

Research on a Contemporary Legal Issue

Defining ‘Terrorism’ in Pakistan’s Anti-Terrorism Law—A Jurisprudential Analysis

*In the context of
International Law and Certain Domestic Jurisdictions*

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Abstract

Terrorism research, across many social science disciplines, has been growing with a snowballing effect. The research on the criminal justice response to terrorism plays a pivotal role in an effective counter-terrorism strategy. The growing concern about the human rights and the rule of law perspectives of domestic anti-terrorism laws has grabbed the attention of legal scholars. The concern begins with the definition of 'terrorism'. While the definition of 'terrorism' has been a disputed issue since early 20th century, it has assumed greater importance since 9/11. This study examines the definition of 'terrorism' as a contemporary issue in Pakistan in the context of international law and certain common law jurisdictions (such as, Australia, India and the UK). Given the dearth of scholarly research on the issue in Pakistan, this study focuses on the definition of 'terrorism' in Pakistan's Anti-Terrorism Act, 1997. The study seeks to test the definition of 'terrorism' in Pakistan's current anti-terrorism law against the criminal law principle of legality and human rights standards. It critically examines the jurisprudence of Pakistan's Supreme Court while interpreting the definition clause of the anti-terrorism law. It also traces the evolution of legal regimes on definition of 'terrorism' in international law and discusses definitional problems in domestic laws of selected common law jurisdictions. The study concludes that like the practice of those other countries examined here, Pakistan's practice scores poorly on the principle of legality and human rights standards. Concluding through a prescriptive approach, the study recommends that Pakistan may follow the 2006 UN guidelines, suitably amend the definitional clause of its anti-terrorism law and put in place a meaningful independent mechanism for review of the law. The study may thus contribute to strengthening the criminal justice response in countering terrorism at the domestic level with implications for global war on terrorism. Due to its limited scope, the study, however, does not endeavour to offer a definition of 'terrorism'.

Key words: Terrorism, Definition of Terrorism, Pakistan, Criminal justice, Security law

Table of Contents

FOREWORD	IV
ACKNOWLEDGEMENT	V
CHAPTER 1	1
INTRODUCTION	1
BACKGROUND AND RESEARCH STATEMENT	1
OBJECTIVES	1
EFFORTS TO STRENGTHEN THE CRIMINAL JUSTICE RESPONSE.....	2
WHY DEFINITION OF OFFENCE OF ‘TERRORISM’ IS IMPORTANT?.....	4
FRAMING OF ISSUES	6
METHODOLOGY & LIMITATION	6
STRUCTURE OF THE STUDY	7
CHAPTER 2	8
LITERATURE REVIEW	8
CHAPTER 3	15
DEFINITION OF ‘TERRORISM’ IN INTERNATIONAL LAW AND SELECTED.....	15
DOMESTIC JURISDICTIONS	15
INTRODUCTION	15
I. HISTORICAL OVERVIEW	16
II. INTERNATIONAL AND REGIONAL TREATIES.....	21
III. THE LEGAL STATUS OF INTERNATIONAL AND REGIONAL EFFORTS.....	23
IV. DOMESTIC JURISDICTIONS.....	26
V. THE PRINCIPLE OF LEGALITY IN DEFINITION OF ‘TERRORISM’	30
CONCLUSION.....	33
CHAPTER 4	35
DEFINING ‘TERRORISM’ IN PAKISTAN:	35
A CRITICAL ANALYSIS OF THE LAW AND JURISPRUDENCE	35
INTRODUCTION	35
I. ANTI-TERRORISM LEGISLATION IN HISTORICAL PERSPECTIVE	36
II. DEFINITION OF ‘TERRORISM’ IN THE ATA: HISTORICAL REASONS	38
III. DEFINITION OF ‘TERRORISM’ IN THE ATA AND SUBSEQUENT AMENDMENTS	40
IV. DEFINITION OF ‘TERRORISM’ AND THE PRINCIPLE OF LEGALITY IN PAKISTANI JURISPRUDENCE.....	48
V. THE ATA AND THE INTERNATIONAL LEGAL FRAMEWORK.....	53
CONCLUSION.....	54
CHAPTER 5	55
CONCLUSION	55
BIBLIOGRAPHY	57

Foreword

The biggest challenge confronted by today's world is the menace of terrorism. Though no part of the world is unaffected by its threat, Pakistan is undoubtedly the frontrunner to fight it out. One equally bigger challenge in front of the legal machinery in Pakistan is its low conviction rate of terror accused. While all the state organs are struggling to meet this challenge in its own spheres, ironically, the Pakistani academia generally and the legal research scholarship in particular have contributed very little so far as their role is concerned. There are many legal issues which can only be analyzed and brought under discussion through focused research studies.

This research report is one right step in that direction. Dr. Khurshid Iqbal, Dean Faculty, KP Judicial Academy has done a commendable job to focus light on the definitional issue of terrorism. He, in my view, is successful to paint an effective and compelling portrait of the need, why a definition is necessary, and what could happen in the absence of or with a vague definition of such a serious offence. He has done great comparison of the case of Pakistan with other selected common law jurisdictions, alongside their historical perspectives of the counter-terrorism regimes.

The Research Wing of this Academy proudly welcomes this great addition to its earlier contribution. I felicitate the author on this remarkable work as he has produced it within a short span of three months without compromising on its quality.

This report has a loud and clear message, that is, the voice of the scholarly community should be heard by those policy makers who are responsible for crafting a successful criminal justice policy for successful prosecution of terror suspects.

Hayat Ali Shah
Director General

Acknowledgement

Though a humble contribution, this study is the first library-based qualitative research of the KP Judicial Academy's Research Wing (RW). The three studies conducted in 2013 were of quantitative nature. To acknowledge the diverse support, I must begin with the UNDP for three reasons: first, helping in the establishment of the RW in 2012; second, funding the previous studies (2012-13); and third, showing its willingness to contribute further to the RW in future. This time round, the UNDP provided support to the RW, which then decided on its own to go for a desk-based research on a contemporary legal issue. Next, my thanks are due to Mr. Hayat Ali Shah, the Director General (DG) of the Academy for inviting my attention to the definitional issue in Pakistan's anti-terrorism law, as one of great contemporary importance. The DG kept supporting me throughout. I always found him willing to discuss with me some of the subtle issues involved in the subject chosen for this study. A man of ideas he is, his more than 3 years experience as a judge of anti-terrorism court has vouchsafed on him a deep and critical insight on the application of the anti-terrorism law. It is because of his unflinching academic support that I have expanded the canvass of my research on the anti-terrorism law into other grey areas, such as, the causes for low conviction in such cases. Further next, I must express my gratefulness to Mr. Zia-ul-Hassan, Research Associate. Zia's support was both academic and logistical. He provided critical comments on my work many a time, right from the beginning when I prepared my proposal. I would continuously discuss my ideas with Zia, who, in turn, would, not only listen to me patiently, but also demonstrate keen interest in my views, and more so, provide useful comments. I am happy that Zia has grown more critical on my academic work, having successfully filled the intellectual gap left by Asghar's departure. Zia searched case law for my study as part of his logistical support to me. I must mention that Asghar too had helped me in searching some of the most interesting reading material on anti-terrorism law. I am proud of both these two young judges and see them as potential scholars amongst the younger generation of our District Judiciary that has been demonstrating fast growing tendencies towards enhancing their education, knowledge and skills. Finally, my acknowledgment must go to my wife for her support as my work at home had to gnaw on my family time. At times, I had to halt my work, when my little Zarak Khan would jump on my shoulders, snatching my laptop to switch to kids car racing games. The views expressed in this study are my own, motivated by academic interest only, and do not, in any way, reflect the official views of the UNDP, the KPJA and the Pakistani judiciary. All errors, however, are mine.

KP Judicial Academy,
21 March 2015

Dr Khurshid Iqbal
Dean of Faculty

Chapter 1

Introduction

Background and research statement

One key direction in which the 9/11 event changed the world was the need for a quick, persistent and rigorous criminal justice response to actions and threats of terrorism. Following the event, the United Nations (UN) Security Council's Resolutions 1368 and 1373 called on the States to urgently join hands 'to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks', and establish financing, planning, preparing, perpetrating or supporting terrorist acts 'as serious criminal offences in domestic laws with proportionate penalties.' While the post 9/11 UN Resolutions appeared to adopt a criminal law approach to acts and threats of terrorism, the international community has failed to develop a consensus definition of the offence of 'terrorism'.¹ Defining 'terrorism' has been a challenge since early 20th century. A 1988 study found as many as 109² and a 1994 study identified 212 definitions of 'terrorism'.³ Obviously, since 9/11, the definition has assumed greater importance and has been a hot topic for scholarly research. However, as research focusing on international law and domestic practice pertaining to definition of 'terrorism' is flourishing, Pakistan, despite its role of being a frontline State in the global war against terrorism, has been largely ignored.

This study seeks to critically examine the legal definition of 'terrorism' introduced in Pakistan's prevailing Anti-Terrorism Act (ATA), 1997 (including all amendments till date), the relevant cases adjudicated by Pakistani Supreme Court and to contextualise State practice in the emerging international legal framework and practices of some notable comparable common law jurisdictions. It investigates what are the problems in defining 'terrorism' and what criteria may be developed and applied for an appropriate definition of 'terrorism' in Pakistan.

Objectives

Following are the key objectives of this study:

- To examine the definition of 'terrorism' as a contemporary issue in Pakistan in the context of international law and certain common law jurisdictions.

¹ Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004', 4 *Chinese Journal of International Law* (2005), 1, 20 (hereafter as Saul, Chinese JIL).

² John F. Murphy, 'Defining International Terrorism: A Way Out of the Quagmire', 19 *Israel Yearbook on Human Rights* (1989), 13, 14.

³ Jonathan Matusitz, *Terrorism and Communication: A Critical Introduction*, Chapter 1 Introduction, p 2, Thousand Oaks: Sage, 2013 (quoting Jeffrey D. Simon, *The Terrorist Trap*, Bloomington, Indiana University Press, 1994).

- To test the definition of ‘terrorism’ in Pakistan’s anti-terrorism law against the principle of legality and human rights standards.
- To critically examine the jurisprudence of Pakistan’s Supreme Court while interpreting the definition of terrorism.

Efforts to strengthen the criminal justice response

Pakistan’s criminal justice system is required to have an effective response to terrorism. Such a response is seen to have far reaching implications on national, regional and international efforts to fight terrorism. There is growing research on Pakistan’s role in fighting terrorism.⁴ However, little attention is given to research focusing on challenges to Pakistan’s criminal justice system. A brief conference paper has found that in the Punjab, the high acquittal rate was mainly because of defects in registration, deficiencies in investigations and faults in prosecution of terrorism cases.⁵ The situation in the Khyber Pakhtunkhwa (KP) province—the worst hit in the war against terrorism—also requires study. Most other comments on anti-terrorism cases and their problems do not move beyond newspapers analysis.

There have been some efforts both at the law and policy levels to strengthen the criminal justice response to terrorism. First, the Pakistani government has announced a national counter-terrorism strategy. Second, the government has recognised the need of an exhaustive strategic planning to combat terrorism and has also introduced the National Counter Terrorism Authority Act, 2013. The law seeks to create a focal institution to unify state response by planning, combining, coordinating and implementing Government policy. Third, two laws were introduced: a presidential ordinance, 2013, amending the ATA and the Protection of Pakistan Act (PPA), 2013. These two laws are of great significance for strengthening the legal response to terrorism offences. The former (the 2013 amendment):

- allows longer detention of terror suspects;
- justifies admissibility of electronic evidences;
- introduces trials by video links, new witness protection measures; and,
- bans possession of cell phones by prisoners.

⁴ See generally, Moeed Yusuf (ed.) *Pakistan’s Counterterrorism Challenge*, Delhi, Foundation Press, 2014 (an edited book that focuses ‘on violence being perpetrated against the Pakistani state by Islamist groups and how Pakistan can address these challenges, concentrating not only on military aspects but on the often-ignored political, legal, law enforcement, financial and technological facts of the challenges.’). Akbar Ahmad, *The Thistle and the Drone: How America’s War on Terror Became a Global War on Terror*, Lahore & Washington D.C., Vanguard Books, 2013 (examines the social and historical context of the relations between America and the Muslim world and America’s involvement in the fight against terrorism; devotes two chapters to Pakistan: one on Waziristan and another on Musharraf’s counter-terrorism policy). Laila Bokhari, *Pathways to Terrorism-Faces of Jihad: the Case of Pakistan*, 2013, at www.iospress.nl (using Pakistan as a case study, reviews ‘some of the issues relevant to radicalization towards violent extremism; last accessed 15 June 2015); Rohan Gunaratna and Khuram Iqbal, *Pakistan: Terrorism Ground Zero*, London, Reaktion Books, 2011 (analyzes the roles of the insurgent groups working in Pakistan); Ejaz Hussain, *Terrorism in Pakistan: Incident, Patterns, Terrorists’ Characteristics, and Impact of Terrorist Arrests on Terrorism*, PhD Dissertation, University of Pennsylvania, 2010. Available at <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1163&context=edissertations> (accessed 21 October 2013).

⁵ Syed Ejaz Hussain, ‘Why Terrorism Cases Fail in Court? An Empirical Analysis of Acquittal Cases in Punjab’, 2011, Paper presented at the American Society of Criminology’s annual meeting in Washington DC, 2011 (on file with the author).

The latter (PPA)—

- confers powers on police, armed and civil armed forces to use force against terror suspects, though after giving prior warning, and
- seeks to establish separate special courts and police stations in the near future.

These laws seek to help in successful implementation of the anti-terrorism law, particularly, to ensure efficient investigation of terrorism cases and enhance the ratio of conviction. High acquittal rate in terrorism-related cases in Pakistan (4 % conviction ratio) has been a matter of serious concern.⁶ In early 2013, the Chief Justice of Pakistan urged ‘effective measures’ to pursue terrorism related cases in the country.⁷ In its 2011 country report, State Department of the United States’ (US) has observed that in Pakistan the acquittal rate of terror suspects remained 85 percent.⁸ Other countries have better conviction ratio, for example, 89 percent in the US⁹ and 64 percent in the UK.¹⁰ In Australia, so far out of total 38 terror suspects, 26 have been convicted for terrorism offences (68 %).¹¹ In Pakistan, investigation, prosecution and judicial hearing leave much to be desired. Only the recent amendments in the anti-terror law have introduced some changes, such as, the use of cell phones’ call data record, as having evidentiary value in a terrorism offence. The issue of balancing security and human rights is also of great concern.¹²

The year 2014 has witnessed increased serious efforts to improve protection of witnesses and security measures and procedures for courts dealing with terrorism cases. First, in March 2014, 05 justices of higher courts (01 from the Supreme Court and 01 each from the provincial high courts) visited the UK to learn some lessons from the British criminal justice experience in prosecuting terrorists.¹³ Second, in June 2014, Pakistan’s Law and Justice Commission, in collaboration with the British High Commission, Islamabad, organized a symposium on witness

⁶ Daily the Express Tribune 12 Dec. 2012.

⁷ Daily the Express Tribune 17 Feb. 2013.

⁸ US State Department Country Reports on Terrorism, 2011, available at <http://www.state.gov/documents/organization/195768.pdf> (accessed 18 October 2013).

⁹The Center on Law and Security, New York University School of Law, ‘The Terrorist Trials Report Card, 2001-2009’, p. ii. Available at www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan42.pdf (accessed 18 October 2013).

¹⁰ See UK Home Office Statistics, Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop and searches, Great Britain, 2012 to 2013. Available at <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-searches-great-britain-2012-to-2013> (accessed 4 October 2013).

¹¹ See Nicola McGarrity, ‘“Let the Punishment Match the Offence”: Determining Sentences for Australian Terrorists’, 2 (1) *International Journal of Crime and Justice*, 2013, pp1-15; focuses on sentencing issues in prosecuting terrorists.

