitimacy. The purpose of this thesis has been to provide a pragmatic, solution-focused approach to resolving this issue.

It has proposed that a successfully drafted international definition of terrorism does exist, found within one of the instruments that form the backbone of this United Nations counterterrorism framework. That is the definition of terrorism within Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism 1999. This Convention’s negotiation process alone demonstrates that innovative Conventions can be developed within the space of a year. It holds the highest ratification rate of the Framework with 185 parties; therefore being only eight State parties away from universal acceptance. This is remarkable considering that it is one of the only international conventions in existence that contains a controversial definition of an act of terrorism.

²⁴² ibid
This definition provides a compromise between groups of States with different outlooks on counter terrorism. It allows for recognition of the sectoral approach to counter terrorism by including an Annex. This clearly outlines the specific offences that States are able to deem as having terrorist intent, by making reference to the previous counter terrorism Conventions. States when needed can then develop this Annex further.

The definition also however includes a ‘mini-definition’ of terrorism. This provides States with the elements of a terrorist offence including motives and acts, therefore compensating for the Annex’s failings. This takes into consideration the views of States who prefer a more all-encompassing approach, giving them clear guidance on the elements of an international definition of terrorism.

This definition also makes important reference to a number of the obstacles raised within the Comprehensive Convention negotiations. It recognizes and provides a solution for the formulation of an armed forces caveat. It additionally, as a whole, supports the Right to Self-Determination by recognizing the large part that this right has within United Nations history. It also does not limit State sovereignty, leaving such contentious issues up to domestic authorities to deal with through reservations or during implementation of the definition.

The comparison with the European regional definition of terrorism sought to both praise and critique this proposed definition. This demonstrated, through the instrument’s similarities, that the Financing Conventions definition has the necessary elements that would allow it to be applied to a wider context. It is able to effectively balance controversial issues and cover both the subjective and objective elements of the offence.

The context in which this definition was developed is however considerably narrower than the context that this thesis seeks to apply it. The high ratification rate is a result primarily of September 11th and the shock that the attacks provoked across the world. States were legally required to ratify the Convention following Resolution 1373 and so the overall motives of States are unclear. Therefore the high level of international agreement should not be considered as full international support for the all the Convention’s provisions, including this definition.

Despite this, the negotiation process success still represents international agreement on a controversial topic. The definition is able to provide a clear example to States of what
elements are necessary for acts of international terrorism. The use of such a definition as a guide for States, will add much needed legitimacy to technical assistance programs, ensuring that the implementation of the Universal Framework is somewhat uniform and that clarity is given to a number of its provisions. It may also in the future, with increased international recognition, be able to form a part of customary international law.

The negotiations within the Ad Hoc Committee have been described as a quest for a common understanding of terrorism. This thesis has attempted to demonstrate that such an understanding already exists, through the international acceptance of this Framework, strategy and the definition that it includes. The creation of a Comprehensive Convention, this thesis contends, should now simply serve to complement this existing Framework, with any agreement being more politically rather than legally significant.

This pragmatic approach to the definition problem has the potential to aid the further development of the provisions within this United Nations counter terrorism policy, allowing it to continue to provide a sustainable successful response to the problem of international terrorism.