

# RETHINKING THE *NO DEFINITION* CONSENSUS AND THE *WOULD HAVE* *BEEN BINDING ASSUMPTION* PERTAINING TO SECURITY COUNCIL RESOLUTION 1373

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Security Council Resolution 1373, which was stirred by 9/11, instructs states to take several counter-terrorism measures. This instruction gives rise to a proliferation of domestic anti-terror laws. There is a consensus among scholars that the Resolution does not provide meaning for a terrorist act. It is widely claimed this gap makes room for and results in overly broad domestic definitions, thereby permitting governments to discipline dissent and crack down on opposition in the pretext of countering terrorism. This view is based on a commonly held assumption that had the Resolution defined a terrorist act, that definition *would have been* binding among states. This article challenges both the *no definition* consensus and the *would have been binding* assumption. It contends that the Resolution has implicitly endorsed the definition provided under the *International Convention for the Suppression of the Financing of Terrorism*. However, the article further argues that, owing to the nature of the obligations that the Resolution imposes on the states, they are required to criminalise conduct that falls within the scope of the definition of a terrorist act that the Resolution tacitly endorses. It does not prohibit them from adopting a broader definition that captures conduct other than that covered by the definition it endorses. Thus, contrary to perceived wisdom, the definition is unhelpful to circumscribe the scope of domestic definitions.

## I INTRODUCTION

Security Council Resolution number 1373 (2001)<sup>1</sup> (Resolution 1373 or the Resolution) is the major<sup>2</sup> counter terrorism instrument that the

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Security Council has passed following 9/11. The Resolution has been a primary factor in setting the roadmap of the post 9/11 global counter-terrorism push.<sup>3</sup> It was described by Turkey as a ‘ground breaking resolution’,<sup>4</sup> by Singapore as a ‘landmark decision’,<sup>5</sup> by the United Kingdom as ‘an historic event’<sup>6</sup> and by Russia as ‘a major historic document’<sup>7</sup> in the Council’s history. While the impetus for Resolution 1373 was the terrorist attacks of 9/11, its reach is far beyond that. This Resolution, unlike other Security Council counter-terrorism resolutions, is neither situation specific nor addressed to a particular state(s). Rather it sets the direction of global counter-terrorism,<sup>8</sup> which Ramraj refers to as a vertical dimension of the global anti-terrorism law.<sup>9</sup>

Although the Resolution is applauded for mobilising states against terrorism (something which was not possible to be achieved through

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<sup>1</sup> SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

<sup>2</sup> Eric Rosand describes the Resolution as the “cornerstone” in the United Nations’ fight against terrorism: see Eric Rosand, ‘Security Council Resolution 1373, the Counterterrorism Committee, and the Fight Against Terrorism’ (2003) 97 *The American Journal of International Law* 333, 333.

<sup>3</sup> Curtis A Ward, ‘Building Capacity to Combat International Terrorism: the Role of the United Nations Security Council’ (2003) 8(2) *Journal of Conflict & Security Law* 289, 289.

<sup>4</sup> UN GAOR, 56<sup>th</sup> sess, 48<sup>th</sup> plen mtg, UN Doc A/56/PV.48 (12 November 2001) 9.

<sup>5</sup> UN GAOR, 56<sup>th</sup> sess, 25<sup>th</sup> plen mtg, UN Doc A/56/PV.25 (15 October 2001) 10.

<sup>6</sup> UNSC, 4413<sup>th</sup> mtg, UN Doc S/PV.4413 (12 November 2001) 15.

<sup>7</sup> UNSC, 4453<sup>rd</sup> mtg, UN Doc S/PV.4453, (18 January 2002) 7.

<sup>8</sup> Ward, above n 3, 289.

<sup>9</sup> Ramraj identifies two dimensions of ‘global anti-terrorism law’. The first refers to international legal norms and standards which are to be adopted and applied by the states. He calls it the ‘vertical dimension’ of the anti-terrorism regime. The second one which he calls the ‘horizontal dimension’ refers to the convergence of principles and practices through borrowing and coordination between and among states: see Victor V Ramraj, ‘The Impossibility of global anti-terrorism law?’ in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 50.

the treaty process),<sup>10</sup> it has been subject to several criticisms.<sup>11</sup> One major criticism that this article is concerned about is the alleged failure of the Resolution to define the term ‘terrorism’ or ‘terrorist act’ (to be used interchangeably). There is an agreement among scholars and non-governmental institutions that the Resolution’s failure to define a terrorist act allows governments to define terrorism broadly and restrict human rights in the pretext of countering terrorism. The too broad definition in domestic legislation is attributed to the claimed lack of definition because it is believed that had the Resolution defined a terrorist act, that definition *would have been* binding among states thereby preventing them from adopting their own state-centric definitions.

This article challenges both the *no definition* consensus and the *would have been binding* assumption. It contends that a critical rereading of the Resolution, in conjunction with the 1999 *International Convention for the Suppression of the Financing of Terrorism*<sup>12</sup> (*Suppression of Financing Convention* or *Convention*), reveals that the Resolution tacitly endorses the definition under the Convention. As such it provides another, perhaps stronger, reason for the states to follow the definition in the Convention. However, the article further argues that, owing to the nature of the obligations that

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<sup>10</sup> Nicholas Rostow, ‘Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>’ (2001-2002) 35 *Cornell International Law Journal* 475, 481-84.

<sup>11</sup> Resolution 1373 is criticised for circumventing the requirement of consent of states as a conventional law making process by instructing them to adopt and implement anti-terrorism measures: see Nigel D White, ‘The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making’ in Ana Maria Salinas De Frias, Katja LH Samuel and Nigel D White (eds), *Counter terrorism International Law and Practice* (Oxford University Press, 2012) 54, 72; Rostow, above n 10, 482; Ben Saul, ‘Definition of “Terrorism” in the UN Security Council: 1985–2004’ (2005) 4(1) *Chinese Journal of International Law* 161, 165. The Resolution is also criticised for its failure to give mandate to the Counter Terrorism Committee to oversee that counterterrorism does not violate human rights and rule of law: see Sudha Setty, ‘What is in a name? How Nations Define Terrorism Ten Years After 9/11’ (2011) 33(1) *University of Pennsylvania Journal of International Law* 1, 12-3.

<sup>12</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002).

the Resolution imposes, states are required to criminalise conduct that fall within the scope of the definition of a terrorist act that the Resolution tacitly endorses. That is, the Resolution obliges states only not to have a narrower, but not a broader, definition than the definition it endorses

The article begins with a brief summary of the ‘*no definition*’ consensus and a discussion on the consequence of the claimed gap, followed by a discussion on the solution that scholars and international bodies have proposed in response to the claimed lack of definition and its consequences. Then the article searches for, and suggests, a definition of a terrorist act that is argued to have been tacitly incorporated in Resolution 1373. Next it provides a brief outline of the *would have been* binding assumption followed by examination of the assumption and bindingness of the suggested tacit definition in Resolution 1373.

## II THE *NO DEFINITION* CONSENSUS AND CONSEQUENCES OF THE CLAIMED GAP

Resolution 1373 which, *inter alia*, requires states to take legislative measures against terrorism has resulted in a proliferation of anti-terrorism legislation across the globe.<sup>13</sup> Invoking the absence of a clear provision in the Resolution that defines a terrorist act, many assert the Security Council has left the definition of a terrorist act to individual governments.<sup>14</sup> In view of the fact that a ‘terrorist act’

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<sup>13</sup> Kent Roach, ‘Defining Terrorism: the need for a restrained Definition’ in Nicole LaViolette and Craig Forcese (eds), *The Human Rights of Anti-terrorism* (Irwin Law, 2008) 97, 98; Beth Elise Whitaker, ‘Exporting the Patriot Act? Democracy and the ‘war on terror’ in the Third world’ (2007) 28(5) *Third World Quarterly* 1017, 1017.

<sup>14</sup> Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 316-7, 320; Rostow, above n 10, 484; Roach, above n 13, 98-9; Reuven Young, ‘Defining Terrorism: the Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’ (2006) 29(1) *Boston College International and Comparative Law Review* 23, 44.

does not have a universally accepted meaning,<sup>15</sup> it is argued, the imposition of an obligation on a state to criminalise a ‘terrorist act’, without providing a definition or guideline, means authorising states to ‘define terrorism according to its own history, objectives and concerns’,<sup>16</sup> which permits a range of overly broad definitions. Requiring states to take measures against terrorism without defining it, Guillaume argues, enables states to make ‘unilateral interpretations geared towards their own interests’.<sup>17</sup> Roach describes this gap as a ‘critical lacunae’ in Resolution 1373.<sup>18</sup>

Many have expressed their fear that lack of definition<sup>19</sup> in Resolution 1373 would make the pursuit of terrorism convenient

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<sup>15</sup> Samuel characterises absence of universal definition of terrorism as the major lacunae in the rule of law framework of international counter terrorism: see Katja LH Samuel, ‘The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?’ in Ana Maria Salinas De Frias, Katja LH Samuel, and Nigel D White (eds), *Counter terrorism International Law and Practice* (Oxford University Press, 2012) 14, 16-9. However, two courts, one national another international, have adopted a different view of the definition controversy. The UN Special Tribunal for Lebanon and an Italian court recognize a customary law definition for the crime of terrorism: see Ben Saul, ‘Civilizing the Exception: Universally Defining Terrorism’ in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 79, 80, 85.

<sup>16</sup> Kent Roach, Michael Hor, Victor V Ramraj and George Williams, ‘Introduction’ in Kent Roach, Michael Hor, Victor V Ramraj and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2<sup>nd</sup> ed., 2012) 1, 4.

<sup>17</sup> Gilbert Guillaume, ‘Terrorism and International Law’ (2004) 53 *International and Comparative Law Quarterly* 537, 540.

<sup>18</sup> Roach, above n 13, 99.

<sup>19</sup> Some consider the absence of definition as reasonable. For Rosand, because definition of terrorism divides the international community at the General Assembly, it is appropriate for the Security Council not to deal with this issue so as to maintain its legitimacy. Thus, he argues, the Council deliberately ‘avoided addressing those issues on which there was no consensus among the wider U.N. Membership’: see Eric Rosand, ‘The Security Council as “Global Legislature”: ultra vires or ultra-innovative’ (2005) 28 *Fordham International Law Journal* 542, 581. Telhami has gone so far as to say that the Resolution ‘was possible only because member [S]tates did not have to tackle the issue of terrorism’: see Shibley Telhami, ‘Conflicting Views of Terrorism’ (2002) 35 *Cornell International Law Journal* 581, 584. In a similar fashion quoting

shorthand for states to label their enemies and to use anti-terrorism legislation as a tool against them in the pretext of fighting terrorism.<sup>20</sup> Many definitions of terrorism, Scheppele observes, have a broad reach so as to include constitutionally protected political dissent.<sup>21</sup>

Kent Roach succinctly puts the repercussion of lack of definition in the Resolution as allowing:

... all 192 members to define terrorism in their own way. Left to their own devices, member states could enact over broad definitions of terrorism, including definitions that would allow for the criminalization of dissent and protest.<sup>22</sup>

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Jeremy Greenstock, Bondi notes that definition was not included deliberately to obtain consensus to pass the Resolution: see Loretta Bondi, 'Legitimacy and Legality: Key Issues in the Fight Against Terrorism' (2002) 25 *the International relations and Security network* <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=92743>>. However, this argument seems to be fallacious for two reasons. First, in the absence of definition of terrorism, it is difficult to see the Resolution as a big achievement as it does not address the major problem which prevented the General Assembly from progressing in the anti-terrorism treaty making. If action is needed, it should be in relation to the most controversial issue which has made the international community unable to act. Furthermore, according to this argument, had the SC attempted to define terrorism, either the Resolution would not have passed or if passed it would have reflected the position of the few on such a controversial issue, which would have made the Resolution more controversial. From this follows the second flaw of the argument. It does not answer the question why should we not trust the Security Council's representativeness in defining terrorism if we trust it and accept its position on other aspects of counter-terrorism incorporated in Resolution 1373?

<sup>20</sup> Telhami, above n 19, 584.

<sup>21</sup> Kim Lane Scheppele, 'The Migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 347, 363; see also Ian Cram, *Terror and the War on Dissent-Freedom of Expression in the Age of Al-Qaeda* (Springer, 2009), 38; Kent Roach, 'The Post 9/11 migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374.

<sup>22</sup> Roach, above n 13, 111.

Similarly, Seety observes the ‘lack of a uniform and universally accepted definition, coupled with a mandate for strong counterterrorism laws and policies, has opened the door for potential abuse by member states in those areas in which the piecemeal international definition does not provide clarity’.<sup>23</sup> Kegoro expresses his fear that ‘lack of clarity in the meaning of “terrorism” in anti-terror laws contributes to situations where legitimate political activity is branded as terrorism’.<sup>24</sup>

The Office of the UN High Commissioner for Human Rights has expressed concern that the war on terrorism not be exploited for political advantage by ‘clamping down on legitimate political dissent’.<sup>25</sup> Amnesty International shares this concern. Noting that ‘the terms “terrorists” and “terrorist acts” in Resolution 1373 are open to widely differing interpretations’, Amnesty International expresses its worry that this may facilitate rights violations.<sup>26</sup> The United Nations Security Council Counter Terrorism Committee (CTC), which is empowered to follow up the implementation of Resolution 1373, has acknowledged the possibility of abuse by states in implementing Resolution 1373.<sup>27</sup>

The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism notes:

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<sup>23</sup> Setty, above n 11, 8.

<sup>24</sup> George Kegoro, ‘The Effects of Counter terrorism measures on human rights: The experiences of East African countries’ in Wafula Okumu and Anneli Botha (eds), *Understanding Terrorism: In Search for an African Voice* (Institute of Security Studies, 2006) 51, 55.

<sup>25</sup> BBC News, ‘UN Questions New US Entry Controls’, *BBC News* (online) 6 June 2002 <[www.bbc.co.uk/1/hi/world/americas/2028990.stm](http://www.bbc.co.uk/1/hi/world/americas/2028990.stm)>.

<sup>26</sup> Amnesty International, *Statement on the Implementation of SC Res 1373*, 1 October 2001.

<sup>27</sup> UN Information Service, *Human Rights Committee Briefed on Work of Counter-terrorism Committee*, (press release, HR/CT/630 27, March 2003) <<http://www.un.org/News/Press/docs/2003/hrct630.doc.htm>>.

Of particular concern to the Special Rapporteur's mandate is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights. Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term.<sup>28</sup>

Analysis of over 500 state reports to the CTC is said to have confirmed that the 'critical gap' in the Resolution has already produced a result.<sup>29</sup> The study indicates that definitions of terrorism in domestic anti-terror laws are not only divergent but also very broad and vague.<sup>30</sup> The Eminent Jurists Panel of the International Commission of Jurists states that imprecision and over broadness of definitions are the most common problems in national anti-terrorism legislation.<sup>31</sup> Where a definition of terrorism is broad and/or imprecise there is a risk that non-terrorist conduct might be captured. As noted by Roach, lack of 'precise and restrained' meaning of terrorism has enabled many states to define the term in an overly broad fashion and in a manner that some forms of protest and civil disobedience will be caught in the definition.<sup>32</sup> Similarly, Saul argues that lack of guidance on what constitutes terrorism under the Resolution permits states to adopt a definition that captures conduct other than terrorist acts having international reach.<sup>33</sup> Furthermore, Saul notes that some states have exploited the 'legitimacy conferred by the Security Council authorization to define terrorism to repress or de-legitimize political opponents and to conflate them with Al-Qaeda'.<sup>34</sup>

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<sup>28</sup> Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc E/CN.4/2006/98 (28 December 2005) para 27.

<sup>29</sup> Saul, above n 11, 160.

<sup>30</sup> *Ibid.*

<sup>31</sup> International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' (Report, International Commission of Jurists, 2009) <<http://www.refworld.org/pdfid/499e76822.pdf>>.

<sup>32</sup> Roach, above n 13, 98.

<sup>33</sup> Saul, above n 11, 157-9.

<sup>34</sup> *Ibid* 160.

Because the Security Council's instruction to states to take counter terrorism measures, without telling them what terrorism stands for, is believed to have facilitated the promulgation of domestic anti-terror laws with sweeping definitions, Roach goes as far as attributing complicity to the UN Security Council in the violation of rights arising from such definitions.<sup>35</sup>

### III PROPOSED SOLUTION FOR THE PERCEIVED LACK OF DEFINITION

Unlike Resolution 1373 which is widely interpreted not to have defined terrorism, the *Suppression of Financing Convention* and the UN Security Council Resolution 1566<sup>36</sup> (Resolution 1566) incorporate provisions that appear a definition of a terrorist act.<sup>37</sup> Article 2(1) of the Convention defines a terrorist act as any specific offence under a pre-existing counter-terrorism treaty or as:

Any ... 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 abstain from doing any act.

Paragraph 3 of Resolution 1566 provides a comparable definition for a terrorist act.<sup>38</sup> It refers to:

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<sup>35</sup> Roach, above n 13, 98-9.

<sup>36</sup> SC Res 1566, UN SCOR, 5053rd mtg, *S/RES/1566* (8 October 2004).

<sup>37</sup> Though Bianchi recognises that the desire to homogenise domestic anti-terrorism legislation inspired Resolution 1566, pointing to the ambiguities surrounding Resolution 1566, he expresses reservation if it can help achieve that goal: see Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview' (2006) 4 *Journal of International Criminal Justice* 1044, 1050.

<sup>38</sup> However it is noteworthy that Ambassador Ronaldo Mota Sardenberg of Brazil stated to the Security Council, during its debate of Resolution 1566, that operative para 3 was not an attempt to define the concept of terrorism but rather a compromise among the member states that contained a clear political

... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable ...

Scholars and international bodies call for states to follow these definitions while passing their anti-terrorism legislation. For example, Young argues that states should base their anti-terrorism legislation on the international law definition of terrorism ‘for legal and policy reasons, including enhancing the protection of human rights’.<sup>39</sup> Similarly, Hardy and Williams indicate that arguably<sup>40</sup> national definitions of terrorism should not be broader in scope than the definition in the *Suppression of Financing Convention*.<sup>41</sup> In 2004, the United Nations High-Level Panel on Threats, Challenges and Change recommended that domestic legislatures refer to definitions of terrorism under the *Suppression of Financing Convention* and Resolution 1566 when drafting their own.<sup>42</sup> Martin Scheinin, former

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message: see Security Council, ‘Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of Most Serious Threats to Peace’ (Media Release, UN Doc SC/8214, 8 October 8 2004) <<http://www.un.org/News/Press/docs/2004/sc8214.doc.htm>>.

<sup>39</sup> Young, above n 14, 23.

<sup>40</sup> While supportive of the idea that definitions of terrorism in domestic laws should follow the definitions of terrorism under the two international legal instruments, Hardy and Williams raise three problems that would militate against using these definitions as standard that states should follow. First, the definitions are not binding on the states. Second, there is no ‘absolute’ international consensus on the definitions being the best available ones. Third, the definitions are not comprehensive: see Keiran Hardy and George Williams, ‘What is “terrorism”? Assessing Domestic Legal Definitions’ (2011) 16 *UCLA Journal of International Law & Foreign Affairs* 77, 95-7.

<sup>41</sup> Ibid 95.

<sup>42</sup> *A More Secure World: Our Shared Responsibility – Report of The High-Level Panel on Threats, Challenges and Change*, UN GA , 59<sup>th</sup> sess, 49 [164](c), UN Doc A/59/565 (2004). The High-Level Panel recommended a definition which is extraordinarily similar to the definitions in both the *Suppression of Financing Convention* and Resolution 1566. It defines a terrorist act as: ‘any action ... that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to

Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, concurs.<sup>43</sup> Though the concept of terrorism does not have a comprehensive definition under the existing international law, he reasons, the cumulative characterisation of a terrorist crime, as elaborated by the Security Council in Resolution 1566, represents an effort to confine counter-terrorism measures to offences of a ‘genuinely terrorist nature’.<sup>44</sup> Any offence defined in domestic law as a terrorist crime, he notes, should meet the conditions that Resolution 1566 set.<sup>45</sup>

Having examined the Security Council’s approach to terrorism from 1985-2004, Saul identifies what he calls ‘the substantive content of terrorism’ which, he argues, is caught by the definition of terrorism as provided under Resolution 1566.<sup>46</sup> This definition, as noted by Hardy and Williams, is ‘strikingly similar’<sup>47</sup> to and ‘practically indistinguishable’<sup>48</sup> from the definition article of the *Suppression of Financing Convention*. Similarly, Thomas Weigend notes that the Security Council reiterates the broad definition of

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intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act’ at 49 [164](d).

<sup>43</sup> Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, addendum, mission to Spain*, A/HRC/10/3/Add.2 (16 December 2008) <<http://www.refworld.org/docid/498c24562.html>>.

<sup>44</sup> Ibid para 6.

<sup>45</sup> The three conditions Scheinin identifies are that the offence: (a) be committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages; (b) be committed for the purpose of provoking a state of terror, intimidating a population, or compelling a government or international organisation to do or abstain from doing any act; and (c) corresponds to all elements of a serious crime as defined by the law: see Scheinin, above n 28, para 37. He reiterated this view in 2008 in connection with his visit to Spain: see Scheinin, above n 43, para 6.

<sup>46</sup> Saul, above n 11.

<sup>47</sup> Hardy and Williams, above n 40, 93.

<sup>48</sup> Ibid.

terrorism in Resolution 1566.<sup>49</sup> In 2008, the Office of the UN High Commissioner for Human Rights reported that the definition in Resolution 1566 remains of ‘considerable benefit’ because it ‘is based on agreed parameters and is compatible with the principles of legality and precision’.<sup>50</sup>

The support of the international definition of terrorism comes not only from scholars and international bodies. Both the England and Wales Court of Appeal<sup>51</sup> and the Canadian Supreme Court<sup>52</sup> resort to the definitions given under the *Suppression of Financing Convention* and Resolution 1566. Citing the overwhelming support from distinguished scholars, domestic courts and influential international bodies, Hardy and Williams acknowledge that the definitions provided under the *Suppression of Financing Convention* and Resolution 1566 are ‘the most authoritative international definitions of terrorism available’.<sup>53</sup> The Eminent Jurists Panel opined that the definitions under both instruments secured a ‘high degree of political consensus’.<sup>54</sup> Relating to the definition of terrorism under the *Suppression of Financing Convention*, the Canadian Supreme Court indicates that it ‘catches the essence of what the world understands by “terrorism”’.<sup>55</sup> As argued by Roach, the Convention definition of terrorism ‘provides the most restrained and defensible definition of terrorism’.<sup>56</sup>

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<sup>49</sup> Thomas Weigend, ‘The Universal Terrorist: The International Community Grappling with a Definition’ (2006) 4 *Journal of International Criminal Justice* 912, 920.

<sup>50</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, terrorism, and counter terrorism* (2008), 41 <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>>.

<sup>51</sup> *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA 222.

<sup>52</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

<sup>53</sup> Hardy and Williams, above n 40, 92, 94-5.

<sup>54</sup> International Commission of Jurists, above n 31, 7.

<sup>55</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, [98].

<sup>56</sup> Roach, above n 13, 126.

#### IV SCRUTINISING THE MEANING OF A TERRORIST ACT UNDER RESOLUTION 1373<sup>57</sup>

While Resolution 1373 does not expressly define terrorism, by requiring or calling upon states to take the several measures that it provides against terrorism, it is logical to assume the Security Council would not use the term to mean *everything* or *nothing*. To think otherwise would render the Resolution ineffective. The principle *ut res magis valeat quam pereat*, which requires a presumption that every provision in a legal instrument is there for a purpose and calls for an interpretation that gives effect to each provision of the legal instrument, would, by extension, prohibit an interpretation that would make the whole document ineffective. Thus, to let the Resolution serve a purpose, it should be construed that the term terrorist act refers to *something*.

Indeed, sources suggest that. For example, Bianchi notes that '[i]t surely was not the intention of the SC at the time of the adoption of Res. 1373 to give states a blank cheque to fight terrorism according to their own definitions'.<sup>58</sup> The CTC indicates that its members have a fair idea of the meaning of terrorism under the Resolution.<sup>59</sup> Jeremy Greenstock, former British Ambassador to the United Nations and chair of the Committee, stated:

... increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this: terrorism is terrorism ... What looks, smells and kills like terrorism is terrorism.<sup>60</sup>

<sup>57</sup> Part of the argument in this Section is taken from Wondwossen Demissie Kassa, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments' (2014) 8(2) *Mizan Law Review* 371, 380-3.

<sup>58</sup> Bianchi, above n 37, 1050.

<sup>59</sup> Ambassador Jeremy Greenstock, 'Combating International Terrorism: The Contribution of the United Nations' (Speech delivered at the Symposium: "Combating International Terrorism: the Contribution of the United Nations", Vienna, 3-4 June 2002) quoted in Saul, above n 11, 157.

<sup>60</sup> John Collins, 'Terrorism' in John Collins and Ross Glover (eds), *Collateral Language: A User's Guide to America's New War* (New York University Press,

Furthermore, though some states have expressed their concern about the lack of explicit definition in the Resolution, others believe that definition is unnecessary as it was defined in previous legal instruments.<sup>61</sup> Moreover, Rostow argues that Resolution 1373 was passed on the assumption that the meaning of terrorism is known from previous counterterrorism legal instruments.<sup>62</sup>

This section is devoted to finding what that *something* is. Many have stressed the link between Resolution 1373 and the *Suppression of Financing Convention*. Weigend argues that the Resolution has ‘the practical effect of conferring universally binding authority upon many provisions of the Financing Convention’.<sup>63</sup> Szasz maintains that by reiterating some of the provisions of the *Suppression of Financing Convention* the Resolution confers upon them a binding force.<sup>64</sup> While Rosand does not support the claim that the Resolution is mainly concerned with terrorist financing, he recognises that the financing of terrorism forms one of the core points in the Resolution.<sup>65</sup> The Resolution is so closely related with the Convention that Roach observes much of Resolution 1373 revolves around the *Suppression of Financing Convention*.<sup>66</sup>

We build upon this strong relationship between the two legal instruments to inquire into the meaning of a terrorist act as used in Resolution 1373. Logical consistency requires that terrorist acts, the financing of which states are instructed to prevent and suppress under para 1 of Resolution 1373,<sup>67</sup> should not be different from

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2002) 167-8 quoted in Alex Schmidt, ‘Terrorism-the Definitional Problem’ (2004) 36 *Case Western Reserve Journal of International Law* 375.

<sup>61</sup> Saul, above n 11, 159.

<sup>62</sup> Rostow, above n 10, 487.

<sup>63</sup> Weigend, above n 49, 920.

<sup>64</sup> Paul Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American Journal of International Law* 903.

<sup>65</sup> Rosand, above n 2, 334.

<sup>66</sup> Roach, above n 13, 112, 113.

<sup>67</sup> This para reads as follows: ‘The Security Council, *Acting* under Chapter VII of the Charter of the United Nations, *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or

(broader or narrower in scope than) terrorist acts, the funding of which the *Suppression of Financing Convention* is concerned with.<sup>68</sup> The Security Council would not have called upon<sup>69</sup> states to become parties to the Convention,<sup>70</sup> under para 3(d) of the Resolution, had it

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indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons’.

<sup>68</sup> As Szasz rightly asserts: ‘the provisions of operative paragraph 1 of Resolution 1373 ... are clearly based on the International Convention for the Suppression of the Financing of Terrorism’: see Szasz, above n 64, 901, 903. Similarly, from the importance that Resolution 1373 attaches to the adoption and implementation of international Conventions and Protocols in general and the similarity between para 1(b) of the Resolution and art 2(1) of the *Suppression of Financing Convention* in particular, the United Nations Office on Drugs and Crime interprets a terrorist act, as used in Resolution 1373, to refer to what is envisaged under art 2(1) of the *Suppression of Financing Convention*: see United Nations Office on Drugs and Crime, *Digest of Terrorist Cases* (Vienna, 2010) 2-3.

<sup>69</sup> As noted by Szasz, it is for political reasons that the Council makes participation in the Convention optional: see Szasz, above n 64, 903. However, the phrase ‘calls upon’ does not necessarily indicate that it is optional to the states to become parties to the Conventions. As noted by the ICJ in the Namibia case: ‘The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect’: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 53 [114]. The ICJ, in that case, by a careful analysis, concluded that the decision made by the Security Council in para 5 of Res 276 (1970) which begin by the phrase ‘Calls upon all states’ were of a legally binding nature at [115].

<sup>70</sup> The obligations that the Resolution imposes on the states under its para 1 are so similar with those imposed under the *Suppression of Financing Convention* that

used the phrase ‘terrorist acts’ the financing of which it requires states to criminalise, under para 1 of the Resolution, differently from its meaning under the *Suppression of Financing Convention*. If the meaning of terrorist acts, as used under para 1 of the Resolution, is different from its meaning under the Convention, states will not be able to comply with both paras 1 and 3(d) of the Resolution simultaneously. Where a state, responding to the Security Council’s call under para 3(d) of the Resolution, ratifies the *Suppression of Financing Convention*, the state undertakes to criminalise financing of terrorist acts as defined under the Convention.<sup>71</sup> It follows that if the meaning of terrorist acts referred to under para 1 of the Resolution is different from that provided under the Convention, then it will neither practically nor logically be possible for the state to comply with both paragraphs of the Resolution concurrently.

This anomalous consequence would not be the Security Council’s intention. Rather the Security Council would like the states both to implement para 1 and to ratify the Convention in compliance with para 3(d) of the Resolution. Thus, the Resolution has to be interpreted in such a manner that compliance with both paragraphs at the same time is possible. The only way to circumvent this anomaly, and to make compliance with both paragraphs possible, is to interpret ‘terrorist acts’ as used under para 1 of the Resolution and the *Suppression of Financing Convention* to refer to the same conduct. It follows that the definition of terrorist acts under the Convention should be applicable to terrorist acts, the financing of which states are instructed to criminalise under para 1 of Resolution 1373.

It stands to reason that the Security Council, in using the phrase ‘terrorist acts’ in the different paragraphs of the Resolution,<sup>72</sup> refers to the same conduct. For example, the CTC has stated that the

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Bantekas describes para 3(d) of the Resolution, which calls for states to ratify the Convention, as ‘ironic’: see Ilias Bantekas, ‘The International Law of Terrorist Financing’ (2003) 97(2) *American Journal of International Law* 315, 326.

<sup>71</sup> Szasz, above n 64, 903.

<sup>72</sup> The Resolution has made about 40 mentions of *terrorism, terrorists or terrorist acts*.

operative para 1 should be read and interpreted in conjunction with sub-para 3(d) of the Resolution.<sup>73</sup> Similarly, the meaning of ‘terrorist acts’ the financing of which states are instructed to criminalise under para 1 of the Resolution would not be different from ‘terrorist acts’ as used in other paragraphs of the Resolution. Because the meaning of terrorist acts, as used in other paragraphs of the Resolution, would not be different from the meaning given to terrorist acts under the Resolution’s first paragraph, which refers to the meaning of a terrorist act under art 2(1) of the *Suppression of Financing Convention*, it follows that this definition is applicable to terrorist acts as used throughout Resolution 1373.

Thus, even though the absence of an explicit definition of terrorism in the Resolution seems to suggest that ‘each country must decide within its legislation on the underlying criminal acts to which resolution 1373 is applicable’,<sup>74</sup> terrorist act under Resolution 1373 refers to offences that art 2(1) of the *Suppression of Financing Convention* envisions.<sup>75</sup> Two categories of offences are listed under art 2(1) of the Convention. The first, as provided under sub-para (a) refers to an offence described in any one of the counter-terrorist treaties listed in the annex to the Convention. These Sectoral conventions designate a number of acts as terrorist. The second, provided under sub-para (b) refers to ‘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’, committed with the goal of intimidating a population or

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<sup>73</sup> Mirko Sossai, *UN SC Res.1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism?* <[http://www.esil-sedi.eu/sites/default/files/Sossai\\_0.PDF](http://www.esil-sedi.eu/sites/default/files/Sossai_0.PDF)>.

<sup>74</sup> Ward, above n 3, 294-5.

<sup>75</sup> White, citing Fuller, notes that legislating indirectly against terrorism, as does the SC in its Resolution 1373, is incompatible with the fundamental requirement of rule of law which entails that conducts prohibited by law be clearly defined: see White, above n 11, 72. However it is not uncommon to infer the intention of the Security Council from what it has expressly stated. For example, Szasz argues that in Resolution 1373 the Security Council *implicitly* approves previous General Assembly recommendations: see Szasz, above n 64, 903. Similarly, Saul notes that Resolution 1373 *implicitly* authorised self defence against terrorism: see Saul, above n 11, 160.

compelling a government or international organisation to act in a certain way.

This argument is supported by the Council's subsequent practice, which is one of the factors to be considered in interpreting Security Council resolutions.<sup>76</sup> Though states routinely claim the occurrence of terrorist attacks in their territories (based on their own definition of terrorism), the Security Council has not taken every allegation seriously.<sup>77</sup> The Council has consistently confined its involvement<sup>78</sup> to attacks which are grave enough to be captured by the definition provided under the *Suppression of Financing Convention*.

Moreover, the CTC's Report Assessment Team has been applying the *Suppression of Financing Convention* to evaluate country reports.<sup>79</sup> The CTC opined that 'resolution 1373 should be interpreted in compliance with existing international agreements'.<sup>80</sup> Wainwright, former expert adviser to the CTC, indicates that because

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<sup>76</sup> Michael C Wood, 'The Interpretation of Security Council Resolutions', *Max Planck Yearbook of United Nations Law* (1998), 92 <[http://www.mpil.de/files/pdf2/mpunyb\\_wood\\_2.pdf](http://www.mpil.de/files/pdf2/mpunyb_wood_2.pdf)>. Unlike interpretation of treaties there is not much authority on interpretation of Security Council resolutions. Michael C Wood examines the appropriateness of arts 31-33 of the Vienna Convention on the Law of Treaties, which provide for rules of interpretation of treaties, to interpret Security Council resolutions. Though he warns that there might be instances where to apply the rules in interpreting the Security Council Resolutions may not be acceptable and to some extent impossible, he maintains that normally to use the rules to interpret Security Council Resolutions is appropriate at 73, 85-95.

<sup>77</sup> For the sporadic involvement of the Security Council in domestic terrorism cases, which arguably do not fall under the Convention's definition see Wondwossen Kassa, 'Examining Some of the Raison d'être for the Ethiopian Anti-terrorism law' (2013) 7 *Mizan Law Review* 49, 60-3.

<sup>78</sup> The Council adopted resolutions denouncing bomb attacks (Bali (Resolution 1438) and Kenya (Resolution 1450) in 2002; Bogota (Resolution 1465) and Istanbul (Resolution 1516) in 2003; Madrid (Resolution 1530) in 2004 and London (Resolution 1611) in 2005); and hostage takings (Moscow (Resolution 1440) in 2002).

<sup>79</sup> Jeremy Wainwright, *Some aspects of compliance with UN Security Council Resolution 1373* (2005), 6-7 <[http://www.opc.gov.au/calc/docs/Loophole\\_papers/Wainwright\\_Mar2005.pdf](http://www.opc.gov.au/calc/docs/Loophole_papers/Wainwright_Mar2005.pdf)>.

<sup>80</sup> UN Information Service, above n 27.

Resolution 1373 calls upon states to give effect to the relevant counter-terrorism international instruments ‘the CTC has seen fit to import into its interpretation of the resolution concepts included in those instruments, in particular, the fairly detailed description of terrorism included in the Financing Convention’.<sup>81</sup> As noted by Wood, in an attempt to understand Security Council resolutions, subsidiary organs of the Council which are established to follow and facilitate implementation of a particular Council’s resolution deserve particular attention as their work necessarily involves interpretation of the resolution that they are in charge of implementing.<sup>82</sup>

Furthermore, noting that the Security Council is best suited to give authentic interpretation to Security Council resolutions, Wood indicates one way of doing this would be reference to a subsequent resolution.<sup>83</sup> He notes that Security Council resolutions should be understood as part of a series which calls for reference to previous and subsequent resolutions.<sup>84</sup> Thus the description of a terrorist act provided under Resolution 1566,<sup>85</sup> could be used as additional evidence to demonstrate the Security Council’s understanding of the term terrorist acts. As noted by Hardy and Williams, the definition in Resolution 1566 is ‘practically indistinguishable’<sup>86</sup> from the definition under the *Suppression of Financing Convention*. This

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<sup>81</sup> Wainwright, above n 79.

<sup>82</sup> Wood, above n 76, 84.

<sup>83</sup> Ibid 82-3; Curtis Ward, Legal Expert for the Security Council’s Counter-Terrorism Committee (CTC), invoked a legal instrument (The Ministerial Declaration annexed to Security Council Resolution 1456 (2003)) which was passed after Resolution 1373 to support his view that the Security Council intended, under Resolution 1373, to require states to ensure that their counter terrorism activity is compatible with human rights: see UN Information Service, above n 27.

<sup>84</sup> Ibid 87.

<sup>85</sup> Under para 3 of Resolution 1566, The Security Council ... *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable.

<sup>86</sup> Hardy and Williams, above n 40, 93; Weigend, above n 49, 920.

‘striking similarity’<sup>87</sup> gives credence to the argument that the Council understood the term terrorism, while passing Resolution 1373, to refer to terrorism as defined under the *Suppression of Financing Convention*.

While agreeing that para 3 of Resolution 1566 constitutes a definition of terrorism, some have criticised this definition for being a late<sup>88</sup> response as if the definition given to a terrorist act under Resolution 1566 is a new one and meant to rectify Resolution 1373’s failure to define terrorism.<sup>89</sup> However on top of the argument relating to the tacit incorporation of a definition of terrorism under Resolution 1373, a close reading of para 3 of Resolution 1566 itself attests that the Security Council is not providing for a new definition of terrorism. First, in that paragraph the Security Council merely ‘recalls’ suggesting that the paragraph refers to pre-existing, but does not provide a new, definition.<sup>90</sup> Second, in the paragraph the Security Council makes a cross-reference to pre-existing United Nations anti-terrorism legal instruments.<sup>91</sup> It is worth noting that the Security Council espouses the Convention’s definition in both Resolutions. While the adoption in Resolution 1566 is explicit, the endorsement in Resolution 1373 is tacit. Thus, contrary to Laqueur’s description of the Security Council’s initiative as being a fight against ‘different terrorisms’ not against ‘terrorism’,<sup>92</sup> the Council, indeed, is talking about *the terrorism* defined under art 2 of the *Suppression of Financing Convention*.

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<sup>87</sup> Ibid.

<sup>88</sup> Saul, above n 11,165; Roach, above n 13, 99; Young, above n 14, 44.

<sup>89</sup> Young, above n 14, 46.

<sup>90</sup> Setty notes that ‘Resolution 1566 limits the use of the label of “terrorism” to offenses that are recognized in previously agreed upon international conventions and protocols’: see Setty, above n 11, 16.

<sup>91</sup> The para in its relevant part indicates that the Resolution applies to acts ‘which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism’.

<sup>92</sup> Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Phoenix Press, 2001) 79 quoted in Saul, above n 11, 161.

### A Summary

The argument advanced in this Section to infer the meaning of a terrorist act in Resolution 1373 can be summarised as follows. By incorporating paras 1 and 3(d) in Resolution 1373, the Security Council intends that states implement both paragraphs. States can implement both paragraphs *if and only if* a terrorist act under para 1 of the Resolution and a terrorist act under the *Suppression of Financing Convention* have the same meaning. It follows that a terrorist act under para 1 of Resolution 1373 parallels a terrorist act as defined under art 2(1) of the *Suppression of Financing Convention*. As the Security Council would use the term terrorist act throughout Resolution 1373 consistently (to refer to the same conduct), the meaning of a terrorist act under para 1 of the Resolution would be applicable to the term throughout the Resolution. Therefore, a terrorist act under Resolution 1373 refers to an act that the definition provided under art 2(1) of the *Suppression of Financing Convention* captures.

## V THE WOULD HAVE BEEN BINDING ASSUMPTION

Scholars who criticise the Security Council for not including a definition of a terrorist act under Resolution 1373<sup>93</sup> are of the view that had there been a definition under Resolution 1373, states would have been required to adopt that definition. Thus, Roach describes the Resolution's failure to define terrorism as a 'missed opportunity to promote a restrained definition of terrorism'.<sup>94</sup> One of the reasons that Roach indicates as to why it would have been appropriate for the Security Council to have sanctioned the Convention's definition in Resolution 1373 is that it would have avoided many overbroad definitions of terrorism in domestic laws.<sup>95</sup> Similarly, Setty indicates

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<sup>93</sup> Roach, above n 13; Saul, above n 11; Guillaume, above n 17; Roach, Hor, Ramraj and Williams, above n 16.

<sup>94</sup> Kent Roach, *The 9/11 Effect: Comparative Counter-terrorism* (Cambridge University Press, 2011) 2.

<sup>95</sup> Roach, above n 13, 97, 112.

that had the Resolution incorporated a definition of terrorism that would have established ‘the parameters for the implementation of counterterrorism efforts’<sup>96</sup> by the states.

It is because of that underlying assumption that the diversity and broadness of domestic definitions are attributed to the Security Council’s failure to include a definition in Resolution 1373.<sup>97</sup> Furthermore, as scholars believe that inclusion of a definition in the Resolution would have prevented overly broad domestic definitions, they claim that the Security Council, by not including a definition in Resolution 1373, is complicit in the human rights violation resulting from broadness of domestic definitions.<sup>98</sup>

Reactions to the inclusion of a definition of a terrorist act under Resolution 1566 gives credence to this inference. Inclusion of a definition in Resolution 1566 has been decried for being a late response to fill the gap in Resolution 1373.<sup>99</sup> The criticism is that the definition came after many of the states have already adopted their own definition of a terrorist act, since 2001, following the instruction under Resolution 1373. This criticism is based on the premise that had that definition been incorporated in Resolution 1373, it would have been a mandatory definition to be adopted by states thereby preventing diversity and broadness of definitions of a terrorist act in domestic legislation.

On the other hand, Young advances a different view. While it is crucial that states harmonise domestic anti-terrorism laws with international law, Young notes, the latter is ‘only one of the relevant considerations taken into account in the anti-terrorism law-making process’.<sup>100</sup> While in view of the international nature of

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<sup>96</sup> Setty above n 11, 12.

<sup>97</sup> Roach, above n 13, 97-8; Whitaker, above n 13, 1017.

<sup>98</sup> Roach, above n 13, 98-9; Saul, above n 14; Adam Duchemann, ‘Defining Terrorism in International Law so as to Foster the Protection of Human Rights’ (2013) 16 *Revue Juridique de l’Océan Indien*, 35-6.

<sup>99</sup> Saul, above n 11, 165; Roach, above n 13, 99; Setty, above n 11, 15-6.

<sup>100</sup> Young, above n 14, 99-100.

counterterrorism it is logical that states draw on ‘international law’s jurisprudence concerning the definition of terrorism’,<sup>101</sup> Young argues, ‘states are ... entitled to proscribe conduct beyond that which they are required to proscribe pursuant to international obligations’.<sup>102</sup> In the following paragraph which summarises his argument, Young indicates the right of the states to define a terrorist act as something that is derived from their sovereignty.

The international definition should be regarded as a minimum; states’ definitions should be assessed against this standard. States are entitled to proscribe further conduct ... To think otherwise would wrongly construe international law, rather than the state, as the source of sovereignty.<sup>103</sup>

Though ‘a core definition of terrorism at international law’ can be discerned, Young argues, it merely provides guidance to states enacting terrorism legislation which states are free to accept or not.<sup>104</sup> Thus, Young further argues, the effectiveness of the core definition is conditional on states’ willingness to look to it and accept its guidance.<sup>105</sup>

## VI BINDINGNESS OF THE TACIT DEFINITION

It is noted above that the Resolution has endorsed the definition of a terrorist act provided under the *Suppression of Financing Convention*. While according to the predominant view that this definition would be mandatory on states thereby preventing them from adopting their own, in Young’s view it would simply provide for the minimum to be criminalised as a terrorist act without necessarily confining domestic definitions to what it provides. Whether this definition can be used to help limit the scope of domestic definitions rests on the nature of the obligations that the

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 100.

<sup>104</sup> Ibid 26.

<sup>105</sup> Ibid.

Resolution imposes on the states in relation to criminalisation of a terrorist act. Does it tell states only *what to do* but not *what not to do* or does it tell states both *what to do and what not to do*? In other words, does the Resolution instruct states to criminalise certain conduct, without prohibiting criminalising other conduct, as a terrorist act or does it order states to criminalise certain conduct, but not others, as terrorist act?

If the Resolution requires states only to criminalise as a terrorist act conduct that the definition it endorses captures, without further demanding states not to go beyond that, what is expected of the states to comply with the Resolution is to make sure that each and every conduct that falls within the definition of a terrorist act that the Resolution has endorsed is criminalised in domestic anti-terrorism legislation. States would be free to adopt a definition that encompasses conduct that goes beyond the definition that the Resolution endorses. It follows that a domestic definition would be in conflict with the definition that the Resolution adopts only where the domestic definition fails to capture, but not where it goes beyond, a conduct criminalised by the latter.

On the other hand if the Resolution requires states to criminalise as a terrorist act only a conduct that its definition captures (no less, no more), states will be obliged to confine their definition of a terrorist act to the definition endorsed by the Resolution. Under this interpretation, for a state to comply with the Resolution its definition of a terrorist act should exactly match the definition that the Resolution adopts. It follows that unlike the previous interpretation, state definition would contravene the definition of the Resolution not only where it fails to include a conduct that the latter captures but also where it goes beyond.

A close reading of the relevant provisions of the Resolution indicates that it simply instructs states to criminalise conduct that it is talking about (terrorist acts and other related conduct) and punish those who are involved in such conduct. According to para 2(b) of the Resolution 'states shall take necessary steps to prevent the

commission of a terrorist act' of which one is criminalisation and prosecution. This duty is explicitly stated under para 2(c) of the Resolution which requires states to 'ensure that ... terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'. In connection with prosecution, the same paragraph instructs states to 'ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice'.

The Resolution's instruction to the states to criminalise a conduct, which falls within the definition that it adopts, as a terrorist act is not accompanied by explicit or tacit prohibition of states from adopting broader definition that would encompass other conduct. Thus, a state definition would be incompatible with the international definition to the extent that it does not capture a conduct which falls within the scope of the international definition. Insofar as a state definition encompasses all acts covered by the international definition, that it is broader than the international definition does not make it incompatible with the latter.

Owing to the transnational nature of terrorism the Resolution, in its preambular<sup>106</sup> and operative paragraphs,<sup>107</sup> makes reference to cooperation among states in countering terrorism. Cooperation would be possible or easier where there is a common understanding of a terrorist act among states. Paragraphs relating to cooperation among

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<sup>106</sup> The seventh and eighth paras of the Resolution respectively provides:  
'*Calling* on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism', and '*Recognizing* the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism'.

<sup>107</sup> Para 2(f) of the Resolution requires that states: 'Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings'; Para 3(a-e) of the Resolution call for states to engage in different joint activities with a view to fight terrorism.

states in counterterrorism would be effectively implemented if states define a terrorist act consistently.<sup>108</sup> State laws' compliance with the definition provided under the Resolution would achieve consistency among domestic definitions, which in turn facilitates the cooperation in countering terrorism.

Though provisions of the Resolution calling for states to cooperate among themselves in the prevention and prosecution of terrorist acts suggest that states ought to adopt a definition that would make cooperation possible, it does not necessarily mean that states need to define a terrorist act in exactly the same way as provided in the definition that the Resolution espouses. The Resolution requires states to take several measures, including cooperation, in relation to what constitutes a terrorist act as understood in the Resolution. It is only to the extent that the state law relates to a terrorist act that falls within this definition that these obligations apply on another state. The provisions on cooperation should not be construed as calling for one state to cooperate with another in the enforcement of the latter's anti-terrorism law in its full extent. Thus, the provisions the enforcement of which envisages communality among domestic definitions of a terrorist act do not lead one to the conclusion that states are not allowed to define a terrorist act differently from the definition of the Resolution. These provisions simply reinforce the argument that state definitions should be broad enough to encompass every act that falls within the scope of the definition of the Resolution.

The Resolution requires states to criminalise certain conduct as terrorist acts with no explicit or tacit prohibition of states from adopting broader definition of a terrorist act. On the other hand, the instrument imposes obligation on the states to criminalise certain conduct as terrorist. A state definition will be incompatible with the international definition to the extent that it does not encompass/capture a conduct which falls within the scope of the

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<sup>108</sup> As noted by Saul, 'countries cannot fully cooperate against 'terrorism' without knowing the scope of the phenomenon against which they would be required to impose legal sanctions': see Saul, above n 15, 79.

international definition. That a state definition is broader than the international definition does not make it incompatible with the latter. However, there is a risk that adopting a definition that is broad enough to embrace conduct other than that envisioned under the *Suppression of Financing Convention* may have human rights implications.

## VII CONCLUSION

While Resolution 1373 is stirred by 9/11, unlike most resolutions, which are confined to an event that triggered their promulgation, it is concerned not only with this particular attack but with terrorism in general. Though Resolution 1373 does not expressly define a terrorist act, reading the Resolution between the lines and in conjunction with the *Suppression of Financing Convention* and the Security Council's post 2001 practice reveals that it has implicitly endorsed the definition under the *Suppression of Financing Convention*. The endorsement of the Convention definition by Resolution 1373 makes the definition applicable not only to state parties to the Convention but also to non-state parties. Furthermore the endorsement nullifies reservations that state-parties to the Convention have made to the definition provision. This provides a strong reason for the states to follow the definition of a terrorist act provided in the Convention.

The endorsement by the Resolution of the Convention definition increases its authenticity and thus would exert considerable political and social pressure on states to conform or not to go too far. However, it could not operate to legally prohibit states from adopting a broader definition. In contrast to perceived wisdom, a definition in Resolution 1373 could not solve the problem of broad and divergent domestic definitions. That is so because the Resolution does not require states to limit the reach of their definition to conduct that the definition it endorses captures. It merely instructs states to criminalise each and every conduct that falls within the scope of the definition it adopts.

As a result, it is only narrowness, but not broadness, of a domestic definition that would make it incompatible with the definition that Resolution 1373 espouses. Thus, the Resolution is capable of setting only the inner, but not the outer, limit of a domestic definition. The outer boundary of a domestic definition is to be delineated by each State's constitutional process and obligation under international human rights instruments.