名古屋学院大学論集　社会科学篇　第58巻　第3号　pp. 41–54

〔Article〕

Is terrorism a crime under customary international law?

——Issues on the definition of international terrorism raised by the Special Tribunal for Lebanon*——

Makoto MINAKAWA

Faculty of Law
Nagoya Gakuin University

Abstract

So far, there is no generally agreed-upon definition of terrorism in the international community. Against this background, in an interlocutory decision issued on 16 February 2011, the Appeals Chamber of the Special Tribunal for Lebanon held that terrorism has evolved into a crime under international customary law. This Appeals Chamber's decision has been harshly criticised from an academic point of view, but several important issues have been raised in this decision, including issues concerning a transnational element and an element of political motives in the definition of international terrorism. In this sense, this interlocutory decision may be regarded as providing an important opportunity for academic analysis and discussion of the definition of international terrorism.

Keywords: International law, Terrorism, UN Special Tribunal for Lebanon

テロリズムは慣習国際法上の犯罪か？

——レバノン特別法廷が提起した国際テロリズムの定義に関する諸問題——

皆　川　　誠

名古屋学院大学法学部

*This article is a part of the results supported by JSPS KAKENHI JP21K01169.

発行日　2022年1月31日

Contents

I Introduction
II The STL Appeals Chamber's Interlocutory Decision
III Issues raised by the Interlocutory Decision
1 Transnational Element
2 Element of Political Motive
IV Concluding Remarks

I Introduction

What has been considered terrorism under international law? Rosalyn Higgins states that her own view is that 'terrorism is not a discrete topic of international law with its own substantive legal norms'[1]. Ben Saul also states that 'terrorism currently lacks the precision, objectivity, and certainty demanded by legal discourse'[2]. International law has for a long time failed to provide a clear answer to the question of what terrorism is, and even now, there is no generally agreed-upon definition on terrorism in the international community. Instead, the international community has responded to terrorism by developing counter-terrorism conventions that focus on specific types of crimes, the nature of victims and the types of terrorist acts[3]. In addition, following the terrorist attacks in the United States on 11 September 2001, attempts to define terrorism in national laws and regional treaties have been actively made, and there is growing momentum to define terrorism in the international community. However, concepts of terrorism in national law are startlingly diverse, and there is little evidence of global convergence[4].

In these circumstances, the Appeals Chamber of the Special Tribunal for Lebanon (hereafter referred to as 'STL'), which was established to try all those allegedly responsible for the attack on the former Lebanese Prime Minister Rafik Hariri in February 2005 and related killings, issued an interlocutory decision on 16 February 2011, holding that terrorism has evolved into a crime under international customary law[5]. The approach adopted by the Appeals Chamber in finding the

1) Rosalyn Higgins, "The General International Law of Terrorism," in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law* (Routledge, 1997), pp. 13–14.

2) Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006), p. 4.

3) Jean-Marc Sorel, "Some Questions About the Definition of Terrorism and the Fight Against Its Financing," *European Journal of International Law*, Vol. 14, No. 2: 2003 (2003), p. 368.

4) Ben Saul, "Terrorism as a Legal Concept," in Genevieve Lennon and Clive Walker (eds.), *Routledge Handbook of Law and Terrorism* (Routledge, 2015), p. 20.

5) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, 16 February 2011 (hereafter referred to as 'Interlocutory Decision').

definition of terrorism established under customary international law is supported by some[6] but not by others[7]. In this article, we first examine how the STL Appeals Chamber's interlocutory decision found the definition of terrorism established under customary international law, and what problems were involved in it, and then examine some issues raised by the STL Appeals Chamber's interlocutory decision from the perspective of 'defining of international terrorism'.

II The STL Appeals Chamber's Interlocutory Decision

The STL was established by the Security Council under Chapter VII of the UN Charter in Resolution 1757 of 30 May 2007, after the adoption of a series of resolutions following the killing of former Prime Minister Rafik Hariri by bombing on 14 February 2005[8]. According to Article 1 of the STL's Statute, its jurisdiction is limited, in principle, to the attack of 14 February 2005 in Beirut, resulting in the death of former Prime Minister Hariri, and to the terrorist attacks with a nature and gravity similar to the attack of 14 February 2005[9]. Article 2 of the STL's Statute also limits its

---

6) Matthew Gillett and Matthias Schuster, "Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism," *Journal of International Criminal Justice*, Vol. 9, Issue 5: 2011 (2011), pp. 1007–1008; Henok Kebede Bekele, "Problem of Defining Terrorism under International Law: Definition by the Appeal Chamber of Special Tribunal for Lebanon as a Solution to the Problem," *Beijing Law Review*, Vol. 12, No. 2: 2021 (2021), pp. 626–628.

7) Stefan Kirsch and Anna Oehmichen, "Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon," *Durham Law Review Online*, Vol. 1: 2011 (2011), pp. 1–20; Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?," *Leiden Journal of International Law*, Vol. 24, Issue 3: 2011 (2011), pp. 655–675; Ben Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism," *Leiden Journal of International Law*, Vol. 24, Issue 3: 2011 (2011), pp. 677–700.

8) UN Doc. S/RES/1757, 30 May 2007, para. 1(a).

9) Article 1 of the Statute of the Special Tribunal for Lebanon (Jurisdiction of the Special Tribunal): 'The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*) and the perpetrators'.

jurisdiction *ratione materiae* to crimes under Lebanese domestic law, such as acts of terrorism[10]. Thus, the STL is the first international tribunal to bring to justice those charged only with violations of domestic law, not international law, and it is the first international tribunal to have jurisdiction *ratione materiae* over the crime of terrorism[11].

Although the activity of the STL had been stagnant for a while, the Tribunal's Prosecutor filed an indictment on 17 January 2011, and four days later, under Rule 68(G) of the Rules of Procedure and Evidence, the Pre-Trial Judge submitted fifteen questions of law to the Appeals Chamber[12]. With regard to the notion of terrorist acts, the Pre-Trial Judge requested a decision on the following issues:

i) Taking into account the fact that Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code in order to define the notion of terrorist acts, should the Tribunal also take into account the relevant applicable international law?

ii) Should the question raised in paragraph i) receive a positive response, how, and according to which principles, may the definition of the notion of terrorist acts set out in Article 2 of the Statute be reconciled with international law? In this case, what are the constituent elements, intentional and material, of this offence?

iii) Should the question raised in paragraph i) receive a negative response, what are the constituent elements, material and intentional, of the terrorist acts that must be taken into consideration by the Tribunal, in the light of Lebanese law and case law pertaining thereto?

iv) If the perpetrator of terrorist acts aimed at creating a state of terror by the use of explosives intended to commit those acts to kill a particular person, how is his criminal responsibility to be defined in the event of death of or injury caused to persons who may be considered not to have been personally or directly targeted by such acts?

On 16 February 2011, the Appeals Chamber issued a 153-page interlocutory decision, primarily on issues of applicable law, including the relationship between Lebanese domestic law and the definition

10） Article 2 of the Statute of the Special Tribunal for Lebanon (Applicable Criminal Law): 'The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute: (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle"'.

11） Fidelma Donlon, "Hybrid Tribunals," in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge, 2011), p. 95.

12） Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G), of the Rules of Procedure and Evidence, Case No. STL-11-01/I, 21 January 2011.

of terrorism under international law.

Despite the Appeals Chamber concluded that the Tribunal must apply the provisions of the Lebanese Criminal Code, and not those of international treaties ratified by Lebanon or customary international law to define the crime of terrorism[13], it held that international conventional and customary law can 'provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code', and that the Tribunal may 'take into account the relevant applicable international law', but only as an aid for interpreting the relevant provisions of the Lebanese Criminal Code[14].

And although '[t]he Defence Office and the Prosecutor both forcefully assert that there is currently no settled definition of terrorism under customary international law', and 'it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society'[15], the Appeals Chamber found that 'a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged', and that this customary rule requires the following three key elements:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson and so on), or threatening such an act;
(ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
(iii) when the act involves a transnational element[16].

The Appeals Chamber stated that there is no doubt that there is a commonly shared agreement on the need to 'fight international terrorism in *all its forms* and *irrespective of its motivation, perpetrators and victims, on the basis of international law*', and that there exists a crime of terrorism under customary international law, which has already been recognised by some national courts, including Canada, Italia, Mexico, Argentina and the United States of America[17]. In light of this, the Appeals Chamber stated that, 'to establish beyond any shadow of doubt whether a customary rule of international law has crystallised one must also delve into other elements', including 'the behaviour of States, as it takes shape through agreement upon international treaties that have an import going

13) Interlocutory Decision, para. 44.
14) *Ibid*., para. 45.
15) *Ibid*., para. 83.
16) *Ibid*., para. 85.
17) *Ibid*., para. 86.

beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as United Nations, as well as the enactment by States of specific domestic laws and decisions by national courts'[18].

Such findings by the Appeals Chamber, however, have been controversial, including the way in which customary rules of international law regarding the definition of terrorism were established.

The first question is whether the Appeals Chamber needed to refer to international law. Because there is no possibility of direct application of customary international law, the Appeals Chamber could claim that international law can assist in the interpretation of relevant provisions of the Lebanese Criminal Code, and the Appeals Chamber did so. Though the Appeals Chamber argued that this reasoning is justified by the fact that the events in Lebanon have been regarded by the UN Security Council as a 'threat to international peace and security'[19], Kai Ambos criticises this reasoning, arguing that the fact that the Security Council qualified the relevant acts as 'threats to international peace and security' served only as a trigger for establishing the STL under Chapter VII of the UN Charter in the first place, but that it has not led to the Council including crimes under international law in its Statutes, and that the reference to international crimes has explicitly been omitted[20]. The fact that a terrorist act may threaten international peace and security does not change the applicable national law, and it is up to the territorial state to decide, pursuant to its domestic rules, whether it applies its national terrorist offences or takes recourse to international law[21]. It could only be otherwise if the Security Council had expressly said so, but it has not done so here, and indeed, it could not have done so, since there is no internationally agreed-upon definition of 'terrorism'[22].

Stefan Kirsch and Anna Oehmichen argue that resorting to international law might only have been necessary if Lebanese law could be held to have been overridden by specific provisions of the Statute, which are based not on the domestic law of Lebanon but on principles of international law, and that no such provisions exist with regard to the substantive criminal law to be applied by the Tribunal[23]. They criticise the judges' view that they tried to justify the recourse to international law by taking into account the 'unique gravity and transnational dimension of the facts at issue', which in their view, justifies interpreting and applying Lebanese law on terrorism 'in light of international standards on terrorism, given that these standards specifically address transnational terrorism and are also binding on Lebanon', and they assert that they have no idea what these international standards are or how

18) *Ibid*., para. 87.

19) *Ibid*., para. 124.

20) Ambos, *supra* note 7, pp. 659–660.

21) *Ibid*., p. 660.

22) *Ibid*., p. 660.

23) Kirsch and Oehmichen, *supra* note 7, p. 6.

they add to established standards of legal interpretation[24].

The second question concerns the way the Appeals Chamber found the definition of terrorism established under customary international law. Kirsch and Oehmichen argue that the reasoning provided by the Appeals Chamber is inept to show the existence of a general consensus of the international community as to the elements of a criminal law definition of terrorism under customary international law, and that no such *opinio juris* can be identified, citing the following reasons: i) supposing that a series of General Assembly resolutions since 1994 provided a clear definition of terrorism, this would by no means prove that it was generally accepted as customary law; ii) the fact that the Ad Hoc Committee tasked with drafting a Comprehensive Convention on Terrorism has not agreed upon common defining elements so far; iii) the definition provided under Article 2(1) of the 1999 International Convention for the Suppression of the Financing of Terrorism only refers to financing offences and does not comprise any general definition of terrorist offences; iv) though the Appeals Chamber claims that the national legislation of countries around the world consistently defines terrorism in similar if not identical terms to those used in the international instruments just surveyed, by doing so, the Appeals Chamber seems to deliberately confuse the fact that certain national definitions share certain elements with the existence of a general consensus on one single, comprehensive definition; and v) the fact that the vast majority of national courts have not discussed the question of defining terrorism under international customary law cannot be interpreted as meaning that the few national courts that did allegedly recognise such a rule under international law are proof of an existing rule under customary international law[25].

Ben Saul also heavily criticises the Appeals Chamber's reasoning, asserting that the Appeals Chamber misjudged the available material sources, such as anti-terrorism treaties of regional organisations, a series of General Assembly resolutions since 1994 that condemn terrorism as criminal, the UN Security Council Resolution 1566 (2004), which defines terrorism, the draft definition in the UN Draft Comprehensive Convention under negotiation since 2000, the 1999 International Convention for the Suppression of the Financing of Terrorism, said to provide 'the UN's clearest definition of terrorism', numerous national laws, and nine judicial decisions from various national courts, evidencing the international community's attitude towards criminal liability for terrorism since these material sources do not sustain any credible argument that terrorism is a customary international crime[26]. He argues that it is important to point out that there is presently no crime of terrorism under customary international law, citing the following reasons : i) incorrect decisions based on poor reasons and loose methodology are not good for international law or public

24) *Ibid*., p. 7.

25) *Ibid*., pp. 9–17.

26) Saul, *supra* note 7, p. 699.

confidence in its institutions and processes; ii) there is a risk that the international tribunal's decisions tend to take on a life of their own; iii) inventing *post facto* liabilities infringes on the human rights of criminal suspects, even if the conduct of such persons is morally abhorrent or falls through the gaps in the law then in force; and iv) through the international tribunal's decisions, encouragement and legitimacy have been given to despots to demonise and convict their opponents as terrorists[27].

The Appeals Chamber stated in its decision on the formation of customary international law:

> 'As was rightly noted by a great authority in international law, Dionisio Anzilotti, "laws that ensure a certain conduct of a State towards other States and which are not motivated by special interests of that State (for as a rule no State does for the other States, without gaining any advantage, more than it believes it must do)" constitute "very important indicia about the existence of a customary rule". However, the mere existence of concordant laws does not prove the existence of a customary rule, "for it may simply result from an identical view that States freely take and can change at any moment". Thus, for instance, the fact that all States of the world punish murder through their legislation does not entail that murder has regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime'[28].

However, such a clear statement is missing with regard to terrorism. Despite its undisputed relevance, the fact that terrorism has not been included in the Rome Statute of International Criminal Court, even though it was discussed in the negotiations and was included in the draft codes, and that it has so far not been possible to adopt a comprehensive terrorism convention, is evidence to the contrary[29]. Terrorism has not been recognised as an international crime so far.

Thus, it appears reasonable to asses that the Appeals Chamber's decision itself cannot serve as a precedent for the establishment of terrorism as a discrete crime under customary international law[30]. Certainly, the elements of terrorism have a solid basis in customary international law, but their lack of precision is proof of the lack of consensus in the international community as to the details of the

---

27） *Ibid*., pp. 699–700.

28） Interlocutory Decision, para. 91.

29） Kai Ambos and Anina Timmermann, "Terrorism and Customary International Law," in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2nd ed., 2020), p. 28.

30） Kirsch and Oehmichen, *supra* note 7, p. 20.

definition of an international crime of terrorism[31]. Nevertheless, the Appeals Chamber's decision highlights several important issues that need to be addressed as the international community continues to discuss the defining of terrorism.

III Issues raised by the Interlocutory Decision

1 Transnational Element

The Appeals Chamber's decision found that a customary definition for terrorism requires that terrorist acts involve a transnational element. The Appeals Chamber held that this transnational element consists of i) a connection of perpetrators, victims or means used across two or more countries, or ii) a significant impact that a terrorist act in one country has on another, constituting at least a threat to international peace and security for neighbouring countries[32]. Ambos urges that specialised UN Conventions criminalising specific acts of terrorism, such as the taking of hostages, the hijacking of planes, violent acts onboard an aeroplane and the attacking of diplomatic representatives, require a transnational element, 'which is the involvement of at least two countries in terms of territory and perpetrators/victims; yet this element is not part of the offence definition, but rather a jurisdictional rule that limits the application of the respective convention to terrorist offences with a cross-border dimension'[33]. While the Appeals Chamber stated that 'the requirement of a cross-border element goes not to the definition of terrorism but to its character as *international* rather than *domestic*'[34], Ambos criticises its reasoning as unclear[35]. Nevertheless, this requirement for a transnational element serves as a distinguishing line between the acts of terrorism that should remain within the national jurisdictional realm and those that can or should justify the intervention of an international tribunal. The transnational element becomes a threshold beyond which an act of terrorism becomes of international concern and qualifies intervention from an international body due to its international connections or a direct 'spillover' effect to other states; however, if the planning, execution or direct impact of a terrorist act does not have transnational dimensions, then the act is considered of purely domestic nature, and only national criminal law is applicable[36].

---

31) Ambos and Timmermann, *supra* note 29, p. 30.

32) Interlocutory Decision, para. 90.

33) Ambos, *supra* note 7, p. 672. Arguing that transnational element is a part of the requirements of defining international terrorism, see Manuel J. Ventura, "Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?," *Journal of International Criminal Justice*, Vol. 9, Issue 5: 2011 (2011), p. 1030.

34) Interlocutory Decision, para. 89.

35) Ambos, *supra* note 7, pp. 672–673.

36) Stella Margariti, *Defining International Terrorism: Between State Sovereignty and Cosmopolitanism*

Thus, a transnational element held by the Appeals Chamber's decision does not cover acts of terrorism that are of purely domestic nature, even if their impact on a state is similar to that of a transnational act of terrorism as far as victims and social destruction are concerned. However, there is an argument that the 'internationality' of a terrorist act should not be strictly determined by its pragmatic transnational dimensions but be extended to include acts of particular gravity that can generally affect international community interests.[37] Robert Kolb argues that a terrorist act can still be considered as an attack on universal values and interests of the international community, qualifying intervention from an international tribunal even if the persons involved in a very serious or large-scale terrorist act are exclusively from one state, which is also the only affected state.[38] In response to these arguments, Stella Margariti argues that this 'transnational element' requirement should be renamed an 'international element' requirement[39].

For Margariti, while the sectoral anti-terrorist conventions could also promote 'a cosmopolitan international morality' in the fight against terrorism, they fail to do so because of this reliance of transnational criminal law on the national penal system[40]. That is, this sectoral anti-terrorist regime demands, first and foremost, law enforcement expertise in the effort to suppress terrorism and relies on some influential states, which assume the role of an 'international enforcer', for its effectiveness, and the ideas of the most powerful states on how criminal law should be, along with their national penal systems, predominate over cosmopolitan values relating to the international legality and the human rights of individuals being prosecuted and punished under this regime; thus, regarding a definition for terrorism, a formulation which would favour the transnational over the international nature of a terrorist act should be abandoned[41]. Following this argumentation, Margariti suggests that one should introduce the element of 'threat to international peace and security', in an effort to eliminate the tension between the two poles of state sovereignty and cosmopolitanism[42]. If terrorism is thought to threaten international peace or security, an international definition must be limited to acts capable of that result; what makes them capable of that result can be their cross-border character and/or state involvement, thus inflicting an injury to international community values or interests[43].

(Springer, 2017), p. 169.

37） Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists," in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Hart Publishing, 2004), p. 245.

38） *Ibid*., p. 244.

39） Margariti, *supra* note 36, p. 169.

40） *Ibid*., p. 170.

41） *Ibid*., p. 170; Neil Boister, "Transnational Criminal Law?," *European Journal of International Law*, Vol. 14, No. 5: 2003 (2003), p. 960.

42） Margariti, *supra* note 36, p. 172.

43） Ben Saul, "Civilising the Exception: Universally Defining Terrorism," in Aniceto Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*

We should consider acts that attack international community interests and values as fulfilling the requirements of 'internationality', and emphasizing the international dimension of terrorist acts seems to be one of the important issues to consider in developing the definition of international terrorism.

2 Element of Political Motive

In considering a number of treaties, UN resolutions, domestic laws and decisions of national courts as grounds for the establishment of customary international law on crimes of international terrorism, the Appeals Chamber noted that a political, religious, racial or ideological purpose, namely the motive or motivation of the perpetrator, is required in the legislation of a number of common law and civil law states, as well as in some of the UN Terrorism Conventions and the draft Comprehensive Convention. However, the Appeals Chamber found that 'the overwhelming weight of state opinion, reinforced by the international and multilateral instruments, to which these states are party, does not yet contain that element'[44]. Nevertheless, the Appeals Chamber noted that 'the terrorist's intent to coerce an authority or to terrorise a population will often derive from or be grounded in an underlying political or ideological purpose', and referring to the Report of the Policy Working Group on the United Nations and Terrorism summarised in 2002[45], assessed that a purpose requirement should be made explicit as positive, which has an additional benefit: it clarifies the scope of conduct that can be charged as an international crime of terrorism, thereby furthering the principle of legality by preventing its over-expansive application. However, the Appeals Chamber held that this purpose requirement has not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law[46].

Concerning this requirement of a political, religious, racial or ideological purpose, Matthew Gillett and Matthias Schuster argue that for states adopting this requirement, the requirement is absolute in the sense that without it, no criminal liability arises, and that for states that do not insist on the enumerated purpose requirement, it is not an essential factor either way, namely, liability will arise whether or not it is demonstrated; thus, because of the essential nature of the enumerated purpose

---

(Springer, 2012), p. 93.

44) Interlocutory Decision, para. 98.

45) The Report of the Policy Working Group on the United Nations and Terrorism proclaimed: '[t]errorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality'. UN Doc. A/57/273-S/2002/875, 6 August 2002, Annex, para. 13.

46) The Appeals Chamber added: 'it remains to be seen whether one day it will emerge as an additional element of the international crime of terrorism'. Interlocutory Decision, para. 106.

requirement for those states and conventions that include it, the Appeals Chamber should have given it a heavier weighting and included it in the definition of terrorism. 'In that way, it would have significantly strengthened the foundation for its adopted definition of terrorism'[47].

General international conventions for the suppression of terrorism have avoided providing a general definition of terrorism, including motives. Those conventions require states to criminalise and punish certain physical and objective acts, such as hijacking, hostage-taking and the use of bombs, whether for private or political purposes. Indeed, the motive behind the action is not required as an element of the crime.

With regard to the current situation around general international conventions for the suppression of terrorism, Saul critically assesses that these conventions, which do not include motive elements, reach considerably beyond common understandings of terrorism since violence for public and private motives is equally criminalised[48]. Furthermore, Saul warns that these trends undermine the offences' moral and political force, and dilute the special character of terrorism as a crime against non-violent politics and social life[49]. For Saul, in a sophisticated criminal justice system, motive elements can promote a more finely calibrated legal response to specific types of socially unacceptable behaviour, and where society decides that certain social, ethical or political values are worth protecting, a motive requirement can more accurately target reprehensible infringements of those values[50]. Racially motivated violence that also intimidates the public or coerces a government could thus be prosecuted as the serious crime of terrorism, sending a strong deterrent message to those who propagate racial hatred or ethnic cleansing[51].

Some disagree with the idea of including elements of political motive in the definition of terrorism[52]. However, at a time when there is a growing consciousness of the need to respond to

---

47) Gillett and Schuster, *supra* note 6, p. 1009.

48) Ben Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?," in Andrew Lynch, Edwina MacDonald and George Williams (eds.), *Law and Liberty in the War on Terror* (Federation Press, 2007), p. 29.

49) *Ibid*., p. 30.

50) *Ibid*., p. 31.

51) *Ibid*., p. 35.

52) Kai Ambos submitted *amicus curiae* brief to the STL and noted that, as a general rule, intent and motive must be distinguished in criminal law, and that a certain motive only becomes relevant at the sentencing stage as a mitigating or aggravating factor, and criticises the Appeals Chamber's finding, which did not include a purpose requirement as an element but evaluated it positively, ignored the difference between intent and motive in criminal law. Kai Ambos, *Amicus Curiae* Brief on the question of the applicable terrorism offence in the proceedings before the Special Tribunal for Lebanon, with a particular focus on a "s*pecial" special intent* and/or a *special motive* as additional subjective requirements, STL-11-01/I/AC/R176bis, 11 February 2011, para. 4; Ambos, *supra* note 7, pp. 674–675. Kent Roach also citicises the

terrorism, it seems worthwhile to consider the idea that the possibility of an effective response to terrorism is enhanced by emphasising the element of political motive and purpose in terrorism and by actively linking the 'political' elements with terrorism. It is necessary to send a strong message to society that terrorist acts carried out based on political motives and purposes are serious criminal acts that should be distinguished from ordinary crimes.

IV Concluding Remarks

Antonio Cassese argued in 2001 that 'it may be safely contended that [...] at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes'[53]. Despite the fact that the Defence Office and the prosecutor both forcefully asserted that there is currently no settled definition of terrorism under customary international law, regardless of the situation that it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in society, the decision by the Appeals Chamber to hold that terrorism has evolved into a crime under international customary law may have been influenced by the fact that Cassese, who had an open mind regarding this issue, was the President of the Appeals Chamber[54]. Although Cassese acknowledges that many states have asserted that, as long as no agreement is reached on the contentious issue of mainly 'freedom fighters' and a comprehensive and all-embracing

---

inclusion of political and religious motive in the definition of terrorism, warning that it would go well beyond the essence of terrorism, such as murder and maiming of civilians, and would undermine the firmest foundation for any expansion of police powers or investigate practices that could be justified as necessary to respond to the harms of terrorist violence. Roach also criticised that this idea would require proof that a terrorist acted for a political or religious motive and would not be consistent with the traditional criminal law principle that motive is not generally an essential element of crime. Kent Roach, "The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive," in Lynch et al. (eds.), *supra* note 48, pp. 40–41.

53) Antonio Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law*, Vol. 12, No. 5: 2001 (2001), p. 994. In the textbook of his own writing on international criminal law, Cassese says: 'over the years, under the strong pressure of public opinion and also in order to come to grips with the spreading of terrorism everywhere, in fact, widespread consensus on a generally acceptable definition of terrorism has evolved in the world community, so much so that the contention can be made [...] that indeed a rule of customary international law on the objective and subjective elements of the international crime of terrorism in time of peace has evolved'. Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed., 2013), p. 148.

54) Saul, *supra* note 7, pp. 677–678.

definition of terrorism has not yet been settled[55], the real intent of the Appeals Chamber in recognising the definition of terrorism under customary international law may have been to take a step forward from the stagnant situation. However, it is reasonable to think that 'at the current state of international law, terrorism can only be qualified as a particularly serious transnational, treaty-based crime that is, at best, on the brink of becoming a true international crime but has not achieved this status yet'[56]. As Saul says, 'the tide may be turning, but it is not yet in'[57].

Nevertheless, there is no doubt that the definition of terrorism 'has gradually emerged' through a number of treaties, UN resolutions and the legislative and judicial practice of states regarding terrorism[58]. The Appeals Chamber's decision raised several important issues, including the transnational element and element of political motive in the definition of international terrorism, and in that sense, it can be evaluated as providing an opportunity for academic analysis, debate and constructive criticism[59]. We must continue to discuss the notion of terrorism as a legal concept as opposed to a social phenomenon[60]. Active discussions from an academic point of view will certainly contribute to future consensus-building on unresolved issues concerning the definition of terrorism in the international community.

55） Cassese et al., *supra* note 53, p. 148.

56） Ambos and Timmermann, *supra* note 29, p. 16.

57） Saul, *supra* note 7, p. 699.

58） Interlocutory Decision, para. 83.

59） Ventura, *supra* note 33, pp. 1041–1042.

60） Kirsch and Oehmichen, *supra* note 7, p. 19.