¹² Sundaresh Menon, ‘International Terrorism and Human Rights’, *Asian Journal of International Law*, (2014), Vol. 4, pp 1-33; Ken Roach, ‘A Comparison of Australian and Canadian Anti-Terrorism Laws’, 30 *University of New South Wales Law Journal*, (2007) Vol. 30, pp 53-85.

¹³ Amna Abbas, Report on Pakistan Judicial Delegation’s Study Tour of UK, 24-27 March, 2014 (on file with the author).

security.¹⁴ Third, the Peshawar High Court (PHC) renewed its effort to explore and address problems faced by the anti-terrorism courts. The PHC sought to develop liaison with relevant provincial government departments and resolved to keep a follow up with them.¹⁵ The 2014 efforts took a dramatic u-turn in the background of terrorist attack on the Peshawar-based Army Public School on 16 December. The attack caused more than 140 deaths that included some 131 school children, leaving scores of injured persons. The nation stood united in that hour of mourn and grief, calling for a final showdown with the militants in search for peace. Cashing in on this sudden and unprecedented national call, the government quickly moved to take on board all political segments of the state and came up with a 20-point National Action Plan (NAP). A significant proposal in the NAP relates to revamping of the criminal justice system.¹⁶ Indeed, given the very low conviction rate of terrorism cases is alarming. Arguably, this necessitates deep and long-term, but outcome-based efforts to cleanse the criminal justice system. Needless to say, different tiers of the criminal justice system are interlinked and interdependent on each other.

In the above perspective, any NAP-based criminal justice reform package would have to seriously study the causes and effects of low conviction ratio of the anti-terrorism cases. Key challenges to efficient prosecution come from registration and investigation of terrorism cases, protection of judges, investigators, prosecutors and witnesses, absence of high security prison, funding and increased regular and outcome-based coordination amongst all actors of the justice system. Of great significance, however, is the issue of statutory definition of ‘terrorism’ and its emerging jurisprudence in Pakistan.

Why definition of offence of ‘terrorism’ is important?

Under the 1997 anti-terrorism law, the offence of ‘terrorism’ has been defined in section 6. An anti-terrorism court, specially constituted under the law (sections 12 & 13), has an exclusive jurisdiction to hear a case of terrorism. Section 6 provides that the use or threat of any action amounts to ‘terrorism’ if it

‘[i]s designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society’.

Section 6 adds that alternatively the purpose of the use or threat of action is to advance

¹⁴ Pakistan Law and Justice Commission, ‘Report of the Witness Security Symposium’, 22-24 June 2014 (on file with the author).

¹⁵ Peshawar High Court, Minutes of the Meeting held with ATC Judges, 25 April 2014 (on file with the author).

¹⁶ See details of the National Action Plan on www.nacta.gov.pk. Key points include the establishment of military courts, revamping of criminal justice system and disciplining the affairs of the religious seminaries.

‘a religious, sectarian or ethnic cause or’ intimidates and terrorizes ‘the public, social sector, media persons, business community or attack [...] the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies.’

The action includes a wide array of specific activities, such as, the doing of anything that causes death, likely to cause death or endangers a person’s life, grievous bodily injury, kidnapping for ransom, mere illegal possession of an explosive substance, an act designed to frighten the general public or intimidate a public servant and extortion of money. The action also includes any act done for the benefit of a proscribed organization and in violation of an international convention mentioned in the Fifth Schedule. An exception, however, is that ‘a democratic and religious rally or a peaceful demonstration in accordance with law’ would not amount to ‘terrorism’. The definition of ‘terrorism’ laid down in section 6 of the law is seen to be very broad.¹⁷ The various amendments introduced in the law have broadened the scope of the offence of ‘terrorism’. Such a broad definition means that in addition to avowed terrorists, many other culprits are to be prosecuted under the law. The courts face two main problems: increase in the backlog and consumption of (particularly higher) courts’ jurisprudential ability to decide whether the case is really one of terrorism or not. One may argue that the anti-terrorism courts are dealing with cases, which fall within the jurisdictional competency of ordinary criminal courts. This has also serious repercussions for the ratio of conviction of terrorism cases.

Some commentators argue that the definition of ‘terrorism’ should be general as well specific; general so that it should articulate the classical criminal law criteria, such as, intention and motivation; and specific for it should refer to particular organized violent actions, for example, such as, hijacking, hostage-taking and kidnapping for ransom.¹⁸ This issue will be further examined in chapters 3 and 5. The definition will also be examined against the principle of legality as it stands in modern criminal law (‘no punishment without law’, ‘no punishment without a crime’, and ‘no crime without a criminal law’) on its own as well as in relation to human rights treaty obligations and the principle of consistency (emphasizing similarity with other jurisdictions aiming at a cooperative global response to terrorism).¹⁹

Broad definition of ‘terrorism’ is not a problem in Pakistan only. Nor is it a new challenge. A study of scholarly literature, to be reviewed in detail in chapter 2, shows that the definition of ‘terrorism’ has been a starting point of many challenges the international community has been facing at the international and regional levels (to be discussed in chapter 3), as well as, at the

¹⁷ Sitwat Waqar Bokhari, *Pakistan’s Challenges in Anti-Terror Legislation*, Islamabad, Center for Research & Security Studies, 2013, p 30

¹⁸ Ben Golder and George Williams, ‘What is ‘Terrorism’? Problems of Legal Definition’, *UNSW Law Journal* (2004), Vol. 27 (2), pp 279-295 (hereafter as Golder and Williams, 2004).

¹⁹ Keiran Hardy and George Williams, ‘What is ‘Terrorism’? Assessing Domestic Legal Definitions’, *UCLA Journal of International Law & Foreign Affairs*, (2011), Vol. 77, pp 78-159 (hereafter as Hardy and Williams, 2011).

domestic level (to be examined in chapter 4) in order to devise an efficient and effective criminal justice policy. Attempts to define ‘terrorism’ have spread over centuries. The number of definitions lawyers, legislators, academics and regional and international organizations have produced so far has been more than one hundred.²⁰ Commentators argue that a broad definition tends to create a scope for abuse of powers by the government.²¹ A global consensus on a definition may help in advancing international cooperation for terrorism.²²

The wealth of scholarly literature on the definition of ‘terrorism’ has largely ignored Pakistan as an important case study, particularly because of its role as a frontline state in the war against terrorism. In the specific context of Pakistan, this study focuses on the definition of the offence of ‘terrorism’ introduced in the 1997 anti-terrorism law.

Framing of issues

The study will address the following issues in the chapters mentioned against each:

- What are the current trends in terrorism research, generally, and anti-terrorism law research, particularly? (chapter 2)
- How Pakistan’s anti-terrorism law evolved and what is its current status? (chapter 4)
- Why and what specific changes have been introduced in the definition of the offence of ‘terrorism’? (chapter 4)
- What is the approach of Pakistan’s judiciary while interpreting the definition of the offence of ‘terrorism’? (chapter 4)
- What are the criminal law and human rights standards in defining ‘terrorism’? (chapters 3 & 4)
- What is the practice of certain common law countries in defining and interpreting the definition of ‘terrorism’? (chapter 3)
- What are the emerging regional and international legal frameworks for fighting terrorism and how do they define ‘terrorism’. (chapter 3)
- Whether the definition of ‘terrorism’ introduced in Pakistan’s anti-terrorism law is comparable to other common law jurisdictions? (chapter 4)

Methodology & limitation

This study has used library-based qualitative research techniques. The approach was investigative, prescriptive, analytical and critical. The relevant international, regional and domestic legislation, courts cases and scholarly literature were studied and reviewed. This study

²⁰ Golder and Williams, 2004.

²¹ U.N. Doc. A/64/211 (3 August 2009). Report of the Special Rapporteur on the Protection and Promotion of Human Rights While Countering Terrorism.

²² Hardy and Williams, 2011.

has not attempted to propose a definition of its own. The findings of this study, however, may influence any attempt to define ‘terrorism’.

Structure of the study

The study is divided into five chapters. **Chapter 2** reviews the vast literature focusing on definitional problems of ‘terrorism’ in the perspective of criminal justice system. **Chapter 3** studies the definition of ‘terrorism’: firstly, in international law (the UN Security Council and General Assembly Resolutions and reports of the Counter-Terrorism Committee, including regional organizations’ (such as the 2002 European Commission’s Framework Decision and the 1997 South Asian Association for Regional Cooperation (SAARC) Convention on countering terrorism. Secondly, chapter 3 examines the definitions formulated in domestic legislation of certain comparable common law jurisdictions: UK, India and Australia. **Chapter 4** studies the definition of ‘terrorism’ in Pakistan’s anti-terrorism legislation and the jurisprudence the courts have developed on it. The chapter also examines Pakistan’s practice in the context of international, regional and national efforts to define ‘terrorism’. **Chapter 5** presents conclusions and recommendations.

Chapter 2

Literature Review

Terrorism research has been spectacularly proliferating within and across academic disciplines. In addition to discipline-focused research, scholastic attention towards resources, trends and prospects and problems of terrorism research, is also growing fast.¹ A 2005 survey has noted that post-9/11, '[e]ach of the following years has seen well over 1000 new books added to the literature...[c]urrently, one new [English] book on terrorism is being published every six hours.'² The rise in the number of research articles is also enormous. Many research journals have increased their volumes to accommodate the growing number of research articles on topics related to terrorism. Surely, by 2015, the number of books and research papers would be much higher. Researchers have also not lost sight of the growing internet-based sources of knowledge about terrorism. A 2013 study has found some 230 websites and blogs for terrorism research, what it has termed as 'valuable information sources for serious researchers in the field of (counter-) terrorism studies.'³ Research on the legal definition of 'terrorism' has also been far reaching and dates back well beyond the 9/11. It appears to be a daunting task to grasp and review this wealth of literature. However, a review of some relevant selected works on definition of terrorism seems instructive in order to explore the existing status of the literature and to add to it the Pakistan perspective.

To begin with, reference may be made to works which raised a question whether it is really useful to define 'terrorism'. Geoffrey Levitt has compared the quest for a definition to the much sought-after Holy Grail.⁴ In 1974, Prof. Richard Baxter argued: 'We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no legal purpose'.⁵ Prof. Baxter wrote in the context of a symposium on terrorism in the Middle East. A close reading of Prof. Baxter's paper shows that his perspective was that of the law of war. In an essay written in 1997, Judge Rosalyn Higgins is of the view that '[t]errorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or

¹ See, for example, Judith Tine, 'Resources: 230 Websites and Blogs for Terrorism Research' 7 (3) *Perspective on Terrorism*, June 2013, pp 84-98. Richard J. Chasdi, 'Trends and Development in Terrorism: A Research Note', 6(3) *Perspective on Terrorism*, August 2012, pp 67-76. Joseph K. Young and Michael G. Findley, 'Promise and Pitfalls of Terrorism Research', 28 April 2010 Draft; available at <http://ssrn.com/abstract=1676553> (Young and Findley, 2010). A. Silke, 'The Devil You Know: Continuing Problems with Research on Terrorism', 13 (4), *Terrorism and Political Violence*, 2001, 1-14.

² Andrew Silke, 'Research on Terrorism: A Review of the Impact of 9/11 and the Global War on Terrorism.' In Chen, H., Reid, E., Sinai, J., Silke, A. and Ganor, B. (Eds.) *Terrorism Informatics: Knowledge Management and Data Mining for Homeland Security*, New York: Springer, 2008, pp.27-50.

³ See *ibid*; Judith Tine, p 84.

⁴ Geoffrey Levitt, 'Is "Terrorism" Worth Defining', 13 *Ohio Northern University Law Review*, 1986, 97.

⁵ Richard R. Baxter, 'A Skeptical Look at the Concept of Terrorism', 7 *Akron Law Review*, 1974, pp 380-387, at 380.

both.⁶ Walter Laqueur has argued that because of its different forms and happening in different circumstances, it not possible to define ‘terrorism’.⁷

Regarding the futility of defining terrorism, many writers have referred to two famous quotes: one of a US Supreme Court Judge on pornography: ‘when one sees terrorism, one recognizes it’, and second, of a UK diplomat: ‘what looks smells and kills like terrorism is terrorism’.⁸ An example that most appropriately illustrates these quotes is the 16 December 2014 attack on an army-run school in Peshawar, the capital city of Pakistan’s Khyber Pakhtunkhwa province, in which six terrorists killed some 131 children and 10 staff members. While the real business is fighting terrorism, the proponents of a definition argue that the real business will be good for nothing if it is not defined what ‘terrorism’ is. Ganor, for example, is of the view that terrorism could be objectively defined and that such a definition is ‘indispensable to any serious attempt to combat terrorism’.⁹ Ganor maintains that a definition will be helpful in developing common international strategies, ensuring ‘effective results of the international mobilization against terrorism’, enforcing international counter-terrorism conventions and effective implementation of extradition laws.¹⁰ The proponents of a definition have even argued that the want of a universally agreed definition of terrorism encourages future terrorism.¹¹ It is also argued that the absence of a commonly agreed definition is prone to abuse; encourages the application of ‘[d]ouble standards’ and the principle of might is right, at both international and domestic levels.¹² A latest example is that of the reservation made by certain religious political parties against the twenty-first constitutional amendment in Pakistan introduced in the backdrop of the recent Peshawar incident referred to above. The 2015 constitutional amendment aims at providing cover to the establishment of military courts for trying terror suspects, who either claim or known ‘to belong to any terrorist group or organization using the name of religion or sect.’¹³ Speaking to the media, Maulana Fazl-ul-Rahman, the leader of a religious political party expressed the apprehension that the amendment may be used only against religious and sectarian organizations without any real nexus with terrorism.¹⁴ The concern of religious political parties is significant for this study as it relates to restricting the definition of ‘terrorism’ to religion-motivated terrorist activities. Some commentators are of the view that a universally agreed definition of ‘terrorism’ is also very helpful for terrorism research, for example, to develop a ‘responsible theory’¹⁵ and to

⁶ Rosalyn Higgins, ‘The General International Law of Terrorism’, in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law*, 1997, 14, 28.

⁷ Walter Laqueur, *Terrorism*, Boston, Little Brown, 1977, p 5.

⁸ EU, ‘Defining Terrorism’, WP 3, Deliverable 4, at www.transnationalterrorism.eu, 01 October 2008, p 8 (last accessed 3 January 2015; hereafter as EU Study, 2008).

⁹ B. Ganor, ‘Defining Terrorism: Is one Man’s Terrorist Another Man’s Freedom Fighter?’, International Institute for Counter Terrorism Conference, available at <http://www.ict.org.il/Article/1123/Defining-Terrorism-Is-One-Mans-Terrorist-Another-Mans-Freedom-Fighter> (accessed 3 January 2015).

¹⁰ Ibid.

¹¹ Alex Schmid, ‘Terrorism: The Definitional Problem’, 36 Case Western Reserve Journal of International Law, 2004, p 375, at 378.

¹² EU Study, 2008, p 9.

¹³ The Constitution of Pakistan, 1973, the Constitution (Twenty-First Amendment) Act, 2015, article 2, proviso.

¹⁴ See Daily the Express Tribune, 6 January 2015.

¹⁵ Alex Schmid, ‘Magnitude and Focus of Terrorist Victimization’ in U. Ewald and K. Turkovic (eds.) *Large-Scale Victimization as Potential Source of Terrorist Activities. Importance of Regaining Security in Post-Conflict Societies*, Amsterdam, IOS Press, 2006, pp 3-19.

ascertain which kind of data may be collected and analyzed for exploring the current trends and predicting the future ones.¹⁶

Commentators have also explored that the absence of an agreed definition of ‘terrorism’ is because of the diversity in the political, legal, social and popular notions of the term, the criminalization of terrorist activities, the different forms of terrorism and the long historical perspective of terrorism.¹⁷ These problems appear to echo more rigorously in some works. Hodgson and Tadros, for example, while arguing for the impossibility of defining terrorism, propose that a definition should meet two ambitions: first, to capture the moral idea of terrorism, and second, to help in appropriate application of the anti-terrorism law.¹⁸ Hodgson and Tadros argue that in order to realize these two ambitions, a proposed definition should resolve certain distinct dilemmas: purpose (whether terrorism pursues some specific goal, including political goal?), action (should terrorism remain restricted to an act that kill or cause serious bodily harm, or may also include damage to property and even threat to kill, cause bodily injury and causing damage to property?), method (whether the creation of terror plays a pivotal role in terrorist activities?) and agent (who is the agent of terrorist acts: individual, group or state?).¹⁹

Indeed, since 9/11, there have been conscious efforts both at the international and national levels to use ‘terrorism’ as a legal concept. As Christian Walter has said, ‘as lawyers we still have to work on an abstract definition of what should legally constitute terrorism.’²⁰ Golder and Williams have also subscribed to Walter, arguing with specific example of Australia that domestic legislations now not only recognize ‘terrorism’ as a crime, but also criminalizes financing of terrorist activities, bans organizations proved to be involved in terrorism, allows enhanced police powers to detain and investigate suspected terrorists, strengthen immigration control to keep suspected terrorists away and provides surveillance of terror suspects.²¹

Amongst the earlier works on the definitions that of Schmid and Jongman, appeared in 1988, has been famously referred to by many scholars.²² After receiving input from 109 scholars on a draft definition, Schmid and Jongman formulated one as under:

Terrorism is an anxiety-inspiring method of repeated violent actions employed by (semi-)clandestine individual, group, or state actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic

¹⁶ Jessica Stern, *The Ultimate Terrorists*, Cambridge, Harvard University Press, 1999, p 12.

¹⁷ EU Study, 2008, pp 10-11.

¹⁸ Jacqueline S. Hudgson and Victor Tadros, ‘The Impossibility of Defining Terrorism’, 16(3) *New Criminal Law Review*, Summer 2013, pp494-526, at 496, 499.

¹⁹ *Ibid.*

²⁰ Christian Walter, ‘The Notion of Terrorism in National and International Law’, at <http://edo.mphil.de/conference-on-terrorism/present/walter.pdf>. (Last accessed 3 Jan. 2015).

²¹ Ben Golder and George Williams, ‘What is ‘Terrorism’? Problems of Legal Definition’, 22 (2) *UNSW Law Journal*, 2004, pp 270-295, at 271 (hereafter Golder and Williams, 2004).

²² See, for example, Jonathan Matusitz, *Terrorism and Communication: A Critical Introduction*, Chapter 1 Introduction, p 2, Thousand Oaks: Sage, 2013; Young and Findley, *Promise and Pitfalls*, p 3; Golder and Williams, 2004.

targets) from a target population, and serve as message generators. Threat-and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.²³

In the 1988 definition, ten main components of ‘terrorism’ found in their statistical order were: violence, force (83.5 %), political (65 %), fear, terror emphasized (51 %), threat (47 %), Psychological effects (41.5 %), victim-target differentiation (37.5 %), purposive, planned (32 %), method of combat (30.5 %), extranormality, in breach of accepted rules, without humanitarian constraint (30 %), and coercion, extortion (28 %). In a 2004 study in which 165 academic, governmental and non-governmental definitions were examined, ten main components Schmid and Jongam identified were: political character (68 %), terror (59 %), threat (42 %), coercion (38 %), civilians (36 %), tactic, strategy (35 %), illegal, criminal (30 %), demonstrative use (28 %), communication (27 %), and psychological warfare (12 %).

Weinberg, Pedahzur and Hirsch-Hoefler have analyzed 73 definitions which different scholars had proposed in their research papers published in three reputed terrorism-related journals (*Terrorism, Terrorism and Political Violence, Studies in Conflict and Terrorism*). They distilled those definitions into a brief 25 words definition given below:

Terrorism is a politically motivated tactic involving the threat or use of force or violence in which the pursuit of publicity plays a significant role.²⁴

Young and Findley argue that while the number of definitions is growing, a consensus among scholars seem to emerge only on a small number of attributes: terrorism is a kind of violence or threatened violence directed at a target with a view to achieve a specific goal, which causes fear in an audience larger than the target.²⁵ Young and Findley suggest that empirical study of definitions proposed in different jurisdictions may be useful as it may help ‘sort out differences.’

The definitional literature has also touched the international law dimension of conceptualizing ‘terrorism’. Ben Saul, for example, has traced and examined the definition of ‘terrorism’ in those resolutions of the UN Security Council, which were passed between 1985 and 2004.²⁶ Kai Ambos and Anina Timmermann have argued that barring some controversial issues, a consensus on certain areas ‘can be inferred from the current version of UN Draft

²³ Reproduced in Alex Schmid and A. Jongman, *Political Terrorism*, Piscataway, NJ, Transaction Publishers, 2005, p 28 (hereafter Schmid and Jongman, 2005).

²⁴ Leonard Weinberg, Ami Pedahzur and Hirsch-Hoefler, ‘The Challenges of Conceptualizing Terrorism’, 16 (4) *Terrorism and Political Violence*, Winter 2004, pp 777-794, at 782.

²⁵ Young and Findley, *Promise and Pitfalls*, p 3.

²⁶ Ben Saul, ‘Definition of “Terrorism” in the UN Security Council: 1985-2004’, 4 *Chinese Journal of International Law*, 2005, pp 1-30 (Saul, 2005).

Comprehensive Terrorism Convention [...]’.²⁷ They are: the unlawful causing of death or serious bodily injury to any person, serious damage to public or private property, or damage to public or private property resulting or likely to result in major economic loss, commission of terrorist acts intentionally, or with the intention to intimidate a population or compel a government, or an international organization to do or abstain from any act and the terrorist act is of an international character.²⁸ While the above mentioned elements reflected in the Draft Convention and many other conventions, may be considered what Reuven Young has argued to be the core content of an international definition, yet it is argued that they are still short of customary international law.²⁹ Scholars have also discussed a 2011 decision of the appeal chamber of the UN Special Tribunal for Lebanon, which identified the following three elements of the definition of ‘terrorism’:

- (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.³⁰

Ben Saul is of the view that a close analysis of the UN resolutions, treaties, domestic laws and judicial practice demonstrates that state practice, a necessary element for customary international law, is missing.³¹ Ambos and Timmermann have though termed the ruling as a bold one, but argue that the court has not followed a more rigorous reasoning.³²

Commentators argue that the failure of the international efforts, particularly of the UN, to propose a clear and acceptable definition, has instead left the matter to the States to unilaterally define ‘terrorism’.³³ Such failure provided wide mandate to states to define ‘terrorism’ in their own way in their counter-terrorism legislation. Domestic definitions have attracted criticism for being broad, vague, subjective, imprecise and potentially prone to abuse by state authorities. The UN has urged the states to fulfil their human rights obligations and take regard of the rule of law while adopting counter-terrorism measures.³⁴

²⁷ K. Ambos and A. Timmermann, ‘Terrorism and customary international law’, in Ben Saul (ed.), *Research handbook on international law and terrorism*, Elgar 2014, 22. Available at SSRN: <http://ssrn.com/abstract=2400446> (Ambos and Timmermann 2014).

²⁸ *Ibid.* p 32.

²⁹ Reuven Young, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’, 29 (1) *Boston College International and Comparative Law Review*, 2006, pp 23-105 (Young 2006).

³⁰ UN Special Tribunal for Lebanon (Appeal Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 February 2011.

³¹ Ben Saul, ‘Civilizing the Exception’ Universally Defining Terrorism’. Sydney Law School Legal Studies Research Paper No. 12/68, September, 2012, available at <http://ssrn.com/abstract=2145097> (Saul, 2012), p 2.

³² Ambos and Timmermann 2014, at 29.

³³ Saul, *Chinese JIL*, 2005, p3.

³⁴ See Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Counter Terrorism, U.N. Doc. E/CN.4/2006/98 (28 Sept., 2005), paragraphs 26, 27. The report notes that the lack of an internationally accepted definition of ‘terrorism’ has ‘the potential for unintended human rights abuses and even the deliberate misuse of the term.’

‘Security Council Resolution 1963 (2010) reiterates that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, and it notes the importance of respect for the rule of law so as to effectively combat terrorism.’³⁵

Sudha Setty argues that states, such as, India, the US and the UK have not followed the UN trajectory while introducing their anti-terrorism legislation.³⁶ Hardy and Williams have assessed the legal definitions of ‘terrorism’ in Australia, Canada, India, New Zealand, South Africa, the US and the UK, against three criteria. The criteria require that the language of a legal definition shall firstly, give a reasonable notice of prohibited conduct, secondly, confines the operation of the legislation to its intended purpose, and thirdly, be consistent with definitions in other comparable jurisdictions.³⁷ Hardy and Williams have concluded that ‘much remains to be done to improve the existing clarity, scope, and consistency of domestic anti-terror law regimes’ in those countries.³⁸

While terrorism research on Pakistan is also growing, little attention appears to have been given to the ATA, its promises and pitfalls, particularly, the definition of ‘terrorism’. A brief look, however, at whatever literature is available, shows that Pakistan’s definition of ‘terrorism’ has attracted criticism. A 2014 contribution by Sohail Habib Tajik has noted that ‘the ATA lacks a comprehensive definition for the most recent kinds of terrorist acts.’³⁹ The Research Society of International Law, Pakistan, has published a research report in 2013.⁴⁰ The report examines definition of ‘terrorism’ in detail and makes some recommendations as well. Charles Kennedy is of the view that a terrorist ‘act could be interpreted to include virtually any violent act, or encouragement of the commission of a violent act.’⁴¹ Illustrating the broadness of the definition, an empirical study of the Asia Society argues that the ATA is applied in a large majority of cases having no nexus with terrorist intention or terrorist organization.⁴² Another empirical study is of Justice Project Pakistan—a human rights organization—has found in Pakistan, the definition of ‘terrorism’ is ‘vague and overly broad, bearing little relationship to terrorism as it is commonly understood.’⁴³ Some contributors

³⁵ See Counter Terrorism Committee (CTC), ‘Protecting Human Rights while countering terrorism’ (the CTC was established by the Security Council Resolution 1373 adopted in 2001). ‘Security Council Resolution 1963 (2010) reiterates that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, and it notes the importance of respect for the rule of law so as to effectively combat terrorism.’ At <http://www.un.org/en/sc/ctc/rights.html> (last accessed 17 January 2015).

³⁶ Sudha Setty, ‘What’s in a name? How Nations Define Terrorism Ten Years After 9/11’, 33 (1) *U. Pa. J., Int’l Law*, 2011, pp 1-63, at 57 (Setty 2011).

³⁷ Hardy and Williams, 2011.

³⁸ Ibid. Hardy and Williams, 2011, p159.

³⁹ Sohail Habib Tajik, ‘Counterterrorism Efforts of Law Enforcement Agencies in Pakistan’ in Moeed Yusuf (ed.) *Pakistan’s Counterterrorism Challenge*, Foundation Books an imprint of Cambridge University Press, India, 2014, pp 103-126.

⁴⁰ Research Society of International Law, Pakistan, ‘The Case for Change: A Review of Pakistan’s Anti-Terrorism Act of 1997’, 2013 (RSIL 2013).

⁴¹ Charles H. Kennedy, ‘The Creation and Development of Pakistan’s Anti-terrorism Regime 1997-2002’, in Satu P. Limaye, Mohan Malik and Robert G. Wirsing (Ed.) *Religious Radicalism and Security in South Asia*, Honolulu, Hawaii, Asia-Pacific Center for Security Studies, 2004, pp 387-411.

⁴² Asia Society, *Stabilizing Pakistan Through Police Reform*, 2012, p 51.

⁴³ Justice Project Pakistan, *Terror on Death Row*, 2014, p 5.

have traced the evolution of Pakistan's anti-terrorism regime. Shabana Fayyaz has reviewed Pakistan's anti-terrorism legal regime developed since independence till the currently prevailing one.⁴⁴ Commenting on the definition, Shabana has observed that a broader definition of 'terrorism' introduced in the ATA, aims at creating deterrence for prospective terrorists. Saba Noor of the Pakistan Institute for Peace Studies has also discussed the evolution of Pakistan's anti-terrorism laws.⁴⁵ While Saba has made no specific comment on the definition, she has referred to the criticism of the law by human rights activists and political parties and their apprehension about the misuse of the law. In an overview of amendments in the ATA, Kamran Adil has offered more detailed comments, arguing that the amendments in the definition are not only driven by external factors (international pressure), but also by eliciting response from the domestic criminal justice institutions.⁴⁶ He maintains that the definition is imprecise and broad, for example, the offence of 'kidnapping for ransom per se' is treated as terrorism.⁴⁷ This view is also shared by Sitwat Bokhari, while identifying shortcomings in the ATA.⁴⁸ Sitwat has observed that under the prevailing law, criminals other than terrorists are being tried, which has also led to an increase in the workload of cases before the anti-terrorism courts.⁴⁹

⁴⁴ Shabana Fayyaz, 'Responding to Terrorism: Pakistan's Anti-Terrorism Law', II (6) *Perspectives on Terrorism*, March 2008, pp 10-19.

⁴⁵ Saba Noor, 'Evolution of Counter-Terrorism Legislation in Pakistan', 1(1) *Conflict and Peace Studies*, Oct.-Dec. 2008, pp 1-17.

⁴⁶ Kamran Adil, 'Amendments to Anti-Terrorism Law of Pakistan: An Overview', 5(2) *Pakistan Journal of Criminology*, July-Dec. 2013, pp 139-146.

⁴⁷ *Ibid.* at 143.

⁴⁸ Ms. Sitwat Waqar Bokhari, 'Pakistan's Challenges in Anti-Terror Legislation', Center for Research & Security Studies, Oc. 2013.

⁴⁹ *Ibid.* at 30.

Chapter 3

Definition of 'terrorism' in International Law and selected Domestic Jurisdictions

Introduction

A relatively modern history of the use of the word 'terrorism' has been traced back to the French Revolution. 'The Reign of Terror' was a phrase a group of rebels (called the Jacobins) used for their brazen violence (1793-94), in which about 40,000 people were killed. In a bid to justify their violence, the rebels proclaimed that 'terror is nothing other than justice, prompt, severe, inflexible.'¹ Terrorism was thus considered as a means to achieve a political goal. A general perception that reflects the political goal element is that 'one man's terrorist is another man's freedom fighter.' As Nielsen has put it, '[r]emember, Osama bin Laden was a freedom fighter for Reagan, but a terrorist for Bush.'² After prefacing the information of some violent actions of 1946, Theodore Seto argues that 'the Jewish "Terrorism"' (so labelled by the mainstream Jews of the time) helped drive the British from Palestine and thus paved the way for the creation of Israel.³ Theodore Seto further argues that some of the violent actions by the Boston Tea Party (the American Revolution) and anti-slavery movement (example: John Brown's attack on Harpers Ferry) would amount to 'terrorism' according to 'most current U.S. legal definitions of that term.'⁴

While terrorism remained a menace faced by the international community since long, the 9/11 terrorist attacks changed the world, triggering a war on terrorism. The foremost challenge in the war on terrorism, however, is how to define 'terrorism.' This chapter examines the attempts for developing a definition of 'terrorism' made at the international, regional and national levels, reflecting on the work done in the UN, the European Union (EU), the South Asian Association for Regional Cooperation (SAARC) and UK, India and Australia. The chapter investigates the problems in defining 'terrorism' and the criteria that may be developed for an appropriate definition. Helping to create a landscape, the chapter will contribute to the main thesis of this study by positioning Pakistan's anti-terrorism law and jurisprudence in broader context, strengthening an efficient and effective criminal justice response to terrorism, fulfilment of international law obligations and a positive role in international anti-terrorism policy.

¹ Jonathan Matusitz, *Terrorism and Communication: A Critical Introduction*, Chapter 1 Introduction, p 2, Thousand Oaks: Sage, at 1-2.

² Kai Nielsen, 'On the Moral Justifiability of Terrorism (State and Otherwise)', 41 (2/3 summer/fall) *Osgood Hall Law Journal*, 2003, pp at 434.

³ Theodore Seto, 'The Morality of Terrorism', 35 *Loyola of Los Angeles Law Review*, June 2002), pp 1227-1263, at 1230 (Theodore 2002).

⁴ Ibid.

Section I looks at the history of international efforts aimed at defining ‘terrorism.’ Section II examines such efforts at the regional level, using the cases of EU and SAARC. Section III investigates the legal status of international and regional efforts in international law. Section IV studies definition of ‘terrorism’ enunciated and practised in the UK, India and Australia. Section V tests the national definition against the criminal law principle of legality. Finally, the results of the discussion are drawn in a brief conclusion.

I. Historical overview

The League of Nations effort: 1926—1972

In 1926, it was proposed to the League of Nations (the League) to declare ‘terrorism’ as a universally punishable crime in an international convention.⁵ A series of International Conferences for Unification of Criminal Law, held between 1930 and 1935, considered terrorism in its different aspects, such as, its status as a public and private crime aimed at social or political objectives, an anarchy and an act creating public danger, a state of terror to compel public authorities to do or omit to do certain acts.⁶ The League continued to remain seized of the issue. By 1937, the League’s expert Committee for the International Repression of Terrorism (CIRT) proposed a draft Convention for Prevention and Punishment of Terrorism, which was (except colonial India) not ratified by member states. The Convention defined ‘acts of terrorism’ and listed certain acts, which the state had to criminalize. Acts of terrorism were defined as those which were intended to create terror in the general public.⁷

The International Law Commission (ILC) initially considered terrorism in 1954. Since 1982, the ILC considered terrorism in its Draft Codes of Crimes in 1991 and 1996. Excluding the role of private individuals, the 1991 Draft Code proposed a distinct article on ‘international terrorism’ as an offence committed or ordered to be committed by a state agent or representative aimed at:

Undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figure, groups of persons or the general public.⁸

⁵ Ben Saul, ‘Attempts to Define ‘Terrorism’ in International Law’, p 2. Sydney Law School Legal Studies Research Paper # 08/115, Oct. 2008 (Saul 2008a). Available at <http://ssrn.com/abstract=1277583>.

⁶ The conferences held were: Third in Brussels (1930), Fourth in Paris (1931), Fifth in Madrid (1933) and Sixth in Copenhagen (1935). For a detailed discussion see *Ibid.* (Ben Saul), 2-3.

⁷ See article 2, the Convention for Prevention and Punishment of Terrorism, which reads: ‘1. The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose. 2. In the present Convention, the expression “acts of terrorism” means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.’

⁸ International Law Commission Yearbook, 1990, article 16, at 336.

The ILC Final Draft Code adopted in 1996 proposed the offence of terrorism as a category of ‘war crimes.’⁹ It, however, did not define ‘terrorism.’

The role of the UN: 1972 onward

The UN involvement with the definition of ‘terrorism’ started in 1972, when the General Assembly passed a resolution that established an ad hoc committee on international terrorism, which had to consider the observations of the states in regard to measures aimed at preventing international terrorism and solid proposals for an effective solution to the problem.¹⁰ The US also presented a draft convention for the Prevention and Punishment of Certain Acts of International Terrorism. The US draft also did not offer any definition of terrorism. However, it suggests criminalization of certain offences of ‘international significance’. Those were:

- (1) act performed with intent to “damage the interests of or obtain concessions from a State or an international organization,” (2) involving the unlawful killing, the causing of serious bodily harm, or the kidnapping of another person, (3) that are “committed neither by nor against a member of the armed forces of a state in the course of military hostilities,” and (4) are international in character.¹¹

A look at the Security Council’s practice would show that post-1985 Resolutions ‘designated specific incidents, and types of violence by and against various actors, as terrorism.’¹² The 1990s witnessed greater impetus in Council’s Resolutions targeting mainly Iraq, Libya, Afghanistan and Sudan.¹³ From 1998 onward, the Council adopted a series of resolutions on Afghanistan in which key issue was the surrender of bin Laden. The 9/11 attacks were immediately followed by notable Council Resolutions 1368 and 1373, respectively. Resolution 1368 condemned the attacks. Resolution 1373, adopted under Chapter VII of the Charter, carved out a range of obligations for the state. It required the state to refrain from supporting terrorism, prevent terrorist acts, deny safe haven to those who support terrorism, prevent the use of their territory for terrorism, criminalize acts supportive of terrorism, bring to justice those who support terrorism, help each other in criminal investigation or criminal proceedings and prevent cross border movement of terrorists. The Council also established a Committee to monitor the implementation of Resolution 1373. Both the Council and the Committee have failed to define ‘terrorism’, leaving it open for the states to develop a definition. Commentators are of the view that ‘[t]he lack of definition was deliberate, since the consensus on Resolution 1373 depended on avoiding definition.’¹⁴ The Committee ‘has advocated that domestic terrorism laws be

⁹ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, article 20.

¹⁰ UNGA Res A/3034/27, 18 Dec. 1972.

¹¹ Reuven Young, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definition in Domestic Legislation’, 29 (1) *Boston College International and Comparative Law Review*, 2006, pp 23-104, at 38 (Young 2006).

¹² Saul, 2005.

¹³ See Saul, 2005.

¹⁴ *Ibid*, at 20.

jurisdictionally widened to cover international terrorism.’¹⁵ However, in its Resolution 1566 adopted in 2004, the Council condemned a number of criminal acts which may be termed as an attempt to define ‘terrorism.’ The relevant paragraph 3 of the Resolutions reads as under:

[C]riminal 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 [...].

The Resolution also makes a reference to the right to self-determination, which is a serious controversy in the definition. It maintains that the above-mentioned criminal acts are not-

justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature [.]

Paragraph 3 is not a legal definition. This was made clear by the Council as reflected in the statement of the Brazilian delegate.¹⁶ Thus the Resolution has no legal value. However, commentators argue that it may explicitly guide the states ‘on the meaning of terrorism’, helping even to the breaking of the deadlock in the General Assembly,¹⁷ and, may attain, at least, a *de facto* significance.¹⁸ Commentators have also noted that the phrase—‘which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism’—appears to be qualifying in nature; as if the Council understands ‘terrorism’ as the sum total of definitions laid down in existing international instruments.¹⁹ The UN High Level Panel has endorsed the Council’s Resolution as one of the elements of the definition of ‘terrorism’.²⁰ Pakistan also supported the Council’s Resolution, particularly, the 9th preambular paragraph, which emphasized enhancing dialogue and broader understanding among civilizations. The implications of Pakistan’s position will be further examined in the next chapter.

In 1994, the General Assembly adopted a declaration on measures to eliminate international terrorism.²¹ Paragraph 2 of the declaration elaborated that terrorist acts, methods and practices have negative effects on the entire UN system characterizing friendly relations among states,

¹⁵ Saul 2005 at 21

¹⁶ Security Council Provisional Record of 5053rd meeting S/PV/5053, 08 Oct., 2004 (SC 08 Oct., 2004).

¹⁷ Saul 2005 at 29.

¹⁸ Young 2006 at 45.

¹⁹ Young 2006 at 45.

²⁰ See UN, A More Secured World, Our Shared Responsibility: Report of Secretary General’s High Level Panel on Threats, Challenges and Change, 2004, at 52 (UN High Level Panel 2004).

²¹ UNGA Res. A/Res/49/60.

human rights and fundamental freedoms and democracy. Paragraph 3 attempts to define ‘terrorism’ as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them[.]

While the 1972 ad hoc committee remained suspended, the General Assembly constituted another ad hoc committee in 1996. The ad hoc committee was to propose draft conventions on terrorist bombing, nuclear terrorism and then ‘further develop a comprehensive legal framework of conventions dealing with international terrorism’.²² Immediately after 9/11 attacks, when the General Assembly was convened for its 56th session, it considered the report of the 1996 *ad hoc* committee on developing a draft comprehensive convention on international terrorism.²³ In the ad hoc committee, key issues which lacked consensus were: the definition of ‘terrorism’, scope of draft convention, exemption for the activities of the armed force during armed conflicts and the relationship of the draft convention to other sectoral and regional counter-terrorism conventions.²⁴ While consensus grew on many issues, the deadlock still remained on the issues of definition.²⁵

²² UNGA Res A/51/210, 16 Jan., 1997.

²³ UNGA Res A/56/88, 22 Jan. 2002.

²⁴ See 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 (3) *International Law FORUM du droit international*, 2002, pp 159-169 (Subedi 2002).

²⁵ The text of the definition reads as under:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
 - (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.
2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.
3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.
4. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of this article;
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of this article; or
 - (c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
 - (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

The definitional issue confounded with a suggestion of the Organization of Islamic Countries (OIC) to insert the following provision to the definition proposed in the draft convention:

Peoples' 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.²⁶

The OIC countries argued that the activities of those exercising their right of self-determination should not be included in the definition of 'terrorism'. They also argued that their proposal is supported by the 1979 International Convention against the Taking of Hostages. Those opposing the OIC proposal expressed the view that the issue of self-determination is dealt with in other international human rights instruments. Commenting on two words 'aggression' and 'hegemony' used in the OIC draft, Prof. Subedi argues that 'aggression' is acceptably used in relation to two states, not in regard to a state on the one side and the people struggling for independence, on the other.²⁷ Subedi further argues that 'hegemony' is 'a fluid political concept' and thus confusing in context of definition of 'terrorism'.²⁸ Suggesting a solution to break the impasse, Subedi argues that the OIC paragraph should not have been adopted; instead the following one should have been added in article 18 of the draft convention:

The activities of armed forces during an armed conflict, as those terms are understood under international law, which are governed by that law, are not governed by this Convention, and the 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, are not governed by this Convention.²⁹

A recent and more significant example is the decision of the UN Special Tribunal for Lebanon (STL), which ruled in a 2011 decision that a general definition of 'terrorism' exists in international law. The court has extensively referred to and examined international treaties, UN resolutions and the legal and judicial practice of States to determine *opinion juris* and State practice. The Court identified the following three elements of the definition:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly

²⁶ See Report of the Ad Hoc Committee established by General Assembly Res. 51/210 of 17 Dec., 1996, General Assembly Official Records 57th Session Supplement # 37 (A/57/37). See also the 1999 Convention of the Organization of Islamic Conference on Combating International Terrorism.

²⁷ Subedi, 2002 at 166.

²⁸ *Ibid.*

²⁹ *Ibid.*

coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.³⁰

II. International and regional treaties

Sectoral treaties

While efforts for developing a consensus on the draft comprehensive convention on international terrorism in the General Assembly continue, a good number of international and regional counter-terrorism treaties have already come into force. Among those treaties, a brief discussion on thirteen international and two regional (European and South Asian) conventions and protocols may be useful. The international conventions relate to specific acts and situations, such as, acts of nuclear terrorism (2005); financing of terrorism (1999); terrorist bombing (1997); making of plastic explosives for the purpose of detection (1991); acts against the safety of fixed platforms located on the continental shelf (1988); acts against the safety of maritime navigation (1988); acts of violence at airports serving international aviation (1988); physical protection of nuclear material (1980); the taking of hostages (1979); prevention and punishment of crimes against internationally protected persons (1973); unlawful acts against the safety of civil aviation; unlawful seizure of aircraft (1970); and, offences and acts committed on board aircraft (1963).³¹

The EU

The European Convention on Suppression of Terrorism was adopted in 1977. Article 1 of the Convention excluded a number of offences from extradition.³² It was amended by a Protocol

³⁰ The Special Tribunal for Lebanon (Appeal Chamber), *Interlocutory Decision on the Applicable Law Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 Feb. 2011 (STL decision 2011).

³¹ International Convention for the Suppression of Acts of Nuclear Terrorism, Dec. 14, 2005 [Nuclear Terrorism]; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, [Financing Convention]; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, [Bombings Convention]; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, [Plastic Explosives Convention]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, [Fixed Platforms Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, [Maritime Convention]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation [supplement to the Montreal Convention], Feb. 24, 1988, [Montreal Airports Protocol]; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, [hereinafter Nuclear Materials Convention]; International Convention Against the Taking of Hostages, Dec. 17, 1979, [Hostages Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, [Internationally Protected Persons Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, [Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [The Hague Convention]; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, [Tokyo Convention].

³² Its text read as: For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: an offence within the scope of the Convention for the Suppression of Unlawful Seizure of

adopted in 2003. The amended provision criminalized all offences falling in eight of the 13 international counter-terrorism conventions, such as, offences falling under the 1973 convention on internationally protected persons, 1979 Convention on the hostage taking, the 1980 Convention on physical protection of nuclear material, the 1988 Convention on unlawful acts of violence at airports serving civil aviation convention, the 1988 Convention on safety maritime navigation, the 1988 Convention on fixed platform located on the continental shelf, the 1997 Convention on terrorist bombing, the 1999 Convention on financing terrorism. The amendment further requires that where the offences are not covered by the above mentioned conventions, the same shall apply to both the commission and attempt to commit those principal offences by the perpetrator or an accomplice. The European Union's 2002 Framework Decision offered a definition of terrorism in two parts. First, the commission or threat to commit criminal acts of murder, bodily injury, kidnapping or hostage taking, destruction of public property resulting in major economic loss, seizure of aircraft, ships, or other means of public transport, manufacture, possession, acquisition, transport, supply or use of explosive or nuclear weapons, release of dangerous substances, interfering or disrupting with water, power supply and other natural resource. Second, when the purpose of the above acts is to seriously intimidate a population, unduly compel a government or international organisation to perform or abstain from performing any act, or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The SAARC

The South Asian Association for Regional Cooperation (SAARC) adopted a Convention on Suppression of Terrorism in 1987 and a Protocol in 2004. The definition of the SAARC Convention may be divided into three parts. First, the SAARC Convention includes those offences which fall under the 1970, 1971 and 1973³³ and all those Conventions to which South Asian nations are parties. Second, it includes a wide range of criminal acts, such as, murder manslaughter, assault, causing bodily harm, hostage taking and offences relating to firearms, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or bodily injury to persons or serious damage to property.' Third, attempt, abetment or conspiracy to commit any offences mentioned in the definition clause. The protocol to the SAARC convention was adopted in 2004; it reiterates the support of the South Asian nations to the UN Security Council resolution 1373. It criminalizes terrorist financing for (a) an

Aircraft, signed at The Hague on 16 December 1970; an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; an offence involving kidnapping, the taking of a hostage or serious unlawful detention; an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

³³ They are the 1970 Hague convention (on unlawful seizure of aircraft), the 1971 Montreal Convention (unlawful acts against safety of civil aviation), the 1970 convention on internationally protected persons.

act that constitutes an offence under 11 treaties mentioned in an annex to the protocol, (b) any other act intended to cause death or serious bodily injury to a civilian, aimed at intimidating a population or coercing a Government or an international organization to do or to abstain from doing any act; or (c) an offence within the scope of any Convention to which SAARC Member are parties and which obliges the parties to prosecute or grant extradition.³⁴

III. The legal status of international and regional efforts

What is the legal status of the efforts made at the international and regional levels to define ‘terrorism’? The 12 international conventions, no doubt, establish an international legal regime, but none of them define ‘terrorism’ as an offence. Among them, 09 are punishment and three are prevention conventions. The former conventions concern with specific criminal acts, for example, acts which may or do jeopardize the safety of the aircraft (the 1963 Convention). These treaty-based crimes are to be recognized by the states in their domestic laws. The latter conventions pertain to specific acts which the states are obliged to prevent from being committed (example: the 1999 Financing Convention). These treaties are of no significance in customary international law because no treaty recognizes any general offence of ‘terrorism’.³⁵ Regional conventions appear to be more problematic. The SAARC convention, for example, is dubbed to create no offence but aims at extradition and cooperation for law enforcement.³⁶ The 2004 SAARC Protocol does not mention political purpose in the definition it proposes.

As no acceptable definition of ‘terrorism’ is recognized in treaty law, it seems worth probing in customary international law. Two preliminary points may be considered. First, like any other serious crime, the offence of ‘terrorism’ must respect the principle of legality: no crime without law. The prohibition of a crime must be certain, clear and articulate. Given the complex nature of customary international law, ‘it seems quite unlikely’ that such criteria may be fulfilled.³⁷ Under the Rome Statute of International Criminal Court (ICC Statute), ‘the definition of a crime is to be strictly construed and shall not be extended by analogy.’ In other words, no criminal responsibility shall ensue from a rule of customary law. Second, there is a distinction between

³⁴ Earlier for the implementation of the 1987 convention, the SAARC Terrorist Offences Monitoring Desk (STOMD) was established in 1990. Some key recent efforts include the 2008 approval of the Convention on Mutual Legal Assistance Treaty, the 2009 Declaration on Cooperation on Combating Terrorism and the 2009 formation of a High Level Group of Eminent Experts. The SAARC efforts, however, have produced negligible success. There are a host of reasons for this, lack of trust, particularly between India and Pakistan; blaming each other’s intelligence agencies; economic disparity; rivalries between states; and lack of explicit link to UN Counter Terrorism Strategy. See, for example, Mussarat Jabeen and Ishitiah A. Choudhry, ‘Role of SAARC for Countering Terrorism in South Asia’, 28 (2) *South Asian Studies*, 2013, pp 389-403; Eric Rosand, Naureen Chowdhry Fink and Jason Ipe, ‘Countering Terrorism in South Asia: Strengthening Multilateral Engagement’, International Peace Institute, 2009.

³⁵ See Saul 2012 at 3.

³⁶ Ibid. Saul 2012 at 3.

³⁷ K. Ambos and A. Timmermann, ‘Terrorism and customary international law’, in Ben Saul (ed.), *Research handbook on international law and terrorism*, Elgar 2014, 22. Available at SSRN: <http://ssrn.com/abstract=2400446> (Ambos and Timmermann 2014).

treaty-based crimes and core international crimes (listed in the ICC Statute). The former creates obligation on the part of the state; the latter, individual criminal responsibility.³⁸ A rule of customary law may be incorporated in a treaty. Conversely, a treaty-based crime may ripen into a customary rule. This, however, necessitates criteria. What should be the criteria? The answer lies in the jurisdictional decision of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in what is known as the famous Tadic criteria:

1. The act constituting the offence must be recognized in international law,
2. The act must be serious, affecting a rule protecting important international value, and
3. The violation must entail individual criminal responsibility.

It merits mention here that the Tadic case concerned the application of international humanitarian law in the context of a non-international armed conflict. While the 12 Conventions referred to above, is treaty law, their comparability for several elements common to them all, may have an impact on customary law. Several common elements may be scored out. Examples are: indiscriminate and random perpetration of violence against the victim, including widespread harm in the form of death, serious bodily injury and damage to property; expression of international concern for the criminal acts as threats to international peace and security; criminal intention (*mens rea*); political purpose of the criminal act.³⁹ The Conventions have the potential of norm-creating and the fact that states have entered these Conventions demonstrates a move towards *opinio juris* though state practice has yet to emerge.⁴⁰

The Tadic criteria may be applied to the UN Resolutions (those adopted by the General Assembly and the Security Council resolutions and the draft comprehensive Convention on terrorism. The first criterion is not fulfilled for the simple reason that there is no consensus on the definition of ‘terrorism’ proposed in the declarations of the General Assembly. For a deeper appreciation of the matter, a comparison between the definitions proposed by the 1994 and 1996 General Assembly Resolutions and the STL Appeal Chamber may be in order. Both definitions differ inasmuch as the former do not mention the element of ‘coercion’ (i.e. a criminal act intended to compel a national or foreign government or an international organization to do or refrain to do a certain act). The latter does not include ‘political purpose’ as a component. Thus, on comparison too, the first Tadic criterion stands not fulfilled. The threat to international values (i.e. the purposes and principles of the UN) is incorporated in the declarations. The definition proposed by the STL decision does not include international values. Regarding the third condition, the 1994 and 1996 General Assembly Declarations emphasize cooperation firstly, for exchange of information about prevention and combating terrorism, and secondly for extradition

³⁸ Ibid. See also N. Boister, ‘Transnational Criminal Law?’ 14 (4) *European Journal of International Law*, 2003, pp 953-975, at 963.

³⁹ See Ibid, at 32. See also Young 2006, at 53-64.

⁴⁰ Young 2006, at 65.

and prosecution.⁴¹ While international cooperation will help contribute to individual criminal responsibility by strengthening the states' right to prosecute terrorists, the 1996 Declaration reiterates state sovereignty, which makes 'clear that universal jurisdiction and prosecution, independent of any territorial link, is not intended.'⁴² The two declarations do not fulfil the third condition.

It is important to examine the draft UN Comprehensive Convention on Cerrorism⁴³ in the context of the Tadic criteria. While there emerged a general consensus on most provisions of the draft convention, the definition of 'terrorism' remained a key disputed issue (criteria 1: recognition in international law). Agreement on a preambular paragraph—saying that 'terrorism is a threat to international peace and security, jeopardize friendly relations among states, hinder international cooperation and aim at the undermining of human rights, fundamental freedoms and democratic bases of society'⁴⁴—proves that the second criteria is fulfilled. Article 2, which defines the offence of 'terrorism' using the words 'any person', establishes individual criminal liability. It, however, does not establish universal jurisdiction.⁴⁴

As noted in section I above, the Council members failed to reach a consensus definition in its resolution 1373, the issue of definition was left open for the states to define 'terrorism.' Commentators argue that this legitimacy has opened an avenue for abuse at the domestic level as the states have tended to use their own definition as a tool of abuse and misuse.⁴⁵ The Council not only failed to offer a consensus definition, but also did not encourage 'harmonization of national definitions.'⁴⁶ A study of selected national definitions seems appropriate in order to explore state practice. The study proposes to examine the definitions in three countries—UK, India and Australia. These countries appear to be comparable amongst them as well as with Pakistan, as they have almost the same legal systems and face similar threats of terrorism. The lessons learnt from practice of these countries will be contextualized in the Pakistan case study in the next chapter.

⁴¹ See UNGA A/Res/49/60, art. 6. A/Res/51/210, art. 5 (see the Declaration to supplement the 1994 Declaration on Measures to Eliminate International Terrorism).

⁴² UNGA A/Res/51/210, art 6; Ambos and Timmermann, 2014, at 31.

⁴³ The definition the draft convention proposes could be divided into four components. First, *actus reus* (the commission of the criminal act) comprises death or serious bodily injury, damage to public or private property resulting or likely to result in major economic loss. Second, the offence of terrorism is committed with *mens rea* (criminal intention) in order to intimidate a population or coerce a government or an international organization to do or refrain from doing an act. Third, the attempt or threat to commit the offence also creates criminal liability. Fourth, the nature of the offence of terrorism is international.

⁴⁴ Ambos and Timmermann 2014, at 34.

⁴⁵ Saul 2005 at 23. The sectoral treaties also require the state to adopt national legislation for criminalizing those acts of terrorism which have been declared as such in those treaties. See Young 2006 at 72.

⁴⁶ Ibid.

IV. Domestic jurisdictions

United Kingdom

The UK has a long experience of dealing with terrorism in Northern Ireland. The earlier laws enforced introduced in 1974 and 1989, provided a broad definition of ‘terrorism’.⁴⁷ ‘Terrorism’, according to both these laws, ‘means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.’⁴⁸ The laws were, however, restricted to a specific geographical area as well as time period. In the year 2000, a new law, not geographical area-and time-specific, was introduced.⁴⁹ The law defined ‘terrorism’ as the use or threat of an action of serious violence to create intimidation and fear, having a political purpose, in which firearms or explosive substances are used.⁵⁰ The 2000 law attracted criticism for a number of reasons: the application of the definition of ‘terrorism’ outside the UK; the criminalization of the mere use of firearms or explosive, which meant that even an ordinary murder committed with such firearms or explosive would amount to terrorism; and, the random police checking of terror suspects.⁵¹

The post 9/11 legislation came in 2001, 2005 and 2006, respectively.⁵² The definition in its present form was introduced in August 2001 amendment of the law. The subsequent amendments built on the definition introduced in the 2001 law. These, however, adopted additional measures, for example: the non-disclosure of information by a bystander was made an offence, aliens could be detained indefinitely and removed on mere suspicion, without trial (the 2001 and 2005 laws), the glorification of ‘terrorism’ if it is intended to help in the commission or preparation and may lead to a reasonable expectation that the public will emulate it; and, the 28 days of pre-charge detention of terror suspects (the 2006 law). Such laws restricted certain civil liberties and human rights, attracted criticism, not only from the public and academia, but also from the courts. Thus in *A v. Secretary of State for Home Department*, the court held that the detention and removal power were conflicting with section 4 of the UK’s Human Rights Act, 1998, and article 14 of the European Convention on Human Rights.⁵³ Lord Hoffman observed:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as

⁴⁷ See Prevention of Terrorism Act (Northern Ireland), 1974 and the Prevention of Terrorism (Temporary Provisions) Act 1989.

⁴⁸ See The Prevention of Terrorism (Temporary Provisions) Act, 1974, c.56, §9(1). See also, c. 4, 20 of the 1989 Act having the same title as that of the 1974 Act.

⁴⁹ See Terrorism Act, 2000.

⁵⁰ See, The Terrorism Act, 2000, c. 11 § 1-2.

⁵¹ Setty 2011, at 33, 34.

⁵² See The Anti-terrorism, Crime and Security Act 2001; The Prevention of Terrorism Act, 2005; The Terrorism Act, 2006; The Counter-Terrorism Bill, 2008 did not receive the approval of the House of Lords. The most recent legislation is The Terrorism Prevention and Investigation Measures Act 2011.

⁵³ *A v. Secretary of State for the Home Department*, [2004] UKHL 56.

these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.⁵⁴

Sudha Setty argues that the post 9/11 legislation reflects a thrust forward in two directions, viz. a broad definition of ‘terrorism’, and introduction of gradual increase in penal provisions.⁵⁵

The laws do provide for certain safeguard mechanisms, such as, a one year review of the law, including definition of ‘terrorism’ and annual reviews by an independent reviewer as well a parliamentary committee.⁵⁶ At policy level, the present UK government announced in 2010 that it will consider the removal of some of the controversial provisions, particularly the pre-charge detention.⁵⁷ Lord Carlile, the Independent Reviewer appointed by the UK government in 2005, examined the definition of ‘terrorism’ introduced in the Anti Terrorism Act, 2000 and found it compatible with those included in domestic legislation of other countries and international treaties.⁵⁸

India

While India’s security laws and policies are said to date back to colonial era,⁵⁹ its first post-independence security law introduced in 1967, was the Unlawful Activities (Prevention) Act (UAPA).⁶⁰ The UAPA did not define ‘terrorism’. The Terrorist Affected Areas Act (TAAA), 1984 defined ‘terrorist’ as one who wantonly kills, unleash violence, disrupts basic services and damages property with the intention to create fear in the public or a section of the public, or disturb harmony between disrupt perturb ‘between different religious, racial, language or regional groups or castes or communities’ and put in danger the sovereignty and integrity of India.⁶¹ The TAAA, however, was to be applied by special courts and to be enforced in specific areas. In 1987—the Terrorist and Disruptive Activities Act (TADA)—was introduced in the background of assassination of India’s then Prime Minister Indira Gandhi. The TADA mostly

⁵⁴ Ibid. Paragraph 97.

⁵⁵ Setty 2011, at 40.

⁵⁶ The Prevention of Terrorism Act, 2005, c. 2, § 13 (1) provides the sunset clause—expiry of the law ‘at the end of 12 months beginning with the day on which this Act is passed’. The Anti Terrorism Act, 2000 provides for annual review and analysis of the law and submission of the review report to the Parliament.

⁵⁷ Home Department, ‘Review of Counter-Terrorism and Security Powers: Review Finding and Recommendations, 2011, Cm. 8004, p 4.

⁵⁸ UK Home Department, ‘The Definition of Terrorism: A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation, 2007, Cm. 7052, at 47 [Carlile Report 2007]. One of the main conclusions of Lord Carlile is: ‘The current definition in the Terrorism Act 2000 is consistent with international comparators and treaties, and is useful and broadly fit for purpose, subject to some alteration.’

⁵⁹ Setty 2011, at 46; refers to certain measures for preventive-detention and security, taken by the British East India Company in 1784.

⁶⁰ See The Unlawful Activities (Prevention) Act, 1967.

⁶¹ The Terrorist Affected Areas Act, 1984; section 2 (h) reads: ‘terrorist’ mean a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to-- (i) putting the public or any section of the public in fear; or (ii) affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities; or (iii) coercing or overawing the Government established by law; or (iv) endangering the sovereignty and integrity of India [.]’

retained the definition of 'terrorism' from the earlier law, was made applicable to the whole India, enhanced police powers, granted admissibility to confession before police officials in cases to be tried by special courts and increased penalties for terrorism convicts.

In 2002, India introduced the Prevention of Terrorism Act (POTA) in compliance with UN Security Council Resolution 1373. The law broadened the definition of a terrorist inserted in the previous law. The law define a terrorist as one who first, threatens the unity, integrity, security of the country, or strikes terror in people or a section of people; and, second, uses a diverse array of means of violence, such as, bombs, dynamite, or explosive substances, or inflammable substance, or firearm, or lethal weapons...or any other means whatsoever' that causes death, serious bodily injury, or loss of or damage to property or disruption of basic services.⁶² The definition does not include political objective as an element of the offence of 'terrorism'. The POTA was repealed in 2004. Instead, the 1967 UAPA was amended, which retained substantial provisions of the POTA. In 2008, further amendments were carried out in the UAPA and the National Investigation Agency Act (NIA Act) was passed. Both laws introduced prolonged pre-arrest detention, a shift of burden of proof from the prosecution to the accused, summary trial and trial in absentia.

Commentators argue that India has traditionally relied on executive's emergency powers, broad police powers, curtailment of fundamental rights and preventive detention.⁶³ A review of the legislation shows that the definition of 'terrorism' is overbroad and subjective, the 2008 amendments were those which were earlier rejected by human rights activists, having been discriminately used against Muslims, inserted no sunset clauses and that it is not subject to judicial scrutiny.⁶⁴ The definition of 'terrorism' was also examined by the Supreme Court of India in some cases. In *Madan Sing v. State of Bihar*, the Court ruled that it is not possible to precisely define 'terrorism'. The Court further reasoned: 'It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole.'⁶⁵ The much-cited case is *Kartar Singh*, in which the Court upheld the constitutionality of the TADA. The Court ruled that the TADA was justified in the given circumstances. The Court's approach has triggered criticism from academic commentators and human rights activities. As one commentator has argued that the Court's view that the protection of social interest will help protect the liberty of greater number of people at the cost of few is wrong and 'false interpretation' of the rights of individual guaranteed in the Indian Constitution.⁶⁶ According to a report of India's National Human Rights Commission, 77, 500 people were arrested during 10-year (1985-1995) enforcement of TADA, which was repealed in

⁶² See the Prevention of Terrorism Act, 2002, section 3 (1) (a).

⁶³ Setty 2011, at 45.

⁶⁴ Setty 2011, at 54, 55.

⁶⁵ *Madan Sing v. State of Bihar*, 2004 AIR 2004 Supreme Court 3317.

⁶⁶ Aditya Swarup, 'Terrorism and the Rule of Law: A Case Comment on *Kartar Singh v. State of Punjab* (1994) SC 4 SCC 569, available at : <http://ssrn.com/abstract=1013043>.

response to nation-wide protest of human rights activists.⁶⁷ International legal experts also criticised the law, arguing that the wide scope of ‘terrorism’ rendered ‘arbitrariness almost...inevitable’.⁶⁸ The arbitrariness was seen through hundreds and thousands of arrests in cases which were covered by ordinary procedural and penal laws.⁶⁹ In response to the growing concern about the misuse of POTA, in 2003, the India government formed a review committee in order to assess how the law was applied across different states and to seek recommendations for efficient implementation.⁷⁰ Commentators have noted problems with the review mechanism in India. For example, late 2003, an amendment restricted review to ‘an aggrieved party’.⁷¹ The review committee could rule on whether a prima facie case exists or not.⁷² The review mechanism has faced consistent resistance by states.⁷³ It is clear that India’s review mechanism is not comparable with those established by the UK and Australia.

Australia

In response to the post-9/11 terrorist threat, Australia introduced the Security Legislation Amendment (Terrorism) Act, 2002 (Cth) (Act 2002). Schedule 1 of the Act 2002 inserted a new definition of ‘terrorist act’ in the 1995 Criminal Code Act (Cth). The definition, as per s. 100.1 of the 1995 Criminal Code, may be summarized as under:

terrorist act means an action or threat intended to (1) advance a political, religious or ideological cause, and (2) coerce or intimidate the Government of Australia or any of its states or foreign country or the public or a section of the public; (3) which causes death, serious bodily harm, damage to property, serious risk to health or safety of the public or a section of the public, serious interference, disruption, or destruction of a range of electronic systems, such as, information, communication, financial, etc. (4) but will not amount to terrorism if in the nature of advocacy, protects, dissent or industrial action and is not intended to cause death, serious bodily harm, endanger the life of a person and serious risk to health or safety of the public or a section of the public.

Literature reveals that the Australian definition has not come under serious challenge before courts. However, in one case,⁷⁴ the definition was examined by the Australian High Court, in

⁶⁷ Rohit Prajapati, *So-called Anti-Terrorism Law are Tools of State Terrorism: Submission for South Asia Sub-Regional Hearing in New Delhi*, Documentation and Study Centre for Action, 27 February 2007, available at <http://www.sacw.net/hrights/rohitICJFeb2007.pdf> (last accessed 17 February 2015).

⁶⁸ International Commission of Jurist, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights*, 2009, at 38 [Report of Eminent Jurists Panel].

⁶⁹ *Ibid.* See also Anil Kalhan et al, ‘Colonial Continuities: Human Rights, Terrorism, and Security Laws in India’, 20 *Columbia Journal of Asian Law*, 2007, pp 93-234 (Kalhan 2007).

⁷⁰ Kalhan 2007, at 169.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.* at 170.

⁷⁴ *Thomas v. Mowbray* (2007)233 CLR 307.

relation to interim control orders as provided in Division 104 of the 1995 Criminal Code (Cth).⁷⁵ Commentators have found it surprising that the Court expressed ‘little concern...as to the breadth of the term ‘terrorist act’...the key element in the power to issue a control order.’⁷⁶ Only Judge Kirby discussed the definition of ‘terrorist act’ more critically:

As drafted, Div 104 is a law with respect to political, religious or ideological violence of whatever kind. Potentially, it is most extensive in its application. Even reading the Division down to confine it to its Australian application, it could arguably operate to enable control orders to be issued for the prevention of some attacks against abortion providers, attacks on controversial building developments, and attacks against members of particular ethnic groups or against the interests of foreign governments in Australia.⁷⁷

Like UK, Australia, too, has a mechanism for review of its anti-terrorism laws. The Council of Australian Government constituted a committee of experts to review counter-terrorism legislation. The committee has issued its report in 2013.⁷⁸ The committee has recommended: (1) the words ‘threat of action’ may be removed from the present definition and inserted as a separate offence; (2) ‘hoax threat’ and (3) ‘hostage-taking’ may also be included as separate offences; and (4) ‘harm’ should be amended so as to include psychological harm. Recommendations 1 and 4 were also put forward by the Security Legislation Review Committee (SRLC) in its 2006 report.⁷⁹ The Parliamentary Joint Committee on Intelligence and Security endorsed most of the recommendations made by the SLRC.⁸⁰ The recommendations of these review bodies help provide a safeguard against abuse, and determine the necessity, appropriateness and effectiveness of the anti-terror laws. Arguably, the clarity and breadth of the definition may be underpinned by the principle of legality.

V. The principle of legality in definition of ‘terrorism’

The Principle of Legality is a doctrine of criminal law, based on three premises:

- ‘no punishment without law’, (a penal law shall not be given retrospective effect)
- ‘no punishment without a crime’ and (presumption of innocence)

⁷⁵ Division 104.5 (3) of the Criminal Code, the court may impose a number of obligations, restrictions and prohibitions, such as, prohibited from or restriction in certain specified areas or places, required to wear a tracking device, prohibited from communication or association with a specified individual, as so on.

⁷⁶ Andrew Lynch, Case Note *Thomas V Mowbray*: Australia’s ‘War on Terror’ Reaches the High Court’, 32 *Melbourne University Law Review*, 2008, pp 1182-1211, at 1192.

⁷⁷ *Thomas v. Mowbray* (2007)233 CLR 307, 401-2.

⁷⁸ See the Australian Government Attorney General Department; The Council of Australian Governments Review, available at <http://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx> (last accessed 18 February 2015).

⁷⁹ See the Australian Government Attorney General Department; Report available at <http://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx> (last accessed 18 February 2015).

⁸⁰ *Ibid.*

- ‘no crime without a criminal law’⁸¹ (a crime must be defined as an offence by criminal law)

Academic commentaries reflect that the maxims are understood in different ways. In the context of criminal law, the principle of legality means prohibition against retroactive punishment, the requirement that the state must define criminal offences specifically, and the obligation of the courts to interpret offences leniently.⁸² The principle of legality is also related to: first, international human rights obligations (Article 15 (1) of the ICCPR, enunciates the right of an individual from protection of punishment from any act or omission which was not an offence under national or international law at the time when it was committed); second, a narrow version of the rule of law (judicial interpretation, for example, the recent case law of UK), and, third, broader concept of rule of law (laws must be prospective, general, certain, consistent and understandable)⁸³

Several international organizations have found many national definitions as violating the principle of legality being overbroad and vague.⁸⁴ Hardy and Williams suggest three ways to solve the issue. First, consideration of ‘whether a domestic definition encompasses a wider range of conduct than is included in definitions from authoritative international sources’ (examples: the definitions offered in the Financing of Terrorism Convention⁸⁵ and UN Security Council Resolution 1566/2004, reproduced above). Second, different national definitions may be synthesized to determine if a particular national definition is overbroad or not.⁸⁶ Third, whether a definition of terrorism serves its intended purpose.⁸⁷ Hardy and Williams have developed three-pronged criteria: *clarity* relates to the three maxims discussed above; *breadth* expresses the

⁸¹ The Latin version of the principles read: *nulla poena sine lege, nulla, poena sine crimine, nullum crimen sine poena legali*. For a recent contribution, see for example, Kenneth S. Gallant, *The Principle of Legality in International and Comparative Law*, 2009. For an older contribution, see Jerome Hall, ‘Nulla Poena Sine Lege’, 47 *The Yale Law Journal*, 1937, pp 165-193.

⁸² Peter Westen, ‘Two Rules of Legality in Criminal Law’, 26 *Law & Philosophy*, 2007, pp 229-305, at 231-2.

⁸³ Hardy and Williams, 2011, at 82; refers to *Regina v. Secretary for the Home Department; Ex parte Person*, [1998] A.C. 539. Also adds that the International Commission of Jurists, the Special Rapporteur on the Promotion of Human Rights While Countering Terrorism (Special Rapporteur on Counter-Terrorism) and the UN Office for the High Commissioner for Human Rights have referred to article as reflecting the principle of legality.

⁸⁴ Report of Eminent Jurists Panel; the Inter-American Commission on Human Rights Report, 2002, OEA/Ser.L/V/II.116, 2002; UN Human Rights Committee, Concluding Observations of the Human Rights Committee on definitions of terrorism in Israel, Estonia, Belgium, the Philippines, and the US, 2003 (Israel, 14, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Estonia, 8, U.N. Doc. CCPR/CO/77/EST (Apr. 15, 2003); Belgium, 24, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004); Philippines, 9, U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003); United States, 11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); the Special Rapporteur on the Promotion of Human Rights While Countering Terrorism (Special Rapporteur on Counter-Terrorism), UN Doc. A/64/211 (03 August 2009).

⁸⁵ Article 8(1) of the 1999 Convention on Financing Terrorism defines ‘terrorism’ as ‘[a]ct 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.’

⁸⁶ Hardy and Williams, 2011, at 97; refers to Young 2006, at 64.

⁸⁷ *Ibid.*

application of the definition beyond its intended purpose; and *consistency* between domestic definitions as a normative function in criminal law and a means of international cooperation. Hardy and Williams have tested the definitions of seven countries, including UK, India and Australia. A brief review of Hardy and Williams seems appropriate here.⁸⁸

The clarity and breadth of the UK definition, offered in section 1 of the Terrorism Act 2000, were examined by courts in two cases. In one case, a Tunisian immigrant challenged the clarity of the definition, when he was arrested in London in 1998 after having been declared as a member of a terrorist group operating abroad.⁸⁹ The court argued that uncertainty was not reflected in the broad terms used in the law.⁹⁰ In another case, a Libyan man was arrested for being in possession of a document that was likely to be used in a possible terrorist attack for overthrowing the regime of Qaddafi.⁹¹ The issue in the case was that whether the definition exculpates a terrorist act intended to pursue a just political cause. The court ruled that such an exemption was not provided in the law. Hardy and Williams see three problems with the UK law.⁹² First, the UK law is stretched to include an intended terrorist act likely to be committed to overawe a foreign government. It appears that the law is applied beyond its intended purpose, which is the prevention of domestic terrorism. Second, a question arises whether the law should be applied to political dissent against a foreign government. Third, it appears that the UK courts can do little ‘to narrow overbroad definition of terrorism’. Concern was also shown that there is ‘high risk’ of application of the definition against freedom of political expression.⁹³ In light of their critical discussion, Hardy and Williams have found ‘serious flaws’ regarding the second criterion (breadth) and ‘serious doubt’ regarding the first criterion (clarity).⁹⁴

As discussed in the previous section, Australian definition was examined in one case in relation to control order under the Australian Criminal Code. Only one judge in the case argued that the application of the definition of ‘terrorism’ in control orders could potentially be extended beyond the law’s intended purpose. Comparing the UK and Australian law with regard to the third criterion (consistency), Hardy and Williams have found both as similar in some respects. For example, both laws require that a terrorist act shall (1) aim at political, religious or ideological cause, (2) intend to endanger life, create a serious risk to the health or safety of the public, cause damage to property, or seriously interfere with electronic system.⁹⁵ Both definitions also require that it is not necessary that damage to property or electronic system should cause death, endanger

⁸⁸ The remaining part of this section heavily draws on Hardy and Williams 2011.

⁸⁹ Secretary of State for Home Department v. E, [2007] HRLR 18, [2007] EWHC 233 (Admin), [186].

⁹⁰ Ibid. at [188].

⁹¹ R v. F, [2007] 2All ER 193, [2007] EWCA Crim 342.

⁹² Hardy and Williams 2011, at 116.

⁹³ See Carlile Report 2007, at 34. See also UK, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters—Third Report of Session 2005-06, 2005, 13 [UK’s JPC Report 2005-06].

⁹⁴ Hardy and Williams 2011, at 120.

⁹⁵ Ibid, at 133-134.

life of a person or create a serious risk to public health or safety.⁹⁶ In both countries, post-enactment reviews have not suggested any ‘substantive amendments’ in the definition.⁹⁷ However, unlike UK law, the Australian law exempts an act of protest that only intends to cause property damage.⁹⁸

India’s definition has come under severe attack by scholars. As the very title of Kalhan’s detailed study suggests, India’s definition of terrorism appears to be rather a colonial continuity. Kalhan argues that the definition of ‘terrorist act’ enunciated in POTA is ‘vague and overly broad’, encompassing

[M]any ordinary criminal law offenses with little relationship to terrorist activity, creating tremendous potential for arbitrary or selective application. POTA’s definition may run afoul of the principle of legality, a nonderogable obligation under the ICCPR that requires the law to define criminal offenses before they are committed and with “sufficient precision” to prevent arbitrary enforcement.⁹⁹

Delving deep into its semantic properties, Hardy and Williams argue that India’s definition ‘score poorly on’ both clarity and breadth, using vague terms like ‘injuries’, ‘destruction of property’ and ‘disruption’ of basic services.¹⁰⁰ By not making them conditional with the word ‘serious’ these words appear to be understood by the law enforcement authorities in their simple and ordinary meaning. A commentator has argued that a simple cutting of a telephone line would amount to terrorism in India, though not in international law.¹⁰¹ On consistency (third criterion) too, India’s definition could be marked poor. For example, both UK’s and Australian definitions provide that a terrorist act shall intend to intimidate a government or an international organization. This element is missing from the Indian definition, rather it enunciates that a terrorist act is one that is intended to ‘threaten or likely to threaten the unity, integrity, security or sovereignty of India.’

Conclusion

Despite the fact that post-9/11 international efforts have been increased and pursued more vigorously, the international community is still unable to define ‘terrorism’. Consensus on definition faces two challenges: first, the activities of national armed forces in an armed conflict, and second, the violent pursuit of self-determination by people under foreign occupation. This is because of the nature of terrorism as a crime. Terrorism is by nature a political crime. As noted in the introduction of this chapter, the French Jacobins justified their reign of terror for what they considered as a just cause. Regarding first challenge, there appears to be little opposition to the

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Kalhan 2007, at 156.

¹⁰⁰ Hardy and Williams 2011 at 152.

¹⁰¹ Young 2006, at 90.

view that international humanitarian law can adequately respond to it. Regarding the second challenge, the thrust of the debate is in favour of the view that the right to self-determination could be pursued through other legal means within the purview of public international law, including international human rights law. This view, however, ignores the realities of international law. The most powerful nations, among them, most notably, the US has been playing a hegemonic role in international law. A commentator argued that the US used its influence in the adoption of the Council Resolution 1373, as ‘the Bush Administration directly solicited other countries’ cooperation [...] the text of the resolution drew significantly from the text of President Bush’s Executive Order against terrorism.’¹⁰² Several movements of self-determination across the world (examples: the Palestinian-Israeli conflict and Kashmir between India and Pakistan) characterizing historical grievances further aggravated by violation of UN Resolutions are some of the key realities of international law, which have impact on the efforts of the international community to define ‘terrorism’.

The failure of the international community has created a scope for domestic definition of ‘terrorism.’ Many countries have added elements of international concerns (examples: a terrorist act intended to target a foreign government or an international organization or violation of an international convention against terrorism) in their domestic legislation. Despite such insertions, it appears that the drafting and interpretation of the definition of ‘terrorism’ is dominated by domestic security challenges. The analysis has shown that domestic definitions are imprecise, overbroad and inconsistent with other jurisdictions. While in international law, the lack of consensus on a clear definition is used by the US as a hegemonic tool of its foreign policy, the domestic law vagueness and impreciseness is exploited by powerful political elites, particularly in developing countries, leading to discrimination against religious minorities, immigrants, political opponents and personal vengeance. The analysis has established that most domestic legislations are not fulfilling the principle of legality, as a benchmark. The next chapter tests the definition of ‘terrorism’ in Pakistan’s anti-terrorism law.

¹⁰² Alexander J. Marcopoulos, ‘Terrorizing Rhetoric: The Advancement of U.S. Hegemony Through the Lack of a Definition of ‘Terror’, <http://ssrn.com/abstract=1327155>.

Chapter 4

Defining ‘terrorism’ in Pakistan: A critical analysis of the law and jurisprudence

Introduction

It was noted in chapter 2 that while Pakistan is an increasingly fertile area of terrorism research, the study of Pakistan’s criminal justice response to terrorism, is a marked deficit area in research. A handful of scholarly contributions reviewed in chapter 2 may be briefly revisited here. A 2014 study has noted that the Anti-Terrorism Act, 1997 ‘(ATA) lacks comprehensive definitions for the most recent kinds of terrorist acts.’¹ Another commentator has argued that in Pakistani anti-terrorism law, a terrorist ‘act could be interpreted to include virtually any violent act, or encouragement of the commission of a violent act.’² An empirical study has found that the ATA is applied in a large majority of cases having no nexus with terrorist intention or terrorist organization.³ Another empirical study has found that the Pakistani definition of ‘terrorism’ is ‘vague and overly broad (the principle of legality), bearing little relationship to terrorism as it is commonly understood.’⁴ Courts’ jurisprudence on definition, too, has been found to be sharply divided on the application of definition of ‘terrorism’.⁵

The previous chapter has established firstly, that the failure of the UN to develop a consensus definition created a scope for the states to frame their own definitions. It has come to light that the states’ legislation has been driven more by domestic politics than by an effort to harmonize definition of ‘terrorism’ with other jurisdictions. Secondly, the principle of legality has been used as a benchmark to assess domestic definitions. An examination of three jurisdictions, viz. UK, India and Australia, has shown that the definitions in those countries fail to come true on the principle of legality. The main focus of this chapter is to assess the definition of ‘terrorism’ in Pakistan against the principle of legality and to contextualize Pakistan’s practice in the emerging international and regional legal framework. Section I briefly traces Pakistan’s practice in the evolution of its anti-terrorism legislation with focus on the definition of the offence of ‘terrorism’. Through an examination of internal and external political dynamics of terrorism, section II traces the historical reasons for the enactment of the ATA. Section III examines the definition of ‘terrorism’ in the ATA and its development in light of various amendments.

¹ Sohail Habib Tajik, ‘Counterterrorism Efforts of Law Enforcement Agencies in Pakistan’ in Moeed Yusuf (ed.) *Pakistan’s Counterterrorism Challenge*, Foundation Books an imprint of Cambridge University Press, India, 2014, pp 103-126.

² Charles H. Kennedy, ‘The Creation and Development of Pakistan’s Anti-terrorism Regime 1997-2002’, in Satu P. Limaye, Mohan Malik and Robert G. Wirsing (Ed.) *Religious Radicalism and Security in South Asia*, Honolulu, Hawaii, Asia-Pacific Center for Security Studies, 2004, pp 387-411, at p 390 (Kennedy 2004).

³ Asia Society, *Stabilizing Pakistan Through Police Reform*, 2012, p 51.

⁴ Justice Project Pakistan, *Terror on Death Row*, 2014, p 5.

⁵ Research Society of International Law, ‘The Case for Change: A Review of Pakistan’s Anti-Terrorism Act of 1997’, Oct. 2013 (RSIL 2013).

Section IV tests the definition of ‘terrorism’ against the principle of legality in light of the jurisprudence of Pakistan Supreme Court. Section V studies Pakistan’s ATA in the context of international and regional legal framework and certain national jurisdictions. The analysis will be followed by a conclusion.

I. Anti-terrorism legislation in historical perspective

As will be seen shortly, until the 1997 ATA, no law ever defined the offence of ‘terrorism’. Nevertheless, a brief study of the history of Pakistan’s anti-terrorism legislation is necessary in order to see how the term was understood in the absence of its definition, why the term was not defined and what factors, after all, made it necessary to define it. From what may be called a negligible literature on Pakistan’s anti-terrorism legislation, two points appear to be worth noting. First, the story of Pakistan’s anti-terrorism legislation begins with political dissent, which was dubbed as an anti-state activity. Second, since the early days of the independence, law making and law enforcement aimed at introducing emergency executive powers and elbowing out of judicial review. Thus, commentators see the 1949 Public and Representative Officers (Disqualification) Act (PRODA) as a weapon to quell political opposition. Other laws introduced were: the Security of Pakistan Act (SPA), 1952, the Defence of Pakistan Ordinance (DPO), 1955 and the Electoral Bodies (Disqualification) Order (EBDO), 1959. The SPA conferred on government wide powers to restrict movements of any suspected person and issue his detention order, to release a person unconditionally or for a specified time, cancel the release orders any time, direct any person to submit his photographs, finger prints, handwriting and signature to the designated officer. The disobedience of orders under the law was punishable for six months or fine or both. The governments also exercised powers of prevention of offences under the Criminal Procedure Code (CRPC), 1898, such as, those defined in sections 107 (security for keeping peace and 144 (passing of temporary executive order in urgent cases of nuisance or apprehended danger). The law attracted criticism and resentment.⁶ As Charles Kennedy argues that in order to ‘combat terrorism in its various guises...the Ayub Khan regime was no stranger to the use of policies to justify the suppression of domestic opposition [under] PRODA and EBDO.’⁷ Commenting on the above-mentioned set of laws, Shabana Fayyaz, observes that ‘terrorism’ was defined through the lens of political dissent, leaving the term vague and abstract. These laws, however, did not use the word ‘terrorism’. Another law called the Prevention of Anti-National Activities Act, 1974 appeared to have more articulate political nature. It sought to criminalize activities which were intended or support any claim for secession of the country, disruption of sovereignty, territorial integrity, racial, linguistics consideration or propagates a view that the citizens of Pakistan comprises of more than one nationality.

⁶ See Saba Noor, ‘Evolution of Counter-Terrorism Legislation in Pakistan’, 1(1) *Conflict and Peace Studies* (Oct.-Dec. 2008), pp 1-17 (Saba 2008), Shabana Fayyaz, ‘Responding to Terrorism: Pakistan’s Anti-Terrorism Laws’, II (6) *Perspectives on Terrorism* (March 2008), pp 10-19, at 11 (Shabana 2008).

⁷ See Kennedy 2004 at 387.

The Suppression of Terrorist Activities (Special Courts) Act (STA), 1975, was the first law that used the word ‘terrorism’. The STA was introduced in the background of political opposition spearheaded by nationalist political forces, particularly in Baluchistan and the Khyber Pakhtunkhwa (then called the North West Frontier Province). Its purpose was two-fold: first, suppression of acts of sabotage, subversion and terrorism, and second, provision for speedy trial of these offences. None of the three offences was defined by the law. These offences were rather defined through a schedule which contained four sets of offences from the Pakistan Penal Code (PPC), 1860, nine other laws (for example, the laws relating to explosive substances, arms, telegraph, aircraft, defence of Pakistan and anti-national activities). The law also criminalized ‘any attempt or conspiracy, or abetment of any of’ offences mentioned in the schedule. The special courts under the law had to follow a speedy trial procedure, with the power to take cognizance of the scheduled offences directly (without routing the case through a magistrate court under the ordinary rules of criminal procedure), refuse adjournment unless justice demands, and trial in absentia in some specific circumstance.⁸ The law also provided that an accused would be presumed to be guilty if found in possession of ‘any article or thing’ about which there could be reasonable suspicion to have been used in the commission of an offence. This characterizes a visible departure from established criminal law principle of presumption of innocence. This particular aspect of the law attracted criticism by human rights activists.⁹ As the law was seen to aim at silencing political opponents, Khan Abdul Wali Khan, a leading political figure of the time (and the leader of opposition in the National Assembly) and his National Awami Party (NAP) proved as prime targets of the law. NAP was banned as an anti-state political party. Khan was booked under the STA for conspiring against the state. A separate tribunal was set up for his trial.¹⁰ Following the STA, the concept of special courts and speedy trial continued until 1997. Thus certain other laws were introduced, such as, the 1987 Speedy Trial Ordinance and the 1990 Terrorist-Affected Areas (Special Courts) Ordinance. The Last mentioned law was introduced as an Act in 1992.

Like many other jurisdiction, such as, the UK and India, Pakistan’s pre-9/11 legislation aimed at countering domestic terrorism. The nature of terrorist threat in Pakistan, however, differed from the UK and India. India faced threats from separatist movements in the East Punjab and Nagaland.¹¹ Like India, the UK faced separatist movement in Northern Ireland. The UK’s threat

⁸ See sections 4 and 5 of the Suppression of Terrorist Activities (Special Courts) Act, 1975. The law provided a trial in absentia if the accused once appeared absented without just cause or behaved in the court in such a manner that compelled the court to order his removal. The accused were not to be presumed to have admitted the commission of the offence he is charged with.

⁹ Shabana 2008 at 11, citing Najm-U-Din, *Terrorist unless proven otherwise: Human rights implications of anti-terror laws and practice in Pakistan*, Lahore, HRCF Publication, 2007, p 10.

¹⁰ See Ibid. Also see Saeed Shafqat, *Civil-Military Relations in Pakistan*, USA, Westview Press, 1997, at p 38.

¹¹ Setty 2011, at 48. See also Hardy and Williams 2011, at 148.

has a religious dimension too (the separatist being Catholic nationalists¹²), which make it similar to the one Pakistan is facing (the Shia-Sunni conflict). Unlike both UK and India, Pakistan did not define ‘terrorism’. The STA did not define ‘terrorism’ as a separate or independent offence. It appended a schedule in which offences from several substantive criminal laws, including, the PPC, the main substantive criminal laws were included. While the courts have developed a good deal of jurisprudence on the STA, having remained in force for 22 years, no definition-specific case law, however, is available.¹³

II. Definition of ‘terrorism’ in the ATA: historical reasons

As seen above, while the anti-terrorism legislation was initially used a tool of political vendetta, with the passage of time, a host of other internal and external political elements also came into play, making the criminal justice response more complex and challenging. It is crucial to understand those other factors as background to the introduction of the ATA, particularly the definition of ‘terrorism’. Internally, since independence, Pakistan faced constitution-making as a dilemma. Among others, two reasons were of great significance: first, the Islamic concept of state and the establishment of a true federal system having a satisfactory provincial autonomy. These two dilemmas set directions for the political dynamics cutting across religion, ethnic identity and socio-economic development. On the eve of Independence, Pakistan (as well as India) inherited the British colonial political, administrative and judicial institutions.¹⁴ No serious effort was made to weed out the colonial mindset. Rather that mindset was used an instrument of political oppression. Constitutional quarrels over the Islamic concept of state were fought inside parliament as well as on the streets. The issue of provincial autonomy lacerated into the body politics of the country, first in the East Pakistan (that led to dismemberment of the country in 1971) and later on (until the 1977 military takeover), in Baluchistan and the Khyber Pakhtunkhwa. The military regime led by Gen. Zia is notable for three incidents: the hijacking of a Pakistan International Airlines flight in 1981 by a terrorist group called Al-Zulfikar; the formation of the Muhajir Qaumi Movement (now called the Muttahida Qaumi Movement (MQM)) a political party of the Urdu speaking Indian migrants settled in Karachi and other

¹² See the University of Ulster, Conflict Archives on the Internet (CAIN) Web Service-Conflict and Politics in Northern Ireland, at <http://cain.ulst.ac.uk/> (last accessed 6 March 2015).

¹³ A few Supreme Court’s reported judgments appeared in Pakistan Law Journal (PLJ) 1992 Supreme Court (SC) 625; PLJ 1992 SC 500; 1995 Supreme Court Monthly Review (SCMR) 59; 1995 SCMR 1151; 1995 SCMR 1285. Section 8 of the STA (putting the burden of proof on accused person if found in possession of any article or thing which may raise a reasonable suspicion that the accused person has committed a scheduled offence) has come under persistent judicial scrutiny in a number of cases, such as, 1995 Pakistan Criminal Law Journal (PCr.LJ) 61 [Quetta]; PLD 1995 Karachi 16; PLD 1995 Karachi 531; 1995 Monthly Law Digest (MLD) 1272 [Lahore]; 1995 PCr.LJ 1954 [Lahore]. In these cases, the main point involved was the proper proof of recovery of the article or thing. None of the decisions have ever ruled that section 8 is inherently unwarranted being a departure from the established norm of criminal justice pertaining to burden of proof.

¹⁴ See Kalhan 2006.

urban centres in Sind;¹⁵ and a massive Islamization of law and society. Externally, the 1978 Russian invasion of Afghanistan and the 1979 Islamic Revolution in Iran significantly influenced Pakistan's internal political dynamics in several ways: first, the *Shia-Sunni* sectarian rift enhanced (example: the Shia community asked for exemption from the *Zakat and Ushr Ordinance*, 1980). Second, with the emergence of the MQM, Karachi immersed in ethnic-linguistic conflict which has been catalyzing terrorism till date. Third, in order to bleed Russia in Afghanistan, Western countries led by the US exploited the Islamic sentiments of the Pakistani people by branding the Afghan resistance as *jihad*. The funding by Arab countries added further fuel to the fire of Shia-Sunni sectarian divide in Pakistan. Despite resistance from leftist political parties (mainly Wali Khan's ANP), Zia played to the tunes of the West in order to prolong his illegal regime. While it has now become an open secret that the Afghan war was merely a proxy war, the undue exploitation of the holy concept of *jihad* through Kalashnikov culture, sowed the seeds of what has now become global terrorism. The sectarian divided flourished extremism, resulting in the establishment of terrorist organizations, which started playing havoc with peace in the country. In this scenario, the government enacted certain anti-terrorism laws in early 1990s and then the ATA to counter ethnic terrorism in Sind and sectarian terrorism in the entire country.

In the post-Russian Afghanistan, the US exploited the sectarian divide by creating the Taliban to settle scores with Iran. As the Taliban went out of control, it turned its back on the US. In the wake of the 9/11, the US invasion of Afghanistan, the Taliban and many Sunni extremist organizations declared war against the US-led West, on the one side, and Pakistan, for its support to the US, on the other. This set off a new wave of terrorism emanating from the terrorists' strongholds in the tribal areas (the Federally Administered Tribal Areas (FATA)), which gradually engulfed the entire Khyber Pakhtunkhwa and key urban centres in the rest of the country. The disgruntlement in Baluchistan (shrouded in the constitutional dilemma of provincial autonomy) also emerged a contributing factor, which got deepened with the killing of Nawab Akbar Bugti, a Baloch feudal lord. Having remained vulnerable to both ethnic and sectarian terrorism, Baluchistan appears to have been doubly jeopardized in this game of death and destruction. Commentators say that the Indians too have been making hay while the sun shines in Pakistan.¹⁶ While in the post-9/11 world, the US has been fighting the war against terrorism from the White House and the Pentagon, it has also opened a diplomatic theatre in the UN Security Council. As discussed in the previous chapter, the Council passed Resolution 1373 (which is of binding nature) urging the member states to prevent and combat terrorism through sound domestic policies and legislation. Pursuant to that and many subsequent UN Resolutions, like other nations, Pakistan introduced major amendments in its anti-terrorism law.

¹⁵ RSIL 2013 at 11, 12.

¹⁶ RSIL 2013 at 13. Recently, Pakistan has formally accused, RAW, India's Intelligence Agency of fueling terrorism in Pakistan. See the Express Tribune, 06 May 2015.

While it is beyond the scope of this study to investigate the reasons for Pakistan's challenges to counter terrorism, a few words may suffice. Perhaps the following views of the UN High-Level Panel in its 2004 report sufficiently captures Pakistan's situation:

Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and order.¹⁷

Referring to inequality in Pakistan, Fukuyama argues that with democratic institutions weakened by social inequality, 'groups with questionable commitment to liberal democracy have gained adherents because they are seen as providing social services and catering to the needs of the poor'.¹⁸ This situation arose in parts of Pakistan's Khyber Pakhtunkhwa province (Malakand division) when during an insurgency (2007-2009), the Taliban established their own brand of police stations and courts. The slogan of the insurgents' 'speedy justice', in the words of a Pakistani commentator, is quite interesting [!].¹⁹ Despite being introducing so many laws for establishment of speedy courts, Pakistan's criminal justice system has been unable to respond efficiently and effectively to terrorism. A question arises: what problems the ATA, particularly, the definition of 'terrorism' suffers with and whether the problems are peculiar to Pakistan only. The answer is explored in the next section.

III. Definition of 'terrorism' in the ATA and subsequent amendments

As the threat of terrorism grew, Pakistan realized that a new law be made. Thus, on 16 August 1997, the President of Pakistan signed the ATA into law. As per its preamble, the ATA has two purposes: first, prevention of terrorism and sectarian violence, and second, speedy trial of heinous offences. Section 6 of the ATA offers definition of 'terrorism'. On a close reading, the definition may be divided into three parts: purpose or motive of violence, means of violence and consequence(s) of violence. A fourth one may be added as exception(s), if any. The definition may be recast as under:

Purpose: 'Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people,'

¹⁷ UN High Level Panel 2004, para 145.

¹⁸ See Fukuyama, 'Dealing with Inequality', 22 (3) *Journal of Democracy*, 2011, pp 79-89, at 80.

¹⁹ See O. Siddique, 'Approaches to Legal and Judicial Reform in Pakistan: Post Colonial Inertia and the Paucity of Imagination in Times of Turmoil and Change', Development Policy Research Centre, Lahore University of Management Sciences Working Paper 4, pp 1-70, at 8; available at www.dprc.lums.edu.pk (last accessed 3 March 2012).

Means: ‘does any act or thing by using bombs, dynamite or other explosive or inflammable substance, or fire-arms, or other lethal weapons or poisonous or noxious gases or chemicals or other substance of a hazardous nature in such a manner as’

Consequences: ‘to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act’

Exceptions: the definition provides no exception.

Definition of ‘terrorism’ in the original ATA and its amendments till the year 2000

Between 1997 and 2000, the ATA was amended five times:

1. ATA (Amendment) Act, 24 Oct. 1998,
2. ATA (Amendment) Ordinance, 27 April 1999,
3. ATA (Amendment) Ordinance, 27 August 1999,
4. ATA (Amendment) Ordinance, 02 Dec. 1999, and
5. ATA (Amendment) Ordinance, 24 July 2000.

Three amendments changed the definition. The 1998 amendment introduced three changes: one each in the purpose, means and consequence of a terrorist act, shown below:

Table 1

	ATA original, 1997	ATA Amendment Act 24 Oct. 1998
Purpose	‘Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people,’	Addition after the word ‘terror’: ‘to create a sense of fear and insecurity’
Means	‘does any act or thing by using bombs, dynamite or other explosive or inflammable substance, or fire-arms, or other lethal weapons or poisonous or noxious gases or chemicals or other substance of a hazardous nature in such a manner as’	Addition after the word ‘weapons’: ‘as may be notified’
Consequence	‘to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or	Addition after the word ‘property’: ‘on a large scale’

	threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act’	After the word ‘duties’, the words ‘commits a terrorist act’ omitted, and the following added: ‘or (b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to alienate any section of the people, or adversely affect harmony among different sections of the people; or (c) commits an act of gang rape, child molestation, or robber coupled with rape as specified in the Schedule to the Act.’
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The changes inserted by amendments introduced on 27 April 1999 and 24 July 2000 are shown in table 2 below:

Table 2

	ATA original, 1997	ATA Amendment Ordinance 27 April 1999 (1)	ATA Amendment Ordinance 24 July 2000
Consequence	‘to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act’	Addition of clause (d): ‘commits an act of civil commotion as specified in section 7-A’.	Clause (d) substituted as under: ‘commits an act of vehicle snatching or lifting, damage to, or destruction of, State or private property, random firing to create pani, charging bhatha or criminal trespass (illegal qabza).’

While sectarian violence did not abate at the domestic level²⁰ even in the wake of several amendments in the ATA, at the international and regional level, the UN Security Council passed many Resolutions against the Taliban-led Afghanistan.²¹ Thus feeling greater security threat within and outside the country, Pakistan almost re-wrote its ATA through an amendment introduced in August 2001. The amendment defined ‘terrorism’.²² Between 2002 and 2013, the ATA was amended as many as nine times, out of which the definition was amended five times: in 2004, 2009, 2010 and twice in 2013.²³ The current definition is reproduced below in terms of purpose, means, consequences and exception.²⁴ Table 3 shows the details of amendments separately.

Purpose:

‘(b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect [or a foreign government or population or an international organization] or create a sense of fear or insecurity in society; or (c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies[.]’

Means:

The use or threat or use of any action falling within sub-section (2) which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1 (c) is satisfied.

Consequences:

If the use or threat of action results in the following:

death; grievous violence, bodily injury or harm to person; grievous damage to property (including government offices, religious centres, etc); doing of anything that is likely to cause death or endangers a person’s life; kidnapping for ransom, hostage-taking or hijacking; use of explosives by any device including bomb blast or having any explosives substance with or without lawful justification or having unlawfully concerned with such explosives; incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal

²⁰ RSILA 2013 at 20.

²¹ Saul 2002, at 15, 16.

²² The Anti-Terrorism (Amendment) Ordinance, (14 August) 2001.

²³ The amending laws are: The Anti-Terrorism (Amendment) Ordinance (15 Nov) 2002; The Anti-Terrorism (Amendment) Ordinance (23 Nov) 2002 ; The Anti-Terrorism (Amendment) Act (30 Nov) 2004 The Anti-Terrorism (Second Amendment) Act 2004; The Anti-Terrorism (Amendment) Ordinance 2009; The Anti-Terrorism (Amendment) Ordinance 2010; The Anti-Terrorism (Amendment) Ordinance (19 March) 2013 The Anti-Terrorism (Second Amendment) Act (26 March) 2013; The Anti-Terrorism (Amendment) Ordinance (14 Oct) 2013.

²⁴ Brackets and footnotes, showing amendment, are omitted for the sake of smooth reading. The details of the amendments are separately shown in table 2.

disturbance; taking the law in his own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the land of the land; firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or any forcible takeover of mosques or other places of worship; serious risk to safety of public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil (civic) life; the burning of vehicles or another serious form of arson; extortion of money (bhatta) or property; serious interference with or serious disruption of a communications system or public utility service; serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or serious violence against a member of the police force, armed forces, civil armed forces, or a public servant; acts as part of armed resistance by groups or individuals against law enforcement agencies; dissemination, preaching ideas, teaching and beliefs as per own interpretation of FM stations or through any other means of communication without explicit approval of the government or its concerned departments; and violation of a convention specified in the Fifth Schedule.

Exception:

The use of threat of action shall not ‘apply to a democratic and religious rally or a peaceful demonstration in accordance with law.’

Table 3

Amended definition between 2001-2013 (A=Amendment, S=Second)

	ATA (SA) 2004	ATA (A) Ordinance 2009	ATA (A) Ordinance 2010	ATA (A) Ordinance (19 March) 2013	ATA (SA) (26 March) 2013
Purpose		Amendment in sub section 1: or intimidating and terrorizing the public, social sector, media persons, business community or attacking the civilians, government officials, installations,		In sub section 1, clause (b) after the word ‘sect’, the following is added: ‘or a foreign government or population or an international organization’	In sub section 1(c) after the word ‘cause’ at the end, the following was added: ‘or intimidating and terrorizing the public, social sector, media persons, business

		security forces or law enforcement agencies[.]’			community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies[.]’
Means	Amendment in sub section 2: ‘(ee) involves use of explosives by any device including bomb blast’				In sub section 2 clause (c), the following is added: ‘including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting arson or any other means’
Consequence		Amendment in sub section 2, after the words ‘grievous damage to property’, added the following	.	After sub section 3, the following new sub section (3A) inserted: ‘Notwithstanding	In sub section 2 clause (ee), the following is added: ‘having

		<p>words: ‘including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property’</p> <p>In sub section 2, clause (g) substituted as under:</p> <p>‘taking the law in his own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the land of the land’</p> <p>In sub section 2 clause (m) ‘or’ omitted; after</p>		<p>anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.’</p>	<p>explosive substance without any lawful justification or having been unlawfully concerned with such explosives’</p> <p>In sub section 2, clause (g) substituted as under:</p> <p>‘taking the law in his own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the land of the land’</p>
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		<p>clause (n), clauses (o) and (p) inserted:</p> <p>acts as part of armed resistance by groups or individuals against law enforcement agencies; dissemination, preaching ideas, teaching and beliefs as per own interpretation of FM stations or through any other means of communication without explicit approval of the government or its concerned departments</p>			<p>In sub section 2 clause (m) ‘or’ omitted; after clause (n), clauses (o) and (p) inserted:</p> <p>acts as part of armed resistance by groups or individuals against law enforcement agencies; dissemination, preaching ideas, teaching and beliefs as per own interpretation of FM stations or through any other means of communication without explicit approval of the government or its concerned departments</p>
Exception	Nil	Nil	Nil	Nil	<p>At the end of sub section 1, the following proviso was added:</p> <p>‘Nothing herein shall apply to a democratic and religious rally or a peaceful demonstration</p>

					in accordance with law.’
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IV. Definition of ‘terrorism’ and the principle of legality in Pakistani jurisprudence

This section will test the definition of ‘terrorism’ on the principle of legality and will critically examine jurisprudence developed by Pakistani Supreme Court. As discussed in the previous chapter, three-pronged criteria (clarity, breadth and consistency) were developed by Hardy and Williams on the basis of the principle of legality. The criteria will be applied to the definition of ‘terrorism’ provided in the original law introduced in 1997 and the various amendments carried out since 2001 till 2013.

As compared to the 2001 definition, the original one appeared to be shorter in volume. The original definition used ambiguous language, at least, in one respect. It provided that, among others, a terrorist act is one which ‘adversely affect[s] harmony among different sections of the people’. These words are comparable to the definition offered by India’s POTA, which says a terrorist act is one which threatens the unity, integrity, security of India. The word ‘harmony’ is ambiguous. As it is not a legal word, reference may thus be made to its plain dictionary meaning. According to the 2010 edition of Oxford Dictionary, ‘harmony’ means ‘a state of peaceful existence and agreement; to live together in perfect harmony’. It also refers to different categories of harmony, such as, ‘social/racial harmony’.²⁵ The Chambers Dictionary defines the word ‘harmony’ as ‘a fitting together of parts so as to form a connected whole; agreement in relation’; ‘a normal and satisfying state of completeness and order in relations of things to each other.’²⁶ Criminal law requires that the language of the law should be clear and specific and that it be construed strictly. The word ‘harmony’ is neither clear, nor specific nor could it be construed strictly. Rather, it is liable to many interpretations. This creates a scope for its abuse and misuse in an anti-terrorism criminal case. The definition also reflects over breadth in several respects. For instance, ‘injury’ and ‘damage’ do not need to be serious. Nor does it make a distinction between public and private ‘property’. Similarly, ‘the disruption of any supply of services essential to the life of the community’ means, as a commentator noted with reference to Indian law, that even the cutting of a telephone line would amount to terrorism.²⁷ The selected parts of the text of the original definition do not fulfil the broader conception of the rule law, i.e. the law must be clear, prospective and certain.

²⁵ Oxford Dictionary, Oxford University Press, 2010, p 712.

²⁶ Chambers Dictionary, Chambers Harrap Publishers Ltd., 2006, reprinted 2007, p 682.

²⁷ Young 2011, at 90.

As table 1 shows several changes were introduced in the definition. Two changes introduced by the 1998 amendment are worth consideration. First, in respect of means of violence, some generic words such as ‘any other weapon’; and regarding the consequences of the terrorist act, the words ‘on a large scale’ after the words ‘damage to property’, were added. These sets of words add breadth to the definition. Second, certain other offences, such as, gang rape, child molestation, robbery coupled with rape were also added a terrorist offences. While these offences are of heinous nature, they could not be categorized as terrorism. In other words, these offences take the law out of its intended purpose.

The post-2001 amendments are reflected in table 3. The purpose, means of violence and consequences all have been loaded with greater details. Since 2005, an exception, shown in table 2, has been added, which is maintained till date. Unlike the UK and Australia, the definition has come under judicial scrutiny in several cases. However, the two landmark cases—*Mehram Ali v. Federation of Pakistan (Mehram Ali)* and *Liaquat Hussain v. Federation of Pakistan (Liaquat Hussain)*--happened to be before 9/11.²⁸ *Liaquat Hussain* is not relevant here as it pertains to the establishment of military courts in light of the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance (XII of 1998), which the court ruled as unconstitutional. *Mehram Ali* touched several issues; the definition of ‘terrorism’ was a notable one. The court rejected the argument that the murder of a public servant even on account of personal enmity would amount to terrorism. The court accepted the argument that if a public servant is murdered with the intention and design to terrorize the public servants so that they may not discharge their official duties, the criminal act would amount to terrorism. Relying on another case,²⁹ the court observed:

[T]he offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 (definition and punishment for ‘terrorism’) ...if an offence included in the Schedule has no nexus with the above section, in that event notification including such an offence to that extent will be ultra vires.’

While *Mehram Ali* clearly enunciated ‘nexus’ as a necessary element of the terrorism, a study of the subsequent case law would show that the higher courts have shown little adherence to it. Rather, as the case law to be examined shortly, demonstrates the creation of fear and insecurity has been seen a sine qua none for the offence of ‘terrorism.’

In a 2002 case, the Supreme Court held that the murder of a lawyer and police officer in court premises amounted to terrorism because it created a ‘sense of insecurity not only amongst a section of the public, but community of Advocates as well.’³⁰ In *Mst. Najam-un-Nisa*, which involved the murder of seven persons in a house at night time, the Supreme Court observed that ‘the crucial question for determination was that whether the said crime had or had not the effect

²⁸ PLD 1998 SC 1445; PLD 1999 SC 504.

²⁹ See *The Government of Baluchistan through Additional Chief Secretary v. Azizullah Memon* (PLD 1993 SC 341).

³⁰ *Ziaullah v. Special Judge Anti-Terrorism Court, Faisalabad and 7 others* (2002 Supreme Court Monthly Review (SCMR) 1225).

of striking terror or creating a sense of fear and insecurity in the people or any section of the people.³¹ The creation of sense of fear and insecurity has also been interpreted as the psychological effect produced by a violent criminal act. In a case in which four persons were killed with Kalashnikov on broad day light on a busy road in a big city, the court held that the ‘cumulative fallout of the occurrence as to the time, place and manner of the act created a sense of fear and insecurity in the society.’³² This line of argument was maintained by the court in many cases involving circumstances of crime, such as, a murder by sprinkling petrol on a person and firing with Kalashnikov,³³ the killing of two persons in a mosque at the time Friday prayer,³⁴ and the killing of a college teacher for restraining a student from cheating in examination.³⁵

In most cases examined here, the court has made no reference to *Mehram Ali*. In some cases, the court has offered interpretation done in *Mehram Ali*. For example, an act involving the murder of a college teacher (who admonishing a student for cheating in examination) was held to be terrorism. The court’s view reflected the *Mehram Ali*’s reasoning, arguing that the teacher apprehended the student as part of his official duties. The court articulated: ‘the act of the accused persons created fear, sensation, panic and insecurity in the teaching class as a whole.’³⁶ Similarly, in *Naeem Akhtar*, the accused persons killed a medical surgeon.³⁷ Facts of the case shortly were that the deceased surgeon had conducted a surgery on the body of the mother of the accused persons, which condition worsened following the surgery, resulting in the amputation of the leg of their mother. The accused persons privately asked for compensation and the expenses incurred on the medical treatment. Their demand, having not been acceded to, they killed the surgeon. The Supreme Court admitted that the motive was ‘the personal grievance’ of the accused persons, ‘but the murder of the doctor after his abduction for such motive would be an alarming situation for all doctors and would direct source of creating panic and terror in the medical profession.’³⁸

Only in a few cases, the Supreme Court held that certain acts were not terrorism. For example, in 2007 case involving criminal trespass, and damage by fire or explosive substance, was not found to be one of terrorism.³⁹ The court referred to the lack of ‘nexus’, as held in the *Mehram Ali* case.⁴⁰ In another case concerning the murder of three persons and attempted murder of one person in the background of a dispute over immovable property, the court held that the first information report did not reflect that the incident create any fear or panic the public.⁴¹ The court

³¹ *Mst. Najam-un-Nisa v. Judge, Special Court Constituted under Anti-Terrorism Act, 1997* (2003 SCMR 1323).

³² *Muhammad Mushtaq v. Muhammad Ashiq and others* (PLD 2002 SC 841).

³³ *State through Advocate General N.W.F.P. v. Muhammad Shafiq* (PLD 2003 SC 224).

³⁴ *Muhammad Farