

ARTICLE

**THE LEXICON OF TERROR:
CRYSTALLIZATION OF THE DEFINITION OF
“TERRORISM” THROUGH THE LENS OF TERRORIST
FINANCING & THE FINANCIAL ACTION TASK FORCE**

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ABSTRACT

There is a widespread belief within both the scholarly and policymaking community that there is no broadly accepted international definition of terrorism. It is indeed the case that the United Nations has not succeeded in finalizing a counterterrorism treaty, and that acts of violence are often followed by a debate over whether they constitute acts of terrorism. This Article argues, however, that the vast majority of nations have in fact committed to adopting a substantive definition of terrorism and are steadily incorporating that definition into their domestic law through their adherence to the standards promulgated by the Financial Action Task Force. The widespread commitment to this definition offers scholars and policymakers the opportunity to move beyond fundamental, longstanding debates over the nature of terrorism and focus on applying this definition on the global stage. With a definition of terrorism in effect, terrorist actors and their supporters can be identified and isolated more effectively, with more innocent lives protected, and terrorism itself met clearly with the international opprobrium of banned international practices like piracy and slavery.

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INTRODUCTION

It is widely assumed that there is no accepted international definition of terrorism, in part because global views on what constitutes terrorism are so politically polarized as to prevent arriving at any meaningful common ground. This view is widespread both in popular culture and the academic community despite the decades of work on this issue at the United Nations (UN), the existence of several UN conventions addressing terrorism, and the increasing convergence of domestic laws on terrorism. In common discourse, any discussion about the definition of terrorism is often met with the relativist quip that “one man’s terrorist is another man’s freedom fighter.”

This Article argues that there is in fact a definition of terrorism that has been widely adopted within the community of nation states, and that this definition is meaningful, substantive, and offers a resolution to some of the most salient debates on the nature of terrorism. Not only are 189 nations party to the UN International Convention for the Suppression of the Financing of Terrorism (“Terrorist Financing Convention”), which offers a basic definition of terrorism, but more than 200 jurisdictions have also committed, through the Financial Action Task Force (FATF), to domestic adoption of a definition of the offense of “terrorist financing” that includes a clear definition of terrorism.¹ Furthermore, a majority of these jurisdictions have

¹ See International Convention for the Suppression of the Financing of Terrorism, art. 2(1), Dec. 9, 1999, 2178 U.N.T.S. 197 [hereinafter Terrorist Financing Convention]; FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 13, 41–42,

actually transposed the FATF definition into their national laws. These include nations, such as the members of the Organisation of Islamic Cooperation, that formerly have led opposition to an international legal definition of terrorism very similar to the definition used by the FATF. While the FATF definition does not resolve all questions, such widespread and consistent adoption implies that the fundamental debates about the definition of terrorism have in fact been quietly concluded.

The literature on the impossibility of defining terrorism has acquired its own collection of literary clichés. It is traditional to begin articles and books about the definition of terrorism with a quote from a thinker of a previous generation reflecting on the difficulties of defining terrorism² or a review of definitional efforts stretching back to at least the 1930s.³

This Article pays due homage to that tradition with a quote from a man who, in contrast to many thinkers and writers on the issue, was confident that he understood what terrorism involved. Nelson Mandela, speaking in his own defense at his 1964 trial for sabotage and treason, offered a clear taxonomy of violent action: “There is sabotage, there is guerrilla warfare, there is terrorism, and there is open revolution.”⁴ He described sabotage as “not involv[ing] loss of life” and as principally involving attacks on economic and infrastructure targets.⁵ Although Mandela did not define terrorism, the use of the term in context suggests that he believed terrorism to entail violence directed against human lives rather than (like sabotage) inanimate

130 (Oct. 2021), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> [https://perma.cc/FE64-S649] [hereinafter FATF RECOMMENDATIONS] (identifying and clarifying Recommendation 5 (“Terrorist financing offence”) and defining “terrorist act”).

² See, e.g., John F. Murphy, *International Law in Crisis: Challenges Posed by the New Terrorism and the Changing Nature of War*, 44 CASE W. RES. J. INT’L L. 59, 61 (2011) (quoting R.R. Baxter); Leonard Weinberg, Ami Pedahzur & Sivan Hirsch-Hoefler, *The Challenges of Conceptualizing Terrorism*, 16 TERRORISM & POL. VIOLENCE 777, 777 (2004) (quoting Walter Laqueur).

³ See, e.g., Ben Saul, *Attempts to Define “Terrorism” in International Law*, 52 NETH. INT’L L. REV. 57, 57–61 (2005); BRUCE HOFFMAN, *INSIDE TERRORISM* 1–21 (3d ed. 2017); Geoffrey Levitt, *Is “Terrorism” Worth Defining?*, 13 OHIO N. U. L. REV. 97, 97–108 (1986); William R. Farrell, *Terrorism Is...?*, 33 NAVAL WAR COLL. REV. 64, 64–66 (1980).

⁴ Nelson Mandela, *I Am Prepared to Die*, Statement from the Dock at the Opening of the Defence Case in the Rivonia Trial (Apr. 20, 1964), https://www.un.org/en/events/mandeladay/court_statement_1964.shtml [https://perma.cc/2NGW-5VQM].

⁵ *Id.*

targets.⁶ But at no point did he suggest that South Africans fighting for the overthrow of the apartheid government could not carry out terrorism simply because they were engaged in a struggle against a racist regime.⁷

Nearly sixty years after Mandela's speech, terrorism remains an intensely contested term. Despite the substantial progress achieved at the UN and FATF, there is no substantive, *universally* recognized definition that spans academic disciplines or political communities.⁸ In the minds of many commentators, the primary obstacle to consensus on the definition of terrorism is the "Nelson Mandela problem": the perceived need to distinguish "terrorists" from "freedom fighters" (two terms that are frequently held to be mutually exclusive).⁹ These commentators reject any definition of terrorism that does not make exceptions for legitimate causes or goals, such as protest, dissent, and even violence against illegitimate regimes. They refuse to label activities by groups whose goals they consider laudable as terrorism, regardless of the nature or consequences of those activities. An equally intense debate rages over whether certain actions by states can or should fall under the rubric of terrorism.

The length and thorniness of the debate reflect the intensely negative valence of the words "terrorism" and "terrorist." It is very rare for any group involved in conflict to embrace the label of terrorist, and both sides in a conflict may seek to apply the label to their opponents in order to attack the other side's legitimacy and cut off its access to international support.¹⁰ Beyond these rhetorical and emotional considerations, the question of what constitutes terrorism goes to the center of many of today's most vexing

⁶ *See id.*

⁷ *See id.*

⁸ *See, e.g.,* THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH (Alex P. Schmid ed., 2011) (presenting over 250 definitions of terrorism).

⁹ For an argument that there is a clear distinction between terrorists and freedom fighters, see President Ronald Reagan, Radio Address to the Nation on Terrorism (May 31, 1986), <https://www.reaganlibrary.gov/archives/speech/radio-address-nation-terrorism> [<https://perma.cc/4S53-ZWSL>] ("Freedom fighters do not need to terrorize a population into submission. Freedom fighters target the military forces and the organized instruments of repression keeping dictatorial regimes in power. Freedom fighters struggle to liberate their citizens from oppression and to establish a form of government that reflects the will of the people. . . . Terrorists intentionally kill or maim unarmed civilians, often women and children, often third parties who are not in any way part of a dictatorial regime. Terrorists are always the enemies of democracy.").

¹⁰ *See* Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter*, 3 POLICE PRAC. & RSCH. 287, 291–92 (2002) (noting the insistence on the part of Fatah and Black September leader Salah Khalef that he was "firmly opposed to . . . terrorism" but that "revolutionary violence" should not be "confuse[d]" with "terrorism").

international security issues and is often at the core of determining legitimacy in international affairs.

The public debate that plays out in media and oratory is so highly charged and politicized that it generally ignores both existing international conventions dealing with terrorism (and related offenses) and the ongoing work at the UN to finalize a counterterrorism convention.¹¹ Debates about terrorism staged in a legal vacuum create a vicious (or depending on a participant's goals, virtuous) cycle: the assumption that there is no definition of terrorism in international law lends credence to the idea that the concept is uniquely resistant to definition. It appears that some parties to this debate resist defining terrorism, or reject those definitions that are proposed, because they assume that anything excluded from the definition would be permissible and even acceptable.¹² This only contributes to terrorism's status as a thing apart, the third rail of international politics. Yet this ignores the fact that many governments have for years successfully prosecuted terrorist offenses in domestic criminal courts and that in the post 9/11 period, the isolation of terrorist groups and prevention of terrorist activities became central features of international security efforts.

This is in contrast, importantly, to genocide, which is an equally highly-charged term but still has a settled definition in international law.¹³ This does not mean that all parties to a debate will necessarily agree that a specific action or campaign is genocide, but it is nevertheless possible to have serious discussions about whether specific atrocities do in fact meet the definition of genocide with reference to a specific standard and without suggesting that actions that do not meet the definition are perforce legal or ethical.¹⁴

¹¹ See Igor Primoratz, *Terrorism is Almost Always Morally Unjustified, But It May Be Justified as the Only Way of Preventing a "Moral Disaster,"* LSE EUR. POL. & POL'Y (Apr. 29, 2013), <https://blogs.lse.ac.uk/euoppblog/2013/04/29/terrorism-moral-disaster-justified-igor-primoratz-philosophy> [<https://perma.cc/RPR3-H5GF>] (describing the definitional debate as "clouded by emotions, moral passions, and political interests").

¹² For a pithy expression of the assumption that what is not defined as "terrorism" is necessarily permitted, see Igor Primoratz, *State Terrorism and Counterterrorism*, in *ETHICS OF TERRORISM AND COUNTER-TERRORISM* 69, 69 (Georg Meggle et al. eds., 2004) (quoting Roger Woddis, *Ethics for Everyman*, in *THE NEW OXFORD BOOK OF LIGHT VERSE* 292 (Kingsley Amis ed., 1978) ("Throwing a bomb is bad, / Dropping a bomb is good; / Terror, no need to add, / Depends on who's wearing the hood.")).

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

¹⁴ On whether the killings in Darfur amounted to genocide, see, for example, Jamie A. Mathew, *The Darfur Debate: Whether the ICC Should Determine That the Atrocities in*

This Article argues that there is in fact an internationally accepted definition of terrorism that, while not necessarily qualifying as international law, nevertheless has achieved nearly universal adoption. We argue that the most important moves towards developing an accepted international definition of terrorism, however, have not taken place in the context of the UN, but instead through the auspices of the FATF and its requirements related to the criminalization of the financing of terrorism. The FATF standards are not international law, but more than 200 states or jurisdictions have committed to complying with them, and at least 100 of those jurisdictions (85 percent of those whose definitions have been reviewed to date) have adopted a domestic definition of terrorism that meets this standard.¹⁵

The FATF process does not create international law, but it shows that it is possible to create a basic legal definition of terrorism that is widely acceptable. Likewise, the FATF definition is not perfect, nor does it put an end to all debates in this area, but it does resolve some fundamental points of difference and clear the stage for a more nuanced debate. In particular, the FATF definition approaches terrorism from the perspective of actions rather than actors; it makes clear that specific actions are terrorism no matter who carries them out or what ends they are seeking to achieve. Under the FATF definition, as Mandela recognized, a freedom fighter can also be a terrorist if the freedom fighter engages in terrorist acts. And the FATF leaves open the possibility that state actors can engage in acts that fall under the definition of terrorism, though such acts would otherwise be considered illegitimate and war crimes under international law.

It is certainly true that the FATF definition, and that definition's action-based approach, could be used by repressive regimes to suppress dissent. It is also the case that the FATF's definition does not encompass every evil in the world, and may in fact exclude the murderous actions of nation-states. But any definition, no matter how carefully drawn, can be subject to abuse by various actors, and any definition will have to be applied to specific facts and circumstances.

Darfur Constitute Genocide, 18 FLA. J. INT'L L. 517 (2006); Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 FORDHAM INT'L L.J. 990 (2008).

¹⁵ *Consolidated table of assessment ratings*, FIN. ACTION TASK FORCE (Feb. 10, 2022) [hereinafter FATF, *Fourth Round Ratings*] (column R.5) <http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> [<https://perma.cc/6PG6-LG8B>].

Scholars and policymakers have been debating the definition of terrorism for nearly a century. It is time to accept that some of these debates have closed—if not in moral or philosophical terms, at least in the arena of international relations. The next step is for policymakers to highlight and formalize this consensus, to use it as a basis for addressing those debates left unresolved, and to build on it to implement a global campaign, similar to historical campaigns against piracy or the slave trade, to eradicate the use of terrorism as a tactic by all actors and in conflicts of any kind.

Part I of this Article contextualizes the problem by providing a background on the current state of debate over the definition of terrorism. Part I.A provides a brief discussion of the need for an international definition of terrorism that enjoys wide, although not necessarily universal, acceptance. Part I.B sketches a high-level outline of the voluminous literature dealing with the definition of terrorism. Part I.C discusses the UN's work to define terrorism, both through a comprehensive counterterrorism treaty and multiple more focused conventions.

Part II shifts the focus from the UN to the FATF. Part II.A provides explanatory background on the organization and purpose of the FATF and on the nature of its forty recommendations. Part II.B explores the FATF's definition of terrorism and contrasts it with definitions found in UN conventions. In Part II.C, we examine how the FATF goes beyond purely definitional efforts to ensure that member states are actually operationalizing its definition of terrorism. In light of the FATF's measures to penalize states that fail to adopt its definition of terrorism, we argue that the FATF and its members have developed and promulgated a definition of terrorism that has become the new international standard.

Part III concludes the Article and provides a summary of outstanding questions.

I. DEBATE OVER AN INTERNATIONAL DEFINITION OF TERRORISM

A. Why We Need an International Definition of Terrorism

As Vincent Proulx has pointed out in this Journal, counterterrorism law and practice will perhaps inevitably be hammered out largely on the domestic level, implicating, as it does, important issues of national security

and sovereignty.¹⁶ Nevertheless, an international definition of terrorism is desirable for a number of reasons. First, it would facilitate the passage of an international counterterrorism convention at the UN that would create binding obligations on states to combat terrorism (and not just its financing, or specific manifestations of it). Such a convention would lay the groundwork for a prohibition on terrorism in international law, and could allow the UN to function as a more effective counterterrorism body. Second, a UN convention, and with it an *official* definition of terrorism, could also allow for disputes related to terrorism to be heard before international legal tribunals such as the International Court of Justice or the International Criminal Court. Furthermore, it could allow persons living in states that do not protect their citizens from terrorism, or from certain forms or strains of terrorism, to force domestic action consistent with the state's international responsibilities, whether through domestic courts or through appeals to these international tribunals.

On the political and rhetorical level, an international definition of terrorism would provide international actors with a firm baseline that could be referenced to identify acts of terrorism. Such reference to a fixed international norm could help to reduce (although it would not eliminate) allegations that the debate over terrorism is essentially and irreducibly political. It would clearly define terrorism as a set of actions rather than a particular ideological approach, and it would help shift the debate from what constitutes an act of terrorism to whether a particular action meets the legal definition and what that means for the actors involved. Bringing debates into the realm of factual questions rather than rhetoric would lower the emotional temperature of the debate and impede attempts to depict terrorism as either an outrage so egregious to be beyond the scope of rational debate, or a numinous concept with no real existence outside the minds of tyrants and extremists.

Finally, a clear definition of terrorism—and with it, the possibility of clearly defined red lines—could help to save lives and reduce terrorist violence by making clear to violent actors that they cannot seek to avoid the label of terrorism by pleading the justice of their cause and also that they may be able to avoid the term by avoiding specific violent acts. In this regard, a clear definition may result in some degree of deterrence, restraining decisions and wanton targeting of innocent civilians by terrorist groups for fear of loss of legitimacy. At the same time, an international definition that makes clear

¹⁶ Vincent-Joël Proulx, *A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty*, 11 HARV. NAT'L SEC. J. 151, 156–58 (2020).

that terrorism is not simply “any action the state does not like” may in fact assist citizens of repressive regimes whose peaceful dissent their governments seek to label and prosecute as “terrorism.”

B. Previous Assessments that There is No Definition of Terrorism in International Law

It is a commonplace in terrorism scholarship that, while individual researchers and writers may have their own definition of terrorism, it is difficult, if not impossible, to fix on a definition that pleases everyone or that is likely to be broadly accepted. One attempt to collect definitions employed in academic and government writings compiled more than 250 separate definitions.¹⁷ The same researcher also proposed a consensus definition that integrated the most common elements of definitions found elsewhere; it was well over 500 words long—hardly suitable for everyday use.¹⁸ A recent bibliography on the subject of defining terrorism specifically extends to well over thirty pages and includes five additional bibliographies.¹⁹

The debate over the definition of terrorism within the specific context of legal academia is equally robust and longstanding. This Article does not propose its own definition of terrorism but simply argues that, in fact, meaningful international consensus has been reached regarding a baseline definition. As such, a full review of definitional debates within the legal community is not necessary to our argument and would unduly enlarge the Article’s scope. A brief outline of the principal schools of thought within the legal community, however, is useful to place the discussion that follows within the context of existing debates.

With that frame in mind, the recent debate on definitional issues can be divided into four analytically separate although not entirely distinct schools of thought. The first two schools are primarily observational, offering arguments as to whether a definition of terrorism exists. Members of the first, and larger, of the observational schools argue that, as a matter of fact, there is no widely accepted meaningful definition of terrorism in international law or within the international community.

The second school, in contrast, argues that there is a baseline conceptual consensus within the international community regarding the

¹⁷ See THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH, *supra* note 8, at 99–157.

¹⁸ See *id.* at 86–87.

¹⁹ Judith Tinnes, *Bibliography: Defining and Conceptualizing Terrorism*, 14 PERSPECTIVES ON TERRORISM 204, 204–35 (2020).

nature of terrorism, although not that any specific definition is universally accepted. Some members of this school believe that this conceptual baseline is in fact meaningful, while others disagree, arguing that it is of limited usefulness. This Article, as discussed below, generally agrees with this second school, but goes beyond most of its members by arguing that there is not just a general consensus on conceptual outlines of terrorism, but in fact a fairly robust and specific understanding.

Academics within the first observational school generally agree that, regardless of the root cause, there is no known or widely accepted definition of terrorism. Summarizing these views, Saul argues, “The many attempts to define terrorism in international law since the 1920s have all ended in failure.”²⁰ At times this acknowledgment is made in passing; at other times it forms the basis of a further quest to arrive at such a definition. As one study put it, “countless papers” present the argument that “(1) [w]e do not have an agreed definition of terrorism” and “(2) [t]his is a problem.”²¹ Many authors then set out to resolve this dilemma by introducing their own definition of terrorism.²² Others follow the first two steps and then throw up their hands in despair at the scope of the challenge, or argue that a definition is not desirable.²³ In some cases, as discussed below, members of this latter group specifically argue that it is not possible to develop a meaningful definition that does not have undesirable chilling effects on legitimate dissent. All, however, share the assumption that there is no existing definition in international law (and, in certain cases, in domestic law as well).

²⁰ Ben Saul, *Defining “Terrorism” to Protect Human Rights*, in INTERROGATING THE WAR ON TERROR: INTERDISCIPLINARY PERSPECTIVE 190 (D. Staines ed., 2007).

²¹ Gilbert Ramsay, *Why Terrorism Can, But Should Not Be Defined*, 8 CRITICAL STUD. ON TERRORISM 211, 211 (2015).

²² See, e.g., Timothy Shanahan, *The Definition of Terrorism*, in ROUTLEDGE HANDBOOK OF CRITICAL TERRORISM STUDIES 103, 110–12 (Richard Jackson ed., 2018); Ganor, *supra* note 10, at 294–304; Weinberg et al., *supra* note 2, at 777–94; Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT’L L. 359, 363–74 (2004).

²³ See, e.g., Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 395 (2004); Anthony Richards, *Conceptualizing Terrorism*, 37 STUD. IN CONFLICT & TERRORISM 213, 217–19 (2014); LORD CARLILE OF BERRIEW Q.C., THE DEFINITION OF TERRORISM 3 (2007) (“There is no universally accepted definition of terrorism. It remains the subject of continuing debate in international bodies.”); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. ON LEGIS. 249, 272–74 (2004); Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT’L L. 1, 7 (2011) (noting in particular “the United Nations’ inability to define terrorism comprehensively”); Alan Greene, *Defining Terrorism: One Size Fits All?*, 66 INT’L & COMPAR. L. Q. 411, 411–14 (2017); Ben Golder & George Williams, *What is ‘Terrorism’? Problems of Legal Definition*, 27 UNSW L.J. 270, 270–72 (2004); Murphy, *supra* note 2, at 62–63; Scharf, *supra* note 22, at 359–60.

Members of the second school, in contrast to the first, argue that various international instruments in fact express something close to a consensus on the basic outlines of terrorism, frequently citing the UN Terrorist Financing Convention as closest to the international consensus.²⁴ Members of this group, however, generally do not go so far as to argue that a definition of terrorism exists in international law, and they disagree as to whether the consensus definition is particularly meaningful or helpful.²⁵

The most robust exposition of the view that international law provides “a powerful definitional jurisprudence” regarding the definition of terrorism appears in a 2006 essay by Reuven Young.²⁶ Young argues that “a core international law definition of terrorism” can be extracted from “common elements and themes” of UN conventions and resolutions on the subject.²⁷ Surveying seventy years of attempts to define terrorism at the international level, including most importantly efforts by the UN, he notes that beginning in the late 1980s and early 1990s, UN documents on terrorism began to condemn terrorism unequivocally, referencing the right of self-determination but not directly linking it to any exemption from the prohibition on terrorism.²⁸ Young ends his survey of UN terrorism-related instruments with a discussion of the Terrorist Financing Convention, which he describes as “the first international convention since 1937 . . . to attempt to define

²⁴ Terrorist Financing Convention, *supra* note 1; *see, e.g.*, Ben Saul, *Defining Terrorism in International Law*, GLOBALEX § 3.3 (Nov./Dec. 2021), https://www.nyulawglobal.org/globallex/Defining_Terrorism_International_Law.html [<https://perma.cc/KG8S-QSHG>] (“None of the treaties establishes a general crime of terrorism, although the Terrorist Financing Convention comes closest in providing a general definition for the limited purpose of criminalising terrorist financing. . . .”); Marcello Di Filippo, *The Definition(s) of Terrorism in International Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 2, 5 (Ben Saul ed., 2d ed. 2020) (noting that the Terrorist Financing Convention “provides something of a general definition”); Proulx, *supra* note 16, at 166 (citing the Terrorist Financing Convention as “one conventional exception” to the UN’s reluctance to actually define terrorism).

²⁵ *See, e.g.*, Ben Saul, *Defining Terrorism: A Conceptual Minefield 2* (Sydney L. Sch., Legal Stud. Rsch. Paper No. 15/84, 2015) (noting that “at the international level, there is certainly a basic legal consensus that terrorism is criminal violence intended to intimidate a population or coerce a government or international organization” but that “a conceptual impasse continues” due to disagreements over whether the definition should include acts taken in the pursuit of “just causes”).

²⁶ Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 65 (2006).

²⁷ *Id.* at 23.

²⁸ *See id.* at 39–41.

terrorism in the abstract.”²⁹ He concludes by elucidating nine common elements of these multilateral documents, arguing that “[t]here is striking consistency in the form, themes, and philosophy of the various conventional statements on terrorism” so “terrorism as a legal concept at international law has a core content.”³⁰ But he notes that the widespread ratification of these multilateral instruments does not in itself qualify as state practice for the purposes of development of a customary rule of international law.³¹

This Article follows in Young’s footsteps by arguing that there is in fact an internationally accepted definition of terrorism, and that state practice has indeed coalesced around a single norm. More than fifteen years have passed since Young published his survey, however, and this Article argues that the international consensus regarding the definition of terrorism has only become stronger and more clearly defined. Most importantly, Young’s survey does not include efforts by the FATF to identify and promote a definition of terrorism, nor the widespread adoption of a FATF-compliant definition by member states (discussed in Part III.C).

Intersecting and overlapping with the two observational schools are two groups of scholars seeking to make substantive or normative points as to what should (and should not) be included in the definition of terrorism. Some scholars argue that terrorism is difficult and perhaps impossible to define because any usefully broad conceptual definition would inappropriately include legitimate protest, liberation movements, or struggles against foreign occupation (the terrorist or freedom fighter problem).³² A final group of thinkers requires that the definition of terrorism include actions carried out by states along with those performed by individuals or non-state actors.³³

²⁹ *Id.* at 53. *But cf. id.* at 44 (noting that later documents, such as UN Security Council Resolution 1373, do not use the Terrorist Financing Convention’s definition of terrorism).

³⁰ *Id.* at 64.

³¹ *Id.* at 65.

³² *See, e.g.,* Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 *NEW CRIM. L. REV.* 494, 507–08 (2013); Ben Saul, *Counter-Terrorism Law and the Shrinking Legal Space for Political Resistance and Violence* 6 (Sydney L. Sch., Legal Stud. Rsch. Paper No. 17/36, 2017); Greene, *supra* note 23, at 413.

³³ *See, e.g.,* Lee Jarvis & Michael Lister, *State Terrorism Research and Critical Terrorism Studies: An Assessment*, 7 *CRITICAL STUD. ON TERRORISM* 43, 43–44 (2014); Ruth Blakeley, *Bringing the State Back into Terrorism Studies*, 6 *EUR. POL. SCI.* 228, 228–29 (2007); Primoratz, *supra* note 12, at 69; Kai Nielsen, *On the Moral Justifiability of Terrorism (State and Otherwise)*, 41 *OSGOODE HALL L.J.* 427, 427–30 (2003). For an account of the role debates over state terrorism played in preventing agreement at the UN on a definition of terrorism, see Schmid, *supra* note 23, at 388–90.

A full recounting of the legal and philosophical debates over the *content* (rather than the existence) of a definition of terrorism is outside the scope of this Article. Suffice to say that the substantive debate can largely be boiled down to two main questions discussed in the introduction. First, should actions carried out by certain actors be excluded from the definition of terrorism on account of those actors' virtuous and desirable motives? And second, should the definition of terrorism include actions by states?³⁴

Supporters of the view that a freedom fighter cannot be a terrorist argue that the nature of the political or ideological goals a group seeks to achieve when carrying out a violent action must be a decisive factor in the determination of whether that action falls under the definition of terrorism. Some writers seek to exclude those actors qualifying as "legitimate freedom fighters" from the definition of terrorism.³⁵ More moderate proponents of this view argue that overly-broad definitions of terrorism—particularly those lacking an exception for forms of protest or resistance that are generally accepted in democratic societies—have allowed repressive regimes to justify punitive action against individuals who engage in legitimate dissent or resistance.³⁶ These scholars therefore propose something of a two-pronged test for terrorism that takes into consideration, first, the nature of the terrorist actor's goal and, second, the nature of the actions the terrorist carries out.

A second group argues that any accurate and fair definition of terrorism must include what they label "state terrorism."³⁷ Scholars in this group criticize the contemporary practice of terrorism studies for ignoring or minimizing violent actions by states.³⁸ As one recent (and sympathetic) study noted, however, these scholars have been less attentive to the distinctions between what they describe as state terrorism and other state behaviors that are morally condemnable or prohibited under international law.³⁹

³⁴ Saul, *supra* note 25, at 1.

³⁵ Hodgson & Tadros, *supra* note 32, at 496.

³⁶ Saul, *supra* note 32, at 1.

³⁷ See generally Jarvis & Lister, *supra* note 33; Blakeley, *supra* note 33; Primoratz, *supra* note 12; Nielsen, *supra* note 33.

³⁸ See Bart Schuurman, *Topics in Terrorism Research: Reviewing Trends and Gaps, 2007-2016*, 12 CRITICAL STUD. ON TERRORISM 463, 473 (2019).

³⁹ Jarvis & Lister, *supra* note 33, at 44–48.

C. UN Efforts to Define Terrorism

Counterterrorism has been a subject of focus at the UN for over fifty years (whether or not work on this issue was explicitly labeled as such).⁴⁰ These efforts first bore formal fruit with the conclusion of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation in 1971.⁴¹ Over the succeeding decades, the UN adopted a series of other conventions relevant to terrorist tactics, although in most cases they did not explicitly address themselves to terrorism, or even contain the word, and they did not attempt to define it.

1. Draft Comprehensive Convention

The UN has worked sporadically to develop and draft a comprehensive international convention on terrorism. The General Assembly's first serious commitment to defining terrorism and developing a counterterrorism convention came in 1987 with the passage of Resolution 42/159.⁴² This Resolution called on the Secretary General to seek the views of member states on convening "an international conference to define terrorism and to differentiate it from the struggle of peoples for national liberation."⁴³ In addition to condemning terrorism, the Resolution called on member states to eliminate the "colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and occupation, that may give rise to international terrorism."⁴⁴ In the context of later UN work on this issue, the Resolution is notable for acknowledging that terrorist acts may be linked to struggles for self-determination or national liberation, while at the same time not suggesting that this linkage exempts such acts from the definition of terrorism.⁴⁵

In 1997, the General Assembly created an Ad Hoc Committee to develop an international convention for the suppression of terrorist bombings, an international convention for the suppression of acts of nuclear terrorism, and, finally, an international counterterrorism framework.⁴⁶ The Committee

⁴⁰ SEBASTIAN VON EINSIEDEL, ASSESSING THE UN'S EFFORTS TO COUNTER TERRORISM, UNITED NATIONS UNIV. CTR. FOR POL'Y RSCH. 1 (2016).

⁴¹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177.

⁴² G.A. Res. 42/159 (Dec. 7, 1987).

⁴³ *Id.* at pmb1.

⁴⁴ *Id.* ¶ 8.

⁴⁵ See *id.* at pmb1 ("Reaffirming also the inalienable right to self-determination and independence of all peoples . . . and upholding the legitimacy of their struggle . . .").

⁴⁶ See G.A. Res. 51/210, ¶ 9 (Jan. 16, 1997).

began work on a comprehensive convention on international terrorism by the end of 2000,⁴⁷ and it circulated a draft to the General Assembly as early as 2005.⁴⁸ In 2013, the General Assembly recommended establishing a Working Group of the Committee to finalize the draft of the comprehensive convention.⁴⁹

The Working Group has been periodically re-established (most recently in 2016), but no progress on the text appears to have been made since 2013, when a revised version of certain articles of the draft convention was published.⁵⁰ According to one account, this delay is due to the inability of member states to “agree on a definition of terrorism, in particular on the questions of whether the definition should include so-called ‘state terrorism’ (i.e., acts carried out by the military forces of a state against civilians) and whether people under foreign occupation should retain the right of violent resistance.”⁵¹ Consistent with this analysis, in 2018, the Chair of the Working Group submitted a progress report to the General Assembly in which he noted the views of some members that “a new procedural impetus . . . was required to generate the political momentum needed to bring a swift conclusion to the negotiations. . . .”⁵² The report also noted that:

A number of delegations had expressed the view that it was premature to discuss the specific details of possible drafting solutions in the absence of political agreement on the goals to be achieved through the draft comprehensive convention. In that regard, it had been noted that consideration needed to be given to questions concerning the relationship between the draft comprehensive convention and international humanitarian law, including in relation to foreign occupation, and to the understanding of notions such as “State terrorism.”⁵³

⁴⁷ United Nations Office of Legal Affairs, *Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UNITED NATIONS (Feb. 17, 2022), <https://legal.un.org/committees/terrorism/> [<https://perma.cc/B8JT-CTMG>].

⁴⁸ Chairman of the Sixth Comm., Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, 7–18, U.N. Doc. A/59/894 (Aug. 12, 2005) [hereinafter *Draft Comprehensive Convention*].

⁴⁹ G.A. Res. 68/119, ¶ 24 (Dec. 18, 2013).

⁵⁰ See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 4–14, U.N. Doc. A/68/37 (May 15, 2013) [hereinafter *Revised Draft Comprehensive Convention Articles*].

⁵¹ VON EINSIEDEL, *supra* note 40, at 1.

⁵² Sixth Comm., Summary record of the 33rd meeting, 2, A/C.6/73/SR.33 (Dec. 6, 2018).

⁵³ *Id.* at 3.

The draft convention, as amended by the articles circulated for discussion in 2013, does not in fact explicitly offer a definition of terrorism or use terms such as “terrorist” or “terrorist act.”⁵⁴ Article 2 of the draft does, however, make it an offense under the convention to “unlawfully and intentionally” cause:

- (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 (b)] 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.⁵⁵

A credible threat to commit such an offense, an attempt to commit such an offense, and a variety of ancillary behaviors are also offenses under the convention.⁵⁶

The scope of the offenses in the 2013 draft is broad, encompassing damage to humans, serious damage to public property, and damage of any kind to public property provided that it causes “major economic loss.”⁵⁷ Notably, this language has not changed since at least 2005, indicating that members of the Working Group may at least be in broad agreement on the specific actions that can constitute terrorism.⁵⁸

Consensus appears to have broken down, however, over whether the actions listed in Article 2 constitute terrorism regardless of which actors are carrying them out. The 2005 draft—the last complete draft of the convention to be publicly circulated—includes language in Article 20 which excludes

⁵⁴ Revised Draft Comprehensive Convention Articles, *supra* note 50.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 6–7. The ancillary behaviors include participating as an accomplice, organizing or directing others, and making an intentional, knowing or purposeful contribution to the commission of an offense “by a group of persons acting with a common purpose.” *Id.*

⁵⁷ *Id.* at 6.

⁵⁸ Compare Draft Comprehensive Convention, *supra* note 48, at 9–10 (draft art. 2) with Revised Draft Comprehensive Convention Articles, *supra* note 50, at 6–7 (draft art. 2).

from the convention's scope "the activities of armed forces during an armed conflict," insofar as these are governed by international humanitarian law, and "[t]he activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law."⁵⁹ These dual clauses appear to exempt both actions carried out by state forces and also the activities of any organization or group, whether or not under the direction of a recognized government, that qualifies as an "armed force" under international humanitarian law.⁶⁰

This language in the 2005 draft has not been formally or finally rejected by the Working Group or UN member states, but more recent discussion drafts remove this article from the main body of text and confine it to a section of proposals by various stakeholders.⁶¹ Seven of the eight proposals deal directly with the questions of state action or self-determination.⁶² Two make it an offense for any person in control of the armed forces of a state—but not of any other armed forces—to order, permit, or plan an action listed in Article 2.⁶³ Two are closely similar to the text of Article 18 in the 2005 draft convention.⁶⁴ Two add language to the preamble emphasizing the right to self-determination under the Charter of the United Nations.⁶⁵ And one extends Article 18's exemption for armed forces to all "parties during an armed conflict, including in situations of foreign occupation."⁶⁶

Stakeholders commenting on the proposed draft are thus fairly evenly split between a desire to broaden the scope of the convention to include state action and to narrow it to exclude, or potentially exclude, persons involved

⁵⁹ Draft Comprehensive Convention, *supra* note 48, at 17.

⁶⁰ *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.").

⁶¹ *See, e.g.*, Revised Draft Comprehensive Convention Articles, *supra* note 50, at 15.

⁶² *Id.* at 15–19. The remaining proposal by the Friends of the Chair of the Working Group could also be said to deal obliquely with the question of state action, as it references international humanitarian law. *See id.* at 17.

⁶³ *Id.* at 16, 18 (proposals submitted by Nicaragua and Cuba).

⁶⁴ *Id.* at 15–16, 18 (proposals submitted by the Bureau of the Committee and by the Coordinator).

⁶⁵ *Id.* at 17 (proposals submitted by the Friends of the Chair of the Working Group and by Argentina).

⁶⁶ *Id.* at 18–19 (proposal submitted by member States of the Organization of the Islamic Conference).

in struggles for self-determination even when they do not qualify as members of armed forces under international humanitarian law. The questions driving this impasse are closely aligned to the two substantive debates addressed in Part II.B: the “state terrorism” problem and the “terrorist or freedom fighter” problem.

2. Terrorist Financing Convention

The UN has adopted several conventions dealing with the financing of terrorism and with specific tactics that may be used by terrorists. In marked contrast to the political quagmire in which the draft comprehensive counterterrorism convention has become mired, these more targeted conventions have achieved widespread, nearly universal adoption. This is particularly remarkable given that one of them, the Terrorist Financing Convention, establishes by reference a definition of terrorism that resolves or simply ignores many of the debates that have stymied the development and adoption of a draft comprehensive counter-terrorism convention.⁶⁷

The Terrorist Financing Convention was adopted by the General Assembly in 1999 and entered into force in 2002.⁶⁸ It has 189 parties.⁶⁹ Although the Convention opened for signature in January 2000, nearly two-thirds of signatory states signed in the period between the 9/11 terrorist attacks and the close of the signature period in December 2001.⁷⁰ The attacks, therefore, and the political momentum that followed in their aftermath, may have overridden concerns among the parties about the breadth of their obligations under the Convention.

It is important to note that the Terrorist Financing Convention, true to its name, is primarily concerned with the financing of terrorism rather than addressing terrorism directly. That said, a definition of terrorism financing without a definition of terrorism could be rendered nugatory by overly narrow (or overly broad) definitions of terrorism applied by individual state parties. As a result, the Convention is careful to define both what qualifies as financing but also those acts the financing of which constitutes the terrorist financing offense.⁷¹

⁶⁷ Terrorist Financing Convention, *supra* note 1, art. 2.

⁶⁸ United Nations Office of Legal Affairs, *Status of Treaties: International Convention for the Suppression of the Financing of Terrorism*, UNITED NATIONS (last accessed Mar. 6, 2022), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en [https://perma.cc/8A59-GTQQ].

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See* Terrorist Financing Convention, *supra* note 1, art. 2.

Article 2, paragraph 1 of the Terrorist Financing Convention makes it an offense when a person:

by any means, directly or indirectly, unlawfully and wilfully, 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.⁷²

States parties are required under Article 4 to make the actions described in Article 2 a criminal offense under domestic law, punishable by “appropriate penalties.”⁷³ The reference to “one of the treaties in the annex” in Article 2, paragraph 1(a) means that the Convention’s definition of the terrorist financing offense incorporates by reference the specific actions described in nine pre-existing UN conventions.⁷⁴

⁷² *Id.* art. 2(1).

⁷³ *Id.* art. 4.

⁷⁴ *Id.* art. 2(1)(a), annex (incorporating the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *adopted by G.A.* Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, *adopted by G.A.* Dec. 17, 1979, 1316 U.N.T.S. 206 [hereinafter Hostage Convention]; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 24631 [hereinafter Nuclear Material Convention]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* Mar. 10, 1988, 1678 U.N.T.S. 222; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, *adopted* Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention for the Suppression of Terrorist Bombings, *adopted by G.A.* Dec. 15 1997, 2149 U.N.T.S. 256 [hereinafter Terrorist Bombings Convention].

Notably, despite its name, the Terrorist Financing Convention does not explicitly define “terrorist financing” nor label the offenses referred to in Article 2 paragraphs 1(a) and (b) as “terrorist acts” or “terrorist offenses.”⁷⁵ Nevertheless, when viewed in the context of the title of the Convention and its preamble, it seems clear that it is appropriate to refer to the offense proscribed in Article 2 as the financing of terrorism, and thus that the acts referred to in Article 2, paragraphs 1(a) and (b) are terrorist acts.

The Terrorist Financing Convention shares key language with the draft comprehensive convention. In particular, the Terrorist Financing Convention and the draft comprehensive convention use identical wording regarding the purpose of acts that qualify as “terrorist acts.” Under both conventions, to qualify as an offense, an act must be carried out “to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”⁷⁶

Notably, this language does not require that the aims of the action in question be “political” as traditionally defined. An act of violence against a civilian or civilians designed to compel a government to pay the perpetrators money would qualify as a terrorist act under the Terrorist Financing Convention. Similarly, an act of violence carried out by a criminal organization and intended to intimidate a population into continuing to pay protection money would also qualify as a terrorist act. Equally important, there are no qualifications or exemptions regarding the nature of the goal—its worthiness, malignity, or alignment with other causes. This definition applies equally to an act of violence carried out to free a nation from the grip of tyranny, to destabilize a peaceful neighboring state, or dissuade residents of a certain area from informing on a criminal group.

But the two texts also have important differences: in their definition of terrorist acts, their interaction with international humanitarian law, and their response to the ongoing “terrorist or freedom fighter” debate.

As compared to the draft comprehensive convention, the scope of actions covered by the Terrorist Financing Convention is fairly narrow. There is no mention of “serious damage” to public or private property, or of damage of any kind that causes “major economic loss,” as there is in the draft

⁷⁵ Cf. Terrorist Financing Convention, *supra* note 1.

⁷⁶ Terrorist Financing Convention, *supra* note 1, art. 2(1)(b); Revised Draft Comprehensive Convention Articles, *supra* note 50, at 6 (draft art. 2(1)(c)).

comprehensive convention.⁷⁷ Only actions that “cause death or serious bodily injury” qualify.⁷⁸ Equally important, the wording of the Terrorist Financing Convention regarding the potential victims of a terrorist act differs importantly from the language of the draft comprehensive convention. The Terrorist Financing Convention includes in the scope of its defined offense attacks against “a civilian, or . . . any other person not taking an active part in the hostilities in a situation of armed conflict.”⁷⁹ The draft comprehensive convention, in contrast, has a potentially far broader scope: it covers an act causing “[d]eath or serious bodily injury to any person.”⁸⁰ In at least the context of non-international armed conflicts, therefore, the Terrorist Financing Convention appears to exclude from its definition of terrorist acts any attacks targeting members of armed forces who are not *hors de combat*.⁸¹

In addition, the draft comprehensive convention at least seeks to address the question of whether actions carried out by all armed forces, the military forces of a state, or persons engaged in liberation struggles should be excluded from the definition of terrorism.⁸² (As discussed above, however, the international disagreement over this issue has prevented any resolution of this question in the discussions drafts.) The Terrorist Financing Convention, in contrast, does not explicitly address this issue. Beyond Article 2(1)(b), which refers to “a person not taking an active part in the hostilities in a situation of armed conflict,” there is no reference in the Convention to armed forces, the military forces of a state, or the law of armed conflict.⁸³ This

⁷⁷ Cf. Revised Draft Comprehensive Convention Articles, *supra* note 50, at 6 (draft arts. 2(1)(b), (c)).

⁷⁸ Terrorist Financing Convention, *supra* note 1, art. 2(1)(b).

⁷⁹ *Id.*

⁸⁰ Revised Draft Comprehensive Convention Articles, *supra* note 50, at 6 (draft art. 2(1)(a)) (emphasis added).

⁸¹ Cf. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; *see also Commentary of 2016: Article 3: Conflicts Not of an International Character*, INT’L COMM. OF THE RED CROSS, ¶ 388, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> [https://perma.cc/U4GJ-U7CP] (last visited Apr. 9, 2022) (“If a situation of violence amounts to a non-international armed conflict, the applicability of common Article 3 and other provisions of humanitarian law applicable in non-international armed conflict ensures that the Parties to that conflict are under an international legal obligation to grant certain fundamental protections to the victims of the conflict and to respect the rules on the conduct of hostilities. Importantly, humanitarian law binds all Parties to the conflict, State and non-State alike.”).

⁸² Revised Draft Comprehensive Convention Articles, *supra* note 50, at 15–19 (listing various proposals submitted by states).

⁸³ Cf. Terrorist Financing Convention, *supra* note 1, art. 2(1)(b).

absence leaves open to debate whether the status of an actor who commits an action described in Article 2 has any relevance to whether the action qualifies as an offense under the Convention.

Additional articles of the Terrorist Financing Convention, however, add critical context to this discussion by addressing the question of whether actions carried out with certain goals can be excluded from the definition of terrorism. Article 6 requires state parties to ensure, if necessary through domestic legislation, that criminal acts proscribed by the Convention are “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”⁸⁴ The requirements of Article 6 appear to be in direct response to those who assert that actions carried out by groups seeking national liberation or self-determination cannot and should not be viewed as terrorist acts.

It is also important to caveat this last observation by noting that Article 6 does not necessarily require states to criminalize the underlying terrorist activity in all circumstances. That is to say, Article 6 requires states to make it an offense to *finance* terrorism regardless of the ideological or political motivations for doing so, but does not explicitly require states to criminalize the actual acts being financed. Furthermore, the overall lack of clarity regarding the relationship between the actions singled out in the Convention and international humanitarian law or the law of armed conflict creates a loophole: it is possible, for instance, to argue that Article 6 only applies to *criminal* behavior and that persons engaged in struggles for national liberation are in fact members of the armed forces of a party to a conflict and thus that international humanitarian law, not criminal law, governs their actions.⁸⁵

Article 2, paragraph 1(a) of the Terrorist Financing Convention incorporates by reference nine international conventions, three of them adopted by the UN General Assembly and six others established independently of the UN.⁸⁶ The nine conventions (“the Annex Conventions”) do not themselves seek to define terrorism or terrorist acts, and in most cases do not even use the word “terrorism” or “terrorist” outside the preamble (the Convention for the Suppression of Terrorist Bombings (“Terrorist Bombings Convention”) being the most obvious of a limited number of exceptions).⁸⁷

⁸⁴ Terrorist Financing Convention, *supra* note 1, art. 6.

⁸⁵ *Cf.* Additional Protocol I, *supra* note 60, art. 43(1) (defining “armed forces of a Party to a conflict” broadly to conceivably include those under the control of a non-state entity).

⁸⁶ For the full list, see *supra* note 74.

⁸⁷ *Cf.* Terrorist Bombings Convention, *supra* note 74.

Despite this, they are widely acknowledged as forming a corpus of international conventions related to counterterrorism.⁸⁸

Each of the Annex Conventions defines as offenses certain activities or actions. When incorporated into the Terrorist Financing Convention by reference, they therefore establish a set of actions which are included in the definition of terrorism under that Convention. These actions range from the fairly general to the highly specific. The Terrorist Bombings Convention, for example, establishes that any person commits an offense who “delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility,” provided that the person does so with the intent to cause death, serious bodily injury, or “extensive destruction . . . where such destruction results in or is likely to result in major economic loss.”⁸⁹ In contrast, another Annex Convention, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, only deals with certain violent actions in connection to fixed platforms.⁹⁰ When read together with the Terrorist Financing Convention, the Annex Conventions establish that a wide range of offenses—including those involving the destruction of property only, without loss of life or serious injury—can qualify as terrorism.

On their own, however, the Annex Conventions do not provide clear answers to the question of what constitutes terrorism, because they do not speak with a unified voice on certain core issues. Unlike the Terrorist Financing Convention and the draft comprehensive convention, the Annex Conventions generally do not require that the particular offenses defined in each convention be carried out for any particular set of purposes, or for the specific purposes highlighted in the Terrorist Financing Convention (e.g., “to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”).⁹¹

⁸⁸ See, e.g., G.A. Res. 42/159, *supra* note 42, pmb1. (citing conventions adopted as of 1987); G.A. Res. 51/210, *supra* note 46, ¶ 6 (urging all member states to become parties to the conventions). The conventions are also grouped together on the website of the United Nations Treaty Collection. See *Text and Status of the United Nations Conventions on Terrorism*, UNITED NATIONS, https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG [https://perma.cc/PTC6-Y3ZN] (last visited Apr. 1, 2022).

⁸⁹ Terrorist Bombings Convention, *supra* note 74, art. 2(1).

⁹⁰ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, *supra* note 74, art. 2(1).

⁹¹ Cf. Terrorist Financing Convention, *supra* note 1, art. 2, ¶ 1(b).

There are some exceptions to this general rule. For example, the International Convention Against the Taking of Hostages (“Hostage Convention”) requires that the offenses it deals with be carried out “to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostages.”⁹² Similarly, the Convention on the Physical Protection of Nuclear Material (“Nuclear Material Convention”) makes it an offense to threaten the theft or robbery of nuclear material “in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act.”⁹³ Other activities can also constitute offenses under the Nuclear Material Convention, however, without there being any corresponding requirement that they be carried out or attempted with the purpose of achieving a certain outcome.⁹⁴

The Annex Conventions are also inconsistent in how they deal with actions by official militaries or armed forces of the parties to a conflict. Some, but not all, of the Annex Conventions contain explicit exceptions or exemptions for acts carried out in the context of an armed conflict or by military forces. For example, the Terrorist Bombings Convention excludes “[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law . . . and the activities undertaken by military forces of a State in the exercise of their official duties.”⁹⁵

The Hostage Convention also exempts hostage-taking “committed in the course of armed conflicts.”⁹⁶ But it is the only one of the Annex Conventions that explicitly excludes acts of hostage-taking carried out in the context of “armed conflicts . . . in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”⁹⁷ The Hostage Convention here references armed conflicts as defined in Article 1 of Additional Protocol I to the Geneva Conventions, which defines certain internal armed conflicts, such as wars of

⁹² Hostage Convention, *supra* note 74, art. 1(1).

⁹³ Nuclear Material Convention, *supra* note 74, art. 7(1)(e)(ii).

⁹⁴ *See, e.g., id.* art. 7(1)(b) (creating an offense for the theft or robbery of nuclear material); *id.* art. 7(1)(c) (creating an offense for embezzlement or fraudulent obtaining of nuclear material).

⁹⁵ Terrorist Bombings Convention, *supra* note 74, art. 19(2).

⁹⁶ Hostage Convention, *supra* note 74, art. 12.

⁹⁷ *Id.*

national liberation, as international conflicts.⁹⁸ This suggests that the question of whether a hostage-taking is a criminal act or a part of a larger armed conflict would depend on additional factors such as the intensity of the conflict and the level of organization of the group carrying out the attack.

An exhaustive treatment of UN documents pertaining to terrorism is outside the scope of this Article. As the discussion of key instruments above makes clear, however, the debate over the appropriate relationship between terrorism and armed conflicts, particularly armed conflicts related to struggles against occupation or racism, has stymied the adoption of an official UN counterterrorism convention and has led to inconsistencies among UN conventions widely seen as addressing specific aspects of terrorist behavior.

In the Terrorist Financing Convention, however, the UN has produced an almost universally adopted convention which contains, if only implicitly, a clear definition of terrorism. The Terrorist Financing Convention has succeeded in side-stepping the debate over the relationship between the law of terrorism and international humanitarian law, but it did so at the cost of allowing uncertainty to persist as to the exact relationship between terrorism and armed conflict, and between terrorist groups and armed forces. Furthermore, the Terrorist Financing Convention's usefulness as an international rhetorical or political statement is diminished by the fact that it does not explicitly define terrorism, allowing certain stakeholders to continue to claim that there is no international definition of this phenomenon.

II. THE FATF PROCESS AND DEFINITION OF TERRORISM

Outside the context of the UN, an alternative international governance body has made major strides in developing and encouraging the widespread adoption of a single definition of a "terrorist act," as well as of "terrorist" and "terrorist organization"—all terms that do not appear in the Terrorist Financing Convention.⁹⁹ The core elements of this definition, adopted and promoted by the Financial Action Task Force (FATF), have been in turn introduced into the domestic legislation of over 100 jurisdictions.¹⁰⁰ The

⁹⁸ Additional Protocol I, *supra* note 60, art. 1(4). Article 1(4) uses identical language to the Hostage Convention in applying the Protocol to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination." *Id.*

⁹⁹ See FATF RECOMMENDATIONS, *supra* note 1.

¹⁰⁰ See FATF, *Fourth Round Ratings*, *supra* note 15. A jurisdiction's adoption of the FATF standards, including the FATF's definition of terrorism, into its domestic legislation is assessed through the "technical compliance" component of each member jurisdiction's "mutual evaluation." Should a jurisdiction fail to employ in its domestic law a definition of

FATF definition, although itself not perfect, offers a far more fully developed terminology, and it goes some way towards resolving the remaining questions that persist in the Terrorist Financing Convention.

A. Background on the FATF

The FATF is an intergovernmental organization established by the G-7 nations in 1989 to set international standards for government and private sector action to combat money laundering and financing of terrorism (AML/CFT) and to increase the effectiveness of national and international responses to this issue.¹⁰¹ Originally composed of fifteen state members, plus the European Commission, the FATF now has 37 direct jurisdictional members.¹⁰² Two regional organizations (the Gulf Cooperation Council and the European Commission) are also full members.¹⁰³ FATF is recognized by the international financial institutions (such as the World Bank and International Monetary Fund), the United Nations, other international bodies, and the private sector as the international standard setter for AML/CFT and combatting proliferation finance.

FATF's reach, however, extends far beyond its direct membership due to the activities of nine "FATF-Style Regional Bodies" (FSRBs)—regional organizations that operate with a similar mandate and procedures to that of the FATF itself.¹⁰⁴ Together, more than 200 jurisdictions are members of either the FATF or of one or more FSRBs.¹⁰⁵ Because jurisdictions that are not fully sovereign may become members of the FATF or an FSRB—including, for example, Hong Kong, Jersey, and Curaçao—a single sovereign state may encompass multiple jurisdictional members. The FATF is the only body within the FATF global network empowered to set standards for AML/CFT, however, and all members of FSRBs are required to make the

terrorism that meets the FATF standard, it will receive a low compliance score for that standard. As discussed in Part II.C, 100 of the 120 jurisdictions assessed by the FATF have received a score of "Largely Compliant" or "Compliant" with the relevant standard, indicating that these jurisdictions have adopted the FATF definition of terrorism into domestic law with no substantive deviations. *Id.*

¹⁰¹ *History of the FATF*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/about/historyofthefatf/> [<https://perma.cc/W2Y6-MVWV>] (last visited Apr. 1, 2022).

¹⁰² *Members and Observers*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/about/membersandobservers/> [<https://perma.cc/Z2B2-64CA>] (last visited Apr. 1, 2022).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (referring to such organizations as "Associate Members").

¹⁰⁵ *See id.*

same commitments and adopt the same standards as FATF members.¹⁰⁶ FSRBs are required to promote compliance of their membership with the FATF standards.¹⁰⁷

The FATF's core work lies in two areas: the development of international standards for AML/CFT, known as the "FATF Recommendations,"¹⁰⁸ and the "mutual evaluation" of member states to determine their compliance with the Recommendations and their overall level of effectiveness in preventing money laundering and the financing of terrorism.¹⁰⁹ Evaluations are known as "mutual" because the assessors are direct representatives of other FATF members rather than of the FATF itself.¹¹⁰

The FATF held a Special Plenary in Washington, DC in October 2001, shortly after the 9/11 attacks, in which FATF's mandate was expanded to include combatting terrorist financing.¹¹¹ At that meeting, Special Recommendations (or standards) were adopted that were specific to addressing the risks of terrorist financing.¹¹² Those were later incorporated in the revision of the FATF's original forty Recommendations. The FATF's Recommendations cover a wide-ranging list of requirements, from elements of a jurisdiction's criminal code to requirements placed on private financial institutions and the rules governing interagency and international cooperation.¹¹³ These include specific requirements for the criminalization of money laundering and, as discussed in greater depth below, of the financing of terrorism.

¹⁰⁶ FIN. ACTION TASK FORCE, HIGH-LEVEL PRINCIPLES AND OBJECTIVES FOR FATF AND FATF-STYLE REGIONAL BODIES 1 (Feb. 2019), <https://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf> [<https://perma.cc/FW96-AVQN>].

¹⁰⁷ *Id.* at 4.

¹⁰⁸ FATF RECOMMENDATIONS, *supra* note 1.

¹⁰⁹ *Mutual Evaluations*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/publications/mutualevaluations/documents/more-about-mutual-evaluations.html> [<https://perma.cc/7UFZ-V7EP>] (last visited Apr. 1, 2022).

¹¹⁰ *Id.*

¹¹¹ *FATF Calls on all Countries to Join Combat against Terrorist Financing*, ORG. FOR ECON. CO-OPERATION AND DEV. (Oct. 9, 2002), <https://www.oecd.org/newsroom/fatfcallsoneallcountriestojoincombatagainstterroristfinancing.htm> [<https://perma.cc/B9AH-F7SL>].

¹¹² *Id.*

¹¹³ *See* FATF RECOMMENDATIONS, *supra* note 1, at 10–30.

All members of the FATF or FSRBs commit to adopting the FATF 40 Recommendations for AML/CFT and to combating money laundering and the financing of terrorism.¹¹⁴ The goal of the mutual evaluation is to determine whether the jurisdiction has indeed taken action to substantiate this commitment. Mutual evaluations consider both the jurisdiction's "technical compliance"—whether it has in place the specific laws and regulations that are required by the Recommendations—and also its effectiveness in actually applying such laws and regulations to combat money laundering and the financing of terrorism.¹¹⁵ Thus mutual evaluations consider not just a jurisdiction's legal framework but also the actions of its police, prosecutors, financial supervisors, and other private and public sector stakeholders. Jurisdictions are assigned a compliance score for each of the forty Recommendations and an effectiveness score on each of eleven "Immediate Outcomes" that capture aspects of an effective national AML/CFT regime.¹¹⁶

When a jurisdiction undergoes a mutual evaluation, the assessors and the FATF Secretariat or the responsible FSRB undertake a multi-year assessment process, including both desk-based reviews and on-site visits to the jurisdiction being assessed and culminating in the production of a "Mutual Evaluation Report" (MER).¹¹⁷ The resulting MERs are considered and accepted at plenary meetings of the FSRB of which the jurisdiction is a member (where relevant) and then at the full FATF plenary.¹¹⁸ Reports are published as soon as they are adopted by the FATF and are made available on the FATF's website.¹¹⁹

At the time of writing, at least 120 jurisdictions have completed an evaluation under the FATF's "fourth round" of evaluations—that is, they have been assessed against the recommendations in their current form and

¹¹⁴ *Process and criteria for becoming a FATF member*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/about/membersandobservers/membershipprocessandcriteria.html> [<https://perma.cc/LY77-JUL3>] (last visited Apr. 1, 2022) (requiring members to endorse and support the FATF Recommendations).

¹¹⁵ *FATF Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*, FIN. ACTION TASK FORCE (Nov. 2020), <https://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html> [<https://perma.cc/37B5-P6SY>] [<https://perma.cc/JX3F-JZL3>].

¹¹⁶ *Id.*

¹¹⁷ See FIN. ACTION TASK FORCE, CONSOLIDATED PROCESSES AND PROCEDURES FOR MUTUAL EVALUATIONS AND FOLLOW-UP 6–8 (Jan. 2021), <https://www.fatf-gafi.org/media/fatf/FATF-Universal-Procedures.pdf> [<https://perma.cc/MG35-WWGV>] [hereinafter FATF UNIVERSAL PROCEDURES].

¹¹⁸ *Id.* at 9–10.

¹¹⁹ *Id.* at 13.

using the current methodology, which includes both technical compliance and effectiveness.¹²⁰ The FATF does not make publicly available results of evaluations prior to the fourth round.

Membership in the FATF is entirely voluntary, and it operates solely on the basis of mutual commitment and goodwill. FATF decisions are reached on a consensus basis. Yet the organization has important tools to promote compliance and to encourage members of the FATF itself and of FSRBs to create compliant legal frameworks and to act vigorously to combat money laundering and the financing of terrorism, as discussed in Part III.C.

B. The FATF Definition of Terrorism and FATF Recommendation 5

The FATF Recommendations contain explicit standards for how member states should address terrorist financing, both within their domestic legal frameworks and in terms of law enforcement activity.¹²¹ Although the Recommendations are in part based on the Terrorist Financing Convention, and rely on the Convention for the core definition of terrorism financing, they go well beyond the Convention in certain key respects. The Recommendations offer explicit definitions of key terms—"terrorist act," individual "terrorist," and "terrorist organisation"—that are not defined or included in the Convention. And they more clearly place requirements related to terrorist financing in the context of criminal law, resolving some but not all of the confusion engendered by the Terrorist Financing Convention regarding the nexus between terrorism and armed conflict.

1. Key FATF Definitions

The FATF defines a terrorist act as any act which constitutes an offense under the treaties mentioned in the Terrorist Financing Convention or "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 organisation to do or to abstain from doing any act."¹²² This is exactly the same definition as used in the Terrorist Financing Convention (although the Convention does not assign the label of "terrorism" to these actions).¹²³

¹²⁰ See FATF, *Fourth Round Ratings*, *supra* note 15.

¹²¹ See FATF RECOMMENDATIONS, *supra* note 1, at 10–30.

¹²² *Id.* at 131.

¹²³ Terrorist Financing Convention, *supra* note 1, art. 2(1)(b).

The FATF defines a terrorist as a “natural person who: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and willfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.”¹²⁴

The FATF’s definition of a terrorist organization is nearly identical to its definition of terrorist: “any group of terrorists that: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.”¹²⁵

2. FATF Recommendation 5

FATF Recommendation 5 is the core standard governing the criminalization of terrorist financing. Recommendation 5 requires countries to “criminalize terrorist financing on the basis of the Terrorist Financing Convention.”¹²⁶ The standard does not end there, however; it goes well beyond the Terrorist Financing Convention by requiring that countries criminalize “not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts.”¹²⁷ The Interpretive Note to Recommendation 5 glosses the fundamental requirement as criminalizing the act of providing “funds or other assets . . . with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part: (a) to carry out a terrorist act(s); (b) by a terrorist organisation; or (c) by an individual terrorist.”¹²⁸

Recommendation 5 also requires that states criminalize the act of financing the travel of individuals “to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or

¹²⁴ *Id.* at 131.

¹²⁵ *Id.* at 131–32.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.*

¹²⁸ *Id.* at 41.

preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.”¹²⁹

As this summary makes clear, the FATF’s treatment of terrorist financing differs markedly from that of the UN. First off, Recommendation 5 frames its discussion of terrorist financing in a manner that sets it apart from the Terrorist Financing Convention. The Convention’s only use of the word terrorism or terrorist is in its title, and it does not seek to place a label on the acts whose financing it seeks to prevent. By contrast, FATF Recommendation 5 makes clear that the behavior at issue is in fact *terrorist* financing, and, more importantly, it introduces the concept of a “terrorist act,” a “terrorist organization” and an individual “terrorist”—none of which exist in the Terrorist Financing Convention. These terms, and their definitions, clearly situate terrorist financing within the larger context of terrorist organizations and activities.

In addition to introducing clear new definitions for certain key terms, the FATF approach extends the definition of terrorist financing in important ways. As mentioned previously, the FATF definition adds two activities to the standard definition used in the Terrorist Financing Convention: financing the cross-border travel of individuals for the “purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;¹³⁰ and providing funds or assets to be used by a terrorist organization or an individual terrorist, whether or not these funds are “actually used to carry out or attempt a terrorist act(s); or . . . [can] be linked to a specific terrorist act(s).”¹³¹

The FATF’s extension of the scope of the terrorist financing offense, and its inclusion of a vocabulary of defined terms that states are required to apply when conceptualizing terrorist activity, do not just establish a more robust account of what constitutes terrorist financing. They also offer a potential resolution to some long-standing debates on the definition of terrorism itself, while also leading to new questions.

The Terrorist Financing Convention does not define “terrorist” (nor does the draft comprehensive convention) so the FATF’s definition breaks new ground. The FATF’s definition is grounded in an individual’s relationship to terrorist acts—whether carrying them out, attempting them, planning them, or ordering them. But it makes clear that this relationship can

¹²⁹ *Id.*

¹³⁰ *Id.* at 41.

¹³¹ *Id.*

be attenuated, extending to persons who merely contribute to the commission of terrorist acts, without rising to the level of an accomplice, and where the contributor has no intention of seeking to carry out such an act herself.

The FATF definition of terrorist organization is also primarily functional: it makes clear that a terrorist organization is an organization made up of individual terrorists (that is, individuals who are themselves involved in terrorist acts) that itself in turn carries out, attempts, participates in, or organizes or directs terrorist acts. That is, the FATF defines a terrorist organization by the actions the organization and its members carry out or attempt to carry out, not by its overall goals or its membership. A soccer club composed of full-time active terrorists would not qualify as a terrorist organization so long as it confines itself solely to organizing games. Nor would the executive committee of a “national liberation front” come under the definition of a terrorist organization, even if some members individually qualify for the designation, so long as it does not itself plan or contribute to terrorist acts.

At the same time, the definition does not distinguish between organizations that use terrorist tactics and “true” terrorist organizations. Any group that commits or attempts to commit terrorist acts qualifies as a terrorist organization. This is a potentially critical advancement of our modern discussion of terrorism; it means that when labeling an organization as “terrorist” we need not confine the term to those organizations with explicitly terrorist agendas. Organizations with a wide range of goals—even otherwise desirable ones, such as freeing a country from foreign domination—would qualify as terrorist organizations should they employ terrorist activities as part of their overall campaign to achieve those goals.

This approach recognizes that most terrorist organizations place tactics subordinate to goals. It would be difficult to find an organization whose primary goal is expressed solely as “intimidating a population” or “spreading fear” rather than achieving a specific outcome, whether expressed in terms of politics or profit. Terrorism is generally a means to an end, but this definition makes clear that an organization that uses terrorist tactics cannot pretend to maintain a distinction between the aspect or cell within the organization that carries out these actions and the branches or subgroups that engage in more legitimate campaigns.

At the same time, FATF’s approach makes clear that the definition of terrorist act, and of individual terrorists, precede that of terrorist organization. An act not meeting the definition of a terrorist act is not an act of terrorism,

even if it is carried out by a terrorist organization. For example, attacks on soldiers involved in active hostilities are not terrorist acts under this definition (unless they constitute an offense under one of the Annex Conventions), even if the group that carries them out qualifies as a terrorist organization due to its membership and its other activities or attempted activities.

Similarly, an individual member of a terrorist organization would not himself qualify as a terrorist unless he individually qualifies as a terrorist in his own right. This definitional issue is more complex, however, as the fourth prong of the FATF's definition of terrorist is quite broad: "contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act."¹³²

What type of "contribution" might cause an individual to qualify as a terrorist under the FATF definition? Although this phrase could perhaps be read so broadly as to make membership in a terrorist organization alone a sufficient "contribution," this would render the FATF definition of terrorist organization circular. Furthermore, FATF could easily have added a fifth prong to the definition of "terrorist" that would have captured simple membership in a terrorist organization. The wording and interplay between the FATF definitions suggests that identifying which members of a terrorist organization are themselves terrorists is a matter of facts and circumstances and not an issue that can be neatly resolved at the definitional level.

Finally, it is critical to note that these core concepts, as defined by the FATF, do not contain any explicit purpose- or context-based exceptions or exclusions. As a result, organizations whose overall goals are related to struggles for freedom or national liberation, or against tyranny, would qualify as terrorist organizations if the conditions of the FATF definition apply. Nor does the definition of "terrorist act" allow for any exemptions based on the purpose behind the act, or the nature of the action that the terrorist seeks to compel a government to take (or refrain from taking). The requirement that states criminalize terrorist financing in line with the Terrorist Financing Convention—Article 6 of which, as discussed above, requires states "to ensure that criminal acts within the scope of [the] Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature"¹³³—strongly suggests that any such exemption would not be acceptable.

¹³² See *id.* at 131.

¹³³ Terrorist Financing Convention, *supra* note 67, art. 6.

The FATF definition therefore offers a clear resolution of the “terrorist or freedom fighter” problem. A freedom fighter will *also* be a terrorist if he or she carries out, organizes, or contributes to the commission of terrorist acts. Similarly, an organization involved in a struggle for national liberation or against a racist or totalitarian regime will also be a terrorist organization if it carries out, organizes, or contributes to the commission of terrorist acts. At the same time, it can cease to be a terrorist organization when it forswears such acts. And even during the period that it qualifies as a terrorist organization, not everything it does—for instance, an attack on an active-duty military facility—necessarily qualifies as a terrorist act.

The FATF approach is less explicit on the question of state action. From an analytical perspective, it is important to observe that the FATF definitions do not exclude armed forces or state military action from their scope. Therefore, at a conceptual level, it appears clear that state action could meet the definition of a terrorist act. And just as a national liberation militia could qualify as both a freedom fighting organization and a terrorist organization, an army unit could qualify as both part of a state’s military forces and a terrorist organization.

At the same time, it is also true that Recommendation 5 is situated in the context of criminal law and the domestic legal system and does not pretend to address international humanitarian law or the law of armed conflict. With this in mind, the best understanding of the FATF’s approach to state action likely follows the contours of each FATF member state’s criminal jurisdiction. States are unlikely to be able, or to seek, to respond to a foreign adversary’s bombing raid on civilian targets by arresting and trying the perpetrators in civilian criminal courts. But a state could arrest and prosecute an agent provocateur or commando unit of a foreign adversary operating on its own territory. Ultimately the determination of whether any specific act of violence is a terrorist act, and what legal regime applies, will depend on an assessment of the context, including not just the status of the actor but also the nature of the act and whether it is carried out in the context of an armed conflict as defined in international law. The FATF definition thus leaves the door open for determination whether a state action qualifies as a terrorist act.

Recommendation 5 is far from the only FATF Recommendation that deals, explicitly or implicitly, with the definition of terrorism. Recommendation 6 requires countries to, among other things, comply with obligations imposed under UN Security Council Resolution 1373 (passed a

few weeks after 9/11) to freeze the funds of persons who commit or attempt to commit terrorist acts.¹³⁴ Resolution 1373 does not define terrorist acts, but by restating this obligation in its own documents, the FATF links it to its own definition of terrorist act. In order to be fully compliant with Recommendation 6, therefore, countries must have a domestic legal basis for freezing the funds of persons engaged in any activities meeting the FATF definition of terrorist act. Such a legal basis is likely to involve the domestic adoption of a definition of terrorist act that is at least consistent with the FATF definition.

C. How the FATF Promotes Compliance with its Recommendations

The FATF is a voluntary body with no official status under international law. Commitment to its Recommendations is also voluntary and does not have the force of a treaty obligation. This Article does not seek to argue, therefore, that the FATF's definition of terrorism has the same force or standing as a potential definition promulgated through a UN convention or similar treaty instrument. Yet this does not mean that the FATF's definition of terrorism lacks force or that commitment to its adoption is meaningless. The FATF has important powers to compel compliance, and it has used these powers specifically to impose consequences on countries that do not adopt its definition of terrorism. This Section describes the FATF's enforcement powers and the potential consequences for countries should FATF apply such powers. It closes with case studies showing how countries have changed their stance on terrorism-related issues when confronted with potential unfavorable action by the FATF.

The FATF process includes clear consequences for a poor showing in a mutual evaluation.¹³⁵ Should a jurisdiction receive a negative evaluation, it will be referred to the FATF subcommittee known as the International Cooperation Review Group ("ICRG"). The criteria for referral to the ICRG are standardized and public: a lack of compliance on core Recommendations (including Recommendation 5) or poor effectiveness on several Immediate Outcomes.¹³⁶ Jurisdictions that are not members of an FSRB may also be

¹³⁴ See FATF RECOMMENDATIONS, *supra* note 1, at 13, 43–50; S.C. Res. 1373, art. 1(c) (Sept. 28, 2001).

¹³⁵ See *High-risk and other monitored jurisdictions*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html> [https://perma.cc/33YC-FN88].

¹³⁶ FIN. ACTION TASK FORCE, PROCEDURES FOR THE FATF FOURTH ROUND OF AML/CFT MUTUAL EVALUATIONS 23 (Jan. 2021), <https://www.fatf->

referred on this ground alone, although referral is not automatic.¹³⁷ Following further discussion and review, the ICRG may choose to place the jurisdiction on one of two public lists FATF maintains of high risk or monitored jurisdictions: the list of jurisdictions under increased monitoring¹³⁸ and the list of High Risk Jurisdictions Subject to a Call for Action.¹³⁹

The list of High Risk Jurisdictions Subject to a Call for Action, commonly known as the “black list,” includes those jurisdictions with “significant strategic deficiencies.”¹⁴⁰ Jurisdictions may be blacklisted as a result of their failure to complete their action plan and remediate deficiencies in a timely fashion, or for a refusal to engage in the FATF process at all. Unlike jurisdictions on the increased monitoring list (“grey list”), blacklisted jurisdictions are subject to countermeasures: all FATF/FSRB member jurisdictions are required to take steps to protect their financial systems from transactions involving these countries.¹⁴¹ These steps, known as countermeasures, can include requiring the private sector to apply enhanced due diligence to every transaction involving blacklisted countries; prohibiting financial institutions in blacklisted countries from establishing domestic branches or subsidiaries; and ending relationships between domestic financial institutions and the financial sector in blacklisted countries. Blacklisting is rare, and currently only two jurisdictions (Iran and the Democratic People’s Republic of Korea) appear on the list.¹⁴²

The list of jurisdictions on the grey list includes those jurisdictions with “strategic deficiencies” in their AML/CFT regimes. These jurisdictions are required to make a “high-level political commitment” to completing an action plan mandated by the FATF and designed to address the deficiencies identified in the jurisdiction’s mutual evaluation.¹⁴³ The main areas of focus of the action plan are public, and following each FATF plenary, the FATF

[gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf](https://perma.cc/BQ67-T2GS) [https://perma.cc/BQ67-T2GS] [hereinafter FOURTH ROUND PROCEDURES].

¹³⁷ See *High-risk and other monitored jurisdictions*, *supra* note 135.

¹³⁸ *Jurisdictions under Increased Monitoring – October 2021*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-october-2021.html> [https://perma.cc/Y4JV-EF3J] (last visited Apr. 1, 2022).

¹³⁹ *High Risk Jurisdictions Subject to a Call for Action*, FIN. ACTION TASK FORCE (Oct. 2021), <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-october-2021.html> [https://perma.cc/9D8K-NUV5].

¹⁴⁰ *High-risk and other monitored jurisdictions*, *supra* note 135.

¹⁴¹ *Id.*

¹⁴² *High Risk Jurisdictions Subject to a Call for Action*, *supra* note 139.

¹⁴³ *High-risk and other monitored jurisdictions*, *supra* note 135.

provides regular public updates on listed jurisdictions' progress towards completion of their action plan.¹⁴⁴ In contrast to the requirements for blacklisted countries, FATF/FSRB member jurisdictions are not explicitly required to take any specific actions against countries on the grey list. Jurisdictions are instead urged to “take into account the information presented [on the list] in their . . . analysis” of the money laundering and terrorist financing risk in the listed jurisdictions.¹⁴⁵

Despite the FATF's status as a voluntary organization and its lack of official status under international law, statistical and anecdotal data suggest that appearance on either FATF list is an extremely undesirable outcome for an assessed jurisdiction, and that the threat of listing is a powerful tool for encouraging compliance.¹⁴⁶ In the authors' professional experience, the majority of global financial institutions use a jurisdiction's presence on a FATF list as a leading indicator of money laundering and terrorist financing risk in the jurisdiction. In response to this perceived risk, they may take certain steps that in turn limit that jurisdiction's access to capital and to international financial markets, a phenomenon sometimes known as “de-risking.”¹⁴⁷ These can include cutting off correspondent banking relationships with financial institutions from that country, declining relationships with customers from that country, or subjecting customers/transactions to onerous and time consuming enhanced due diligence prior to accepting the customer or executing a transaction. All of these measures can increase the cost of transactions for residents and businesses of the listed jurisdiction and decrease their access to capital.

¹⁴⁴ See *Topic: High-risk and other monitored jurisdictions*, FIN. ACTION TASK FORCE, [https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc\(fatf_releasedate\)](https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)) [https://perma.cc/CS35-F2RA].

¹⁴⁵ *Jurisdictions under Increased Monitoring*, *supra* note 138.

¹⁴⁶ See Julia Morse, *Blacklists, Market Enforcement, and the Global Regime to Combat Terrorist Financing*, 73 INT'L ORG. 511, 522–540 (2020) (empirically demonstrating that “the FATF noncomplier list stigmatizes states directly and that market pressure intensifies this effect”).

¹⁴⁷ See, e.g., *FATF takes action to tackle de-risking*, FIN. ACTION TASK FORCE (Oct. 23, 2015), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html> [https://perma.cc/96PT-Q57X]; FIN. ACTION TASK FORCE, HIGH-LEVEL SYNOPSIS OF THE STOCKTAKE OF THE UNINTENDED CONSEQUENCES OF THE FATF STANDARDS (Oct. 27, 2021), <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf> [https://perma.cc/6GUZ-4QG6]; *Derisking and Civil Society: Drivers, Impact and Solutions*, HUM. SEC. COLLECTIVE, <https://www.hscollective.org/news/timeline/article-derisking-and-civil-society-drivers-impact-and-solutions> [https://perma.cc/7UQC-QQKF].

Financial institutions are encouraged by their regulators and supervisors to take a defensive posture vis-à-vis listed countries. For example, the Financial Crimes Enforcement Network (FinCEN), the U.S. agency with primary responsibility for AML/CFT supervision, issues a regular bulletin following each FATF plenary that updates U.S. financial institutions of the jurisdictions that have been listed (or removed from the lists).¹⁴⁸ For greylisted jurisdictions, FinCEN reminds its supervised entities that they are required to apply “risk-based, and, where necessary, enhanced policies, procedures, and controls” to all customers, especially foreign financial institution customers.¹⁴⁹ Under the USA PATRIOT Act and other regulations, far more stringent requirements apply to blacklisted countries.¹⁵⁰ The United Kingdom similarly incorporates both FATF lists directly into its AML/CFT regulations as “High-Risk Third Countries,”¹⁵¹ and requires financial institutions to apply enhanced due diligence to customer and transactions involving these countries.¹⁵²

It is reasonable to expect that the increased costs of providing financial services to residents of a listed jurisdiction and greater friction in account creation and transactions flows would have a negative impact on a jurisdiction’s economy, particularly cross-border financial flows. Although empirical research on this issue has generated mixed results, some researchers (particularly those who have analyzed the issue in more recent years) have found statistical evidence to suggest that FATF listing does indeed have a measurable impact on the economies of listed jurisdictions.

¹⁴⁸ *Financial Action Task Force Identifies Jurisdictions with Anti-Money Laundering and Combating the Financing of Terrorism and Counter-Proliferation Deficiencies*, FIN. ACTION TASK FORCE (Oct. 26, 2021), <https://www.fincen.gov/news/news-releases/financial-action-task-force-identifies-jurisdictions-anti-money-laundering-and-0> [https://perma.cc/Q9KN-L5Z6].

¹⁴⁹ *Id.* (citing 31 U.S.C. § 5318(h), 31 C.F.R. § 1010.610(a), and 31 C.F.R. § 1020.210).

¹⁵⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 312, 115 Stat. 304 (2001); 31 U.S.C. § 5318(i)(2)(ii); 31 C.F.R. § 1010.610(c)(2); 31 C.F.R. § 1010.610(b)(1).

¹⁵¹ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, sch. 3ZA (UK), <https://www.legislation.gov.uk/uksi/2017/692/schedule/3ZA> [https://perma.cc/DC5S-SWXV], as amended by The Money Laundering and Terrorist Financing (Amendment) (No. 3) (High-Risk Countries) Regulations 2021 (UK), <https://www.legislation.gov.uk/uksi/2021/1218/made> [https://perma.cc/QVL2-KF62].

¹⁵² The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, ¶¶ 33(1)(b), 33(3)(a) (UK), <https://www.legislation.gov.uk/uksi/2017/692/part/3> [https://perma.cc/868R-WVZP].

A 2021 International Monetary Fund (IMF) working paper examined the impact of grey-listing on 89 emerging and developing countries and found a “large, significant negative effect of grey-listing on capital inflows” following FATF grey-listing, with inflows declining by 7.6 percent of GDP on average.¹⁵³ Capital outflows also increased by roughly 3 percentage points.¹⁵⁴ A 2019 study which looked specifically at cross-border inter-bank lending found even an even greater impact, with listed countries experiencing on average a 16 percent reduction.¹⁵⁵ Finally, a 2016 paper found an average reduction of 7–10 percent in incoming transfers following grey-listing, but no statistically significant impact on outgoing transactions.¹⁵⁶ The study’s authors note that these findings are not consistent with a loss of correspondent banking relationships, although they do just suggest there are measurable economic consequences of listing, even if the exact causal mechanism remains unclear.¹⁵⁷

In contrast to these findings, three studies described in the IMF working paper found no or negligible impact of FATF listing on cross-border flows.¹⁵⁸ It is worth noting that two of these studies use datasets that terminate in 2007 at the latest, while the third uses a dataset that spans from 1996 to 2014. In contrast, the studies described above finding a negative effect of listing have a more contemporary focus: either their datasets include more recent data (all three datasets terminate between 2014 and 2017), or they exclude data from before the year 2000, or both. The study that found one of the larger impacts (a 16 percent reduction in cross-border inter-bank lending), uses a dataset that commences in 2010 and closes in 2015.¹⁵⁹ These trends are consistent with the authors’ professional experience that non-U.S. financial institutions and foreign jurisdictions are increasingly sensitive to money laundering and terrorist financing risks and, as a result, are increasingly likely to employ onerous measures to protect themselves from exposure to such jurisdictions. In addition, the FATF has become more active over the same period. According to one study that found no impact from

¹⁵³ Mizuho Kida & Simon Paetzold, *The Impact of Gray Listing on Capital Flows: An Analysis Using Machine Learning* 5 (IMF Working Paper No. 2021/153, 2021).

¹⁵⁴ *Id.* at 9.

¹⁵⁵ Morse, *supra* note 146, at 513 (focusing in particular on the use of FATF’s transnational “market enforcement” powers to urge jurisdictions to adopt a uniform definition of terrorist financing).

¹⁵⁶ Matthew Collin, Samantha Cook & Kimmo Soramäki, *The Impact of Anti-Money Laundering Regulation on Payment Flows: Evidence from SWIFT Data 4* (Ctr. for Global Dev. Working Paper No. 445, 2016).

¹⁵⁷ *Id.* at 22.

¹⁵⁸ See Kida & Paetzold, *supra* note 153, at 4.

¹⁵⁹ Morse, *supra* note 146, at 523.

listing, only 29 countries were listed during the period between 1996 and 2014,¹⁶⁰ while a study that found a statistically significant impact focused on the period from 2000 to 2017 and noted that 78 countries had been listed during that time.¹⁶¹ The FATF's new evaluation methodology, which takes into account both technical compliance and actual effectiveness (i.e., process, outcomes, and results), is far more stringent, and a jurisdiction that performed acceptably when assessed under the previous methodology could have a far less positive outcome in the current round of assessments.

While the statistical evidence for impact may be mixed, the authors' experience and the limited academic research on the topic suggests that most countries involved in the assessment process are anxious to avoid being listed and eager to be removed from a list once placed there.¹⁶² Following an MER that qualifies for the ICRG, a jurisdiction has the opportunity to remediate deficiencies during an "observation period."¹⁶³ Although actions related to effectiveness are not made public, the FATF does publish reports on improvements in technical compliance that recount the revisions jurisdictions have made to their regulatory frameworks and, where appropriate, re-rate the jurisdiction's compliance with specific regulations. FATF data shows that jurisdictions consistently improve their technical compliance in successive follow-up reports.¹⁶⁴

At times, a jurisdiction's presence on the FATF list can break out from narrow government and financial sector circles and come to be perceived as a national priority and a subject of widespread interest. For example, Pakistan was placed on the list of jurisdictions under increased monitoring (the grey list) in June 2018.¹⁶⁵ Its action plan addressed a number

¹⁶⁰ Olga Balakina, Angelo D'Andrea, & Donato Masciandaro, *Bank Secrecy in Offshore Centres and Capital Flows: Does Blacklisting Matter?* 10 (BAFFI CAREFIN Ctr. Working Paper No. 2016-20, 2016).

¹⁶¹ Kida and Paetzold, *supra* note 153, at 5.

¹⁶² See, e.g., Mark T. Nance, *Re-thinking FATF: an experimentalist interpretation of the Financial Action Task Force*, 69 CRIME L. & SOC. CHANGE 131, 134 (arguing that concern over being listed is not in fact the primary motivator, but citing a member of Germany's FATF delegation suggesting that "fear" of listing drives compliance); Rainer Hülse & Dieter Kerwer, *Global Standards in Action: Insights from Anti-Money Laundering Regulation*, 14 ORG. 625, 633 (citing the success of the first "black list" (in 2000-2002) in improving compliance).

¹⁶³ *High-risk and other monitored jurisdictions*, *supra* note 135.

¹⁶⁴ *Mutual Evaluations*, *supra* note 109.

¹⁶⁵ *Improving Global AML/CFT Compliance: On-going Process*, FIN. ACTION TASK FORCE (June 29, 2018), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2018.html> [https://perma.cc/E457-HE3Y].

of aspects of Pakistan's AML/CFT regime, but focused on combating terrorist financing, including the full implementation of UN sanctions on terrorist and terrorist financiers and the investigation and prosecution of individuals involved with UN-designated terrorist groups.¹⁶⁶ As of the time of writing (February 2022), Pakistan remains on the grey list.¹⁶⁷ In June 2021, in an unusual step, its action plan was amended to include several new elements focused on money laundering rather than terrorist financing.¹⁶⁸

In Pakistan's highly charged political and media atmosphere, the listing immediately became the subject of dozens of news items and editorials in Pakistan's major news outlets, and the media has continued to intensively cover Pakistan's continued presence on the grey list.¹⁶⁹ Pakistan's major opposition parties have taken turns lambasting the current government for its failure to persuade the FATF to remove Pakistan from the list,¹⁷⁰ while the government itself has blamed the situation on the policies of previous governments.¹⁷¹ The country's foreign minister, who has made himself the face of Pakistan's removal campaign, told reporters that Pakistan's continued presence on the grey list could cost it 10 billion U.S. dollars annually.¹⁷² And despite persistent allegations by both government and opposition figures that

¹⁶⁶ *Id.*

¹⁶⁷ *Jurisdictions under Increased Monitoring*, *supra* note 138.

¹⁶⁸ *Jurisdictions under Increased Monitoring – June 2021*, <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-june-2021.html#pakistan> [<https://perma.cc/J5JS-XKV2>] (last visited Apr. 1, 2022).

¹⁶⁹ *See, e.g.*, Malik Asad, *FIA Recovers RS1.2B from Suspects of Financial Crimes this Year*, DAWN (Dec. 30, 2021), <https://www.dawn.com/news/1666610/fia-recovers-rs12bn-from-suspects-of-financial-crimes-this-year> [<https://perma.cc/KV84-J98H>]; Shahbaz Rana, *Pakistan Not Yet Off the FATF Hook*, EXPRESS TRIB. (Oct. 21, 2021), <https://tribune.com.pk/story/2325759/pakistan-not-yet-off-the-fatf-hook> [<https://perma.cc/KBB5-RZ7H>]; Tahir Kamran, *FATF and Pakistan: A Confrontational Relationship?*, NEWS (July 4, 2021), <https://www.thenews.com.pk/tns/detail/858878-fatf-and-pakistan-a-confrontational-relationship> [<https://perma.cc/3J3B-YNL5>].

¹⁷⁰ *See, e.g.*, *Pakistan Cannot Come out of FATF Grey List in PM Imran's Govt: Marriyum*, DUNYA NEWS (Oct. 25, 2021), <https://dunyanews.tv/en/Pakistan/625642-Pakistan-cannot-come-out-of-FATF-gryy-list-in-PM-Imran-govt-Marriyum> [<https://perma.cc/2ZDC-2SM6>]; Amir Wasim, *PPP, Govt in War of Words over FATF Outcome*, DAWN (Oct. 25, 2020), <https://www.dawn.com/news/1586896> [<https://perma.cc/8D9S-SLTU>].

¹⁷¹ *FATF Has No More Ground to Keep Pakistan in Grey List: FM*, EXPRESS TRIB. (June 23, 2021), <https://tribune.com.pk/story/2306799/fatf-has-no-more-ground-to-keep-pakistan-in-grey-list-fm>.

¹⁷² *May Lose \$10 Billion in Aid if Blacklisted By Anti-Terror Watchdog: Pak*, NDTV (Apr. 2, 2019), <https://www.ndtv.com/india-news/may-lost-10-billion-in-aid-if-blacklisted-by-anti-terror-watchdog-fatf-says-pakistan-2016710> [<https://perma.cc/FD4X-G4XP>].

the FATF's actions with respect to Pakistan are politically motivated,¹⁷³ the country has in fact made major progress on its action plan, having addressed 30 of 34 action items.¹⁷⁴ At times this progress has involved the passage of controversial legislation in the face of strong protest by the opposition.¹⁷⁵

As of February 2022, at least 120 jurisdictions have completed a “fourth round” evaluation (an evaluation against the FATF Recommendations as amended in 2012) for which results have been posted on the FATF's website.¹⁷⁶ (The roughly 70 remaining jurisdictions that are members of the FATF or of FSRBs have not yet completed their mutual evaluation or have not begun the process.)¹⁷⁷ Of these 120 assessed jurisdictions, 31 had an unacceptable definition of the terrorist financing offense at the time of their mutual evaluation—that is, they received a rating of “Noncompliant” (NC) or “Partially Compliant” (PC) on Recommendation 5.¹⁷⁸ But only twenty jurisdictions are still rated as NC or PC—the remaining eleven have since rectified their deficiencies and seen their scores improve on follow-up re-rating.¹⁷⁹ Of the twenty still assessed as NC or PC on this criterion, thirteen saw their mutual evaluation published within the last year.¹⁸⁰ Should jurisdictions in this group amend their definition of terrorist financing to remove deficiencies identified in the FATF assessment, that fact would not become publicly available until the publication of their first follow-up report, which is generally released between twelve and thirty

¹⁷³ See, e.g., Shah Mahmood Qureshi (@SMQureshiPTI), TWITTER (July 19, 2021, 4:02 AM), <https://twitter.com/smqureshipti/status/1417032073647374342> [<https://perma.cc/BL9X-U4LL>]; *FM Qureshi Questions FATF's Decision to Keep Pakistan on Grey List*, GEO NEWS (June 26, 2021), <https://www.geo.tv/latest/357031-fm-qureshi-questions-fatfs-decision-to-keep-pakistan-in-grey-list> [<https://perma.cc/UW9J-MP4B>]; Editorial, *Action on FATF Plan*, DAWN (Sept. 2, 2021), <https://www.dawn.com/news/1644038/action-on-fatf-plan> [<https://perma.cc/2F59-MGEZ>]; Mian Aslam (@MianAslam_), TWITTER (June 25, 2021, 8:43AM), https://twitter.com/mianaslam_/status/1408405491747901440 [<https://perma.cc/A624-772N>].

¹⁷⁴ Shankhyaneel Sarkar, *Pakistan Remains on Grey List of FATF*, HINDUSTAN TIMES (Oct. 21, 2021), <https://www.hindustantimes.com/world-news/pakistan-remains-on-grey-list-of-fatf-101634834252914.html> [<https://perma.cc/U6RR-7577>].

¹⁷⁵ See, e.g., Amir Wasim, *3 FATF-Related Bills Passed in Joint Session Marred by Opposition Protests*, DAWN (Sept. 16, 2020), <https://www.dawn.com/news/1580007> [<https://perma.cc/39GR-SA9L>]; Iftikhar A. Khan, *Senate Passes FATF-Related Bill Amid Opposition Protest*, DAWN (July 17, 2021), <https://www.dawn.com/news/1635490/senate-passes-fatf-related-bill-amid-opposition-protest> [<https://perma.cc/WW6E-6CDE>].

¹⁷⁶ FATF, *Fourth Round Ratings*, *supra* note 15.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* (column R.5).

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

months following the mutual evaluation.¹⁸¹ Only five jurisdictions have sustained a rating of NC or PC through the follow-up process, and none of them exempt certain actions or actors from the definition of terrorism on ideological or political grounds.¹⁸²

It is certainly true that Recommendation 5 contains explicit requirements for the criminalization of terrorist financing, not of terrorism itself. But Recommendation 5's requirement that jurisdictions criminalize terrorist financing "on the basis of" the Terrorist Financing Convention requires that jurisdictions adopt a definition of terrorism that is consistent with that put forward in the convention.¹⁸³ The FATF's own definition of terrorism, furthermore, must be taken into account when understanding its requirements related to terrorist financing. And as will be discussed below in the case of Iran, the FATF has taken strong action when a non-member jurisdiction criminalized terrorist financing using a defective definition of terrorism. The record of compliance on Recommendation 5 thus represents an extraordinary degree of uniformity regarding the definition of terrorist financing and, in turn, of terrorism itself.

¹⁸¹ FOURTH ROUND PROCEDURES, *supra* note 136.

¹⁸² These jurisdictions are Guatemala, Madagascar, Mauritania, Seychelles, and Slovenia. None of these jurisdictions offer any exemptions on the grounds of political or ideological motivations. Guatemala has not ratified all of the Annex Conventions. GAFILAT & CFATF, MUTUAL EVALUATION REPORT OF THE REPUBLIC OF GUATEMALA 113–14 (2016), <https://www.fatf-gafi.org/media/fatf/documents/GAFILAT-CFATF> [<https://perma.cc/4A8H-82B6>]. Madagascar does not criminalize the financing of terrorist individuals or organizations for any purpose. EASTERN AND SOUTHERN AFRICAN ANTI-MONEY LAUNDERING GROUP, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: MADAGASCAR TECHNICAL COMPLIANCE RE-RATING 5–7 (2020), <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/ESSAMLG-1st-Follow-Up-Report-Madagascar-2020.pdf> [<https://perma.cc/LM4R-KQ7V>]. Mauritania's definition is insufficiently broad. MIDDLE EAST AND NORTH AFRICA FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: ISLAMIC REPUBLIC OF MAURITANIA 86–88 (2018), <https://www.fatf-gafi.org/media/fatf/content/images/Mutual-Evaluation-Report-Mauritania-2018.pdf> [<https://perma.cc/7GPH-E4MQ>]. Seychelles does not criminalize the financing of individual terrorists or cross-border travel to commit terrorist acts or train as a terrorist. EASTERN AND SOUTHERN AFRICA ANTI-MONEY LAUNDERING GROUP, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: SEYCHELLES MUTUAL EVALUATION REPORT 130–32 (2018), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-Seychelles-September-2018.pdf> [<https://perma.cc/JHX4-ASPS>]. Slovenia also does not criminalize the financing of a terrorist organization or an individual terrorist for any purpose. COUNCIL OF EUROPE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: SLOVENIA FIFTH ROUND MUTUAL EVALUATION REPORT 147–49 (2017), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MONEYVAL-Slovenia-MER-2017.pdf> [<https://perma.cc/G5P9-KHYB>].

¹⁸³ See FATF RECOMMENDATIONS, *supra* note 1, at 13.

Although FATF Recommendation 5 pre-dates the 2012 revisions to the Recommendations (it was previously known as Special Recommendation II),¹⁸⁴ full statistics on compliance are not publicly available for prior assessment rounds. The limited data available suggests that that overall compliance may be improving over time. For example, a 2012 (pre-fourth round) report on technical compliance in Asia reviewed the performance of twelve Asian jurisdictions on Special Recommendation II. Of the twelve, ten were found to be Partially Compliant or Noncompliant with the Recommendation.¹⁸⁵ Of the nine jurisdictions in this group that have completed a fourth-round evaluation, eight are now largely compliant or compliant, and the ninth has not yet had the results of its follow-up re-assessment made public.¹⁸⁶ In addition to this anecdotal evidence, at least one more exhaustive treatment of this issue has indeed found a causal pathway between the FATF's pressure and criminalization of terrorist financing.¹⁸⁷

The FATF has shown that it is willing to employ its most severe sanction—placement on the black list and call for countermeasures—when a jurisdiction remains intransigent on the issue of terrorist financing. Of the two currently blacklisted jurisdictions, one—Iran—is explicitly listed in part due to its failure to appropriately criminalize terrorist financing and to ratify the Terrorist Financing Convention.¹⁸⁸

Iran was listed on the black list and was subject to a call for countermeasures until June 2016, when it entered into an agreement with the FATF on an action plan to remediate its compliance gaps, including by adequately criminalizing terrorist financing by “removing the exemption for designated groups ‘attempting to end foreign occupation, colonialism and racism,’” among other changes, and ratifying the Terrorist Financing Convention and Convention against Transnational Organized Crime

¹⁸⁴ *Id.* at 5.

¹⁸⁵ IMPLEMENTATION OF ANTI-MONEY LAUNDERING STANDARDS IN ASIA 2, FED. RESERVE BANK OF SAN FRANCISCO (Nov. 2012), <https://www.frbsf.org/banking/files/november1.pdf> [<https://perma.cc/NMV9-44Z5>].

¹⁸⁶ See FATF, *Fourth Round Ratings*, *supra* note 15.

¹⁸⁷ See Morse, *supra* note 146, at 1.

¹⁸⁸ *High Risk Jurisdictions Subject to a Call for Action*, *supra* note 139.

(Palermo Convention).¹⁸⁹ In return, the FATF suspended the call for countermeasures (although Iran technically remained on the black list).¹⁹⁰

Iran's action plan expired in January 2018.¹⁹¹ At that time, the FATF noted that Iran had not remediated the shortcomings in its definition of terrorist financing—including removing the exemption for groups struggling against “foreign occupation, colonialism, and racism”—and had not ratified the Terrorist Financing Convention (nor the Palermo Convention), but that Iran had draft legislation before its parliament that would solve some of these issues.¹⁹²

In October 2018, Iran passed legislation authorizing the country to accede to the Terrorist Financing Convention, but the law excluded “struggles against colonial dominance and foreign occupation” from the definition of terrorism.¹⁹³ Even with these exemptions, Iran's Expediency Council allowed the bill to lapse without approving it, preventing it from becoming law.¹⁹⁴ In response, the FATF imposed an escalating series of defensive measures, including (in June 2019) requiring increased supervisory attention to branches of Iranian financial institutions and (in October 2019) requiring that jurisdictions impose more stringent or systematic reporting of

¹⁸⁹ See *Improving Global AML/CFT Compliance: On-Going Process*, FIN. ACTION TASK FORCE (June 24, 2016), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2016.html> [<https://perma.cc/M964-4KDV>] (omitting Iran from list of jurisdictions with strategic AML/CFT deficiencies); *Public Statement*, FIN. ACTION TASK FORCE (Feb. 23, 2018), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/public-statement-february-2018.html> [<https://perma.cc/PN4W-TFQH>].

¹⁹⁰ *Public Statement*, *supra* note 189.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Iran Parliament Passes Measures Against Funding Terrorism*, REUTERS (Oct. 7, 2018), <https://www.reuters.com/article/us-iran-moneylaundering/iran-parliament-passes-measures-against-funding-terrorism-idUSKCN1MH09D> [<https://perma.cc/GCQ2-YQTD>]; Toby Dershowitz & Saeed Ghasseminejad, *Iranian Parliament Approves Terror Finance Bill with Loopholes for Hamas and Hezbollah*, FOUND. FOR DEF. OF DEMOCRACIES (Oct. 8, 2018), <https://www.fdd.org/analysis/2018/10/08/iranian-parliament-approves-terror-finance-bill-with-loopholes-for-hamas-and-hezbollah> [<https://perma.cc/M8RJ-UM5D>].

¹⁹⁴ *Ratification of FATF-Related Bills No More on Agenda*, MEHR NEWS AGENCY (Jan. 22, 2020), <https://en.mehrnews.com/news/154850/Ratification-of-FATF-related-bills-no-more-on-agenda> [<https://perma.cc/YF4K-DBGW>].

transactions involving Iran.¹⁹⁵ The FATF re-imposed full countermeasures in February 2020.¹⁹⁶

In this case, the FATF clearly did not succeed in changing Iran's behavior or compelling it to adopt a compliant definition of terrorism or terrorist financing. But the case of Iran does support the argument that FATF's membership has coalesced around a clear shared definition of terrorism financing, and, through it, a definition of terrorism. Under its mandate, the FATF's plenary is required to operate by consensus,¹⁹⁷ and ultimately no FATF member was willing to block the re-application of countermeasures.¹⁹⁸ In this respect it is critical to note that Iran's primary deficiency in its legal framework for combating terrorist financing was related to its definition of terrorism, not terrorist financing per se.

Beyond Iran, countries may adopt more pliant postures at the FATF than at the UN. When Pakistan acceded to the Terrorist Bombings Convention in 2002, it did so with a reservation that the provisions of the Convention were not applicable to "struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination."¹⁹⁹ As of Pakistan's 2009 evaluation, its definition of terrorist financing still left unclear whether it covered the

¹⁹⁵ *Public Statement – June 2019*, FIN. ACTION TASK FORCE (June 21, 2019), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/public-statement-june-2019.html> [https://perma.cc/L9K6-L6A7]; *Public Statement – October 2019*, FIN. ACTION TASK FORCE (Oct. 18, 2019), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/public-statement-october-2019.html> [https://perma.cc/Q33Z-EE47].

¹⁹⁶ *High Risk Jurisdictions Subject to a Call for Action*, FIN. ACTION TASK FORCE (Feb. 21, 2020), <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-february-2020.html> [https://perma.cc/X4Z5-YD92].

¹⁹⁷ FIN. ACTION TASK FORCE, MANDATE 7 (2019), <https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf> [https://perma.cc/9EG3-2DJN].

¹⁹⁸ See Press Release, U.S. Department of Treasury, Financial Action Task Force (FATF) Calls for Countermeasures on Iran, Evaluates U.S. AML Framework, Releases Digital Identity Guidance (Feb. 21, 2020), <https://home.treasury.gov/news/press-releases/sm913> [https://perma.cc/F65F-862F].

¹⁹⁹ United Nations Office of Legal Affairs, *Status of Treaties: International Convention for the Suppression of Terrorist Bombings*, UNITED NATIONS (last visited Mar. 15, 2022), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en [https://perma.cc/Z3XN-VLKL]; see generally Terrorist Bombings Convention, *supra* note 74.

financing of terrorism against foreign governments or populations.²⁰⁰ But by its 2019 evaluation, Pakistan had criminalized terrorist financing to FATF's satisfaction and on the basis of the Terrorist Financing Convention, with no impermissible exceptions.²⁰¹

Similarly, the Organization of Islamic Cooperation's 1999 Convention on Combating International Terrorism defines a terrorist crime as "any crime executed, started or participated in to realize a terrorist objective in any of the Contracting States or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law."²⁰² Article 2 of the Convention, however, states that "Peoples [sic] struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."²⁰³ The OIC's proposal, officially submitted by Malaysia, to add a similar exemption to the UN's draft comprehensive counterterrorism convention is reputed to have scuttled post-9/11 negotiations.²⁰⁴ But when Malaysia underwent a FATF assessment in 2015, it received a perfect score for criminalization of terrorist financing, and its legal code did not make any exceptions for acts carried out as part of liberation struggles.²⁰⁵

²⁰⁰ ASIA/PACIFIC GROUP ON MONEY LAUNDERING, ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: PAKISTAN MUTUAL EVALUATION REPORT 2 (2009), <https://documents1.worldbank.org/curated/en/182851468074628105/pdf/700310ESW0P1110an0MER0final0version.pdf> [<https://perma.cc/DAH5-6JTD>].

²⁰¹ ASIA/PACIFIC GROUP ON MONEY LAUNDERING, MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: PAKISTAN 151 (2019), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/APG-Mutual-Evaluation-Report-Pakistan-October%202019.pdf> [<https://perma.cc/K4XA-54L4>].

²⁰² Convention of the Organization of the Islamic Conference on Combating International Terrorism, art. 1.2, July 1, 1999, <https://www.files.ethz.ch/isn/125385/268.pdf> [<https://perma.cc/95YP-JZ3Z>].

²⁰³ *Id.* art. 2(a).

²⁰⁴ Scharf, *supra* note 22, at 361; Surya P. Subedi, *The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law*, 4 INT'L L.F. DU DROIT INTERNATIONAL 159, 163 (2002).

²⁰⁵ FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: MALAYSIA MUTUAL EVALUATION REPORT 155 (2015), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Malaysia-2015.pdf> [<https://perma.cc/468M-A9L7>].

III. SUMMARY OF THE CURRENT STATUS AND QUESTIONS FOR FUTURE CONSIDERATION

From a procedural standpoint, it can no longer be claimed that there is no widely accepted definition of terrorism, as over 200 jurisdictions have committed to the FATF's clear and comprehensive definition. Furthermore, as discussed in Part II.B, the FATF definition of terrorism resolves or at least clarifies the most pressing existential and substantive debates on the definition of terrorism. Although it cannot hope to resolve every issue (and certainly not to the satisfaction of all observers), it does make important choices that turn the page on longstanding debates:

- The FATF definition clearly defines a terrorist act as an act of violence against humans and, in some specific instances defined in the annex conventions, against certain physical structures. Unlike the draft terrorism convention, it does not cover the majority of attacks on public or private property, regardless of the extent of the damage or of the resulting economic loss.²⁰⁶
- The FATF definition makes clear that a terrorist attack must have a goal of “intimidat[ing] a population, or...compel[ling] a Government or an international organisation to do or to abstain from doing any act,” but this goal need not be “political” as traditionally defined.²⁰⁷
- The FATF approach does not distinguish between violent acts carried out by those with virtuous motives and violent acts carried out by those with malign goals. It overlaps with other categories, so that a freedom fighter can be a terrorist, as can a member of a mafia or of a violent extremist group.²⁰⁸
- The FATF approach covers all actors, without regard to status, under the criminal jurisdiction of a member state, and does not make explicit or *prima facie* definitions between state and non-state actors or actions.²⁰⁹

Despite the important achievements of this definition, the FATF approach still leaves some questions to be resolved. Perhaps the most

²⁰⁶ FATF RECOMMENDATIONS, *supra* note 1, at 129.

²⁰⁷ *See id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.*

important area of ongoing debate is the relationship between terrorism and armed conflict. Because FATF's definition is agnostic as to the status of the actors, it leaves open the possibility that a specific action could both qualify as a terrorist act and as a violation of international humanitarian law—or that perpetrators of violent acts could elude justice by exploiting confusion as to whether their actions constitute terrorism or war crimes. The critical need to protect civilian and noncombatant populations in all contexts requires the international community to develop a framework that ensures that crimes of this nature are punishable no matter the status of the actor and no matter the label applied to the offense.

Second, certain technical aspects of the FATF's definitions would benefit from further consideration in order to prevent overreach and ensure the definition is analytically useful. Although many aspects of these debates will be settled in the context of national criminal law, and will rely on an examination of specific facts, a clear international position will promote consistency and help avoid both under- and over-breadth in the application of the FATF definitions.

The FATF definition of terrorist organization specifies that it is composed of terrorists.²¹⁰ The definition of terrorist, in turn, includes individuals engaged in activities very similar to membership in a terrorist organization: “contribut[ing] to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.”²¹¹

Given the somewhat circular nature of this definition, it is possible to imagine a “terrorist organization” comprising dozens or even hundreds of “terrorists” of which only a small cadre actually attempt to carry out terrorist acts. At what point does the intention of specific group members become “the intention of the group”? In particularly large or complex organizations, does terrorist activity need to make up a major proportion of the organization's goals or activity before any member of the organization can be said to be contributing to the commission of terrorist acts simply by participating in the organization?

These somewhat arcane questions take on real significance in the context of multinational diversified terrorist “conglomerates” that engage in a wide range of political, violent, and commercial activities, some with

²¹⁰ *Id.*

²¹¹ *Id.* at 128.

diffuse connections to specific terrorist acts. The ongoing trans-Atlantic debate as to whether to designate the entirety of Hezbollah as a terrorist group (as the United States did in 1997)²¹² or just its military wing (as the European Union did in 2013)²¹³ demonstrates that the international community is far from aligned in this respect.²¹⁴

Relatedly, while the FATF requires that terrorist financing be willful, “contributing to the commission of terrorist acts” by a terrorist organization “with the knowledge of the intention of the group” need not be willful or intentional. What are the consequences of this broad definition for persons forced into labor, victims of human trafficking, or other individuals coerced into contributing to the terrorist activities of a terrorist organization (such as local populations that face a choice between aiding a terrorist organization or displacement)? Too loose an application of this definition could end in penalizing the very populations that counterterrorism regimes are seeking to protect.

CONCLUSION

Words can carry enormous meaning and power—none more so in the realm of international security as “terrorism.” The longstanding debate about a definition of terrorism—in legal, political, security, and diplomatic quarters—underscores the sensitivity and significance of the term. This Article challenges the accepted orthodoxy that no definition exists, by pointing to the definitions of terrorist financing put into practice by the Financial Action Task Force and those states that have adhered to FATF’s international AML/CFT standards. In creating an international regime to address terrorist financing, FATF has helped crystallize a definition of terrorism that is in operation and has effect in domestic laws and international practice.

Given the power that the terms “terrorist” and “terrorism” hold, this is significant. For an act to be “terrorism” is to signal its inherent illegality and inhumanity. For an individual, group, or nation state to be labeled

²¹² See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations> [<https://perma.cc/KKF5-P2LV>] (last visited Apr. 1, 2022).

²¹³ James Kanter & Jodi Rudoren, *European Union Adds Military Wing of Hezbollah to List of Terrorist Organizations*, N.Y. TIMES (July 22, 2013), <https://www.nytimes.com/2013/07/23/world/middleeast/european-union-adds-hezbollah-wing-to-terror-list.html> [<https://perma.cc/HU8R-U87L>].

²¹⁴ *Hezbollah in Europe*, EUR. LEADERSHIP NETWORK (Nov. 5, 2020), <https://elnetwork.eu/policypaper/hezbollah-in-europe> [<https://perma.cc/FVL9-MS9H>].

“terrorist” is to signal its inherent illegitimacy or rogue status in the international community. This is in part why most avoid or reject the label and seek to define their violent acts as legitimate measures that fall outside any definition of terrorism. It is also why the label “terrorist” can be used by repressive regimes to suppress any dissent or opposition. It is in the ambiguity of term—and the claims of a lack of definition—that terrorists and repressive states hope to find legitimacy or at least avoid international rebuke.

The law and lexicon of terrorism hold great power. When defined and understood, the term “terrorism” can mark the legitimacy of actions or causes, constrain the power of states, and even deter wanton violence against civilians. As this Article demonstrates, that definition exists. It is in and around the contours of that definition that the international community must now argue and contend. Perhaps now, terrorism can be seen, diagnosed, and met more clearly with the international opprobrium of banned international practices like piracy and slavery, while protecting the human rights of those wrongfully labeled as terrorists by repressive regimes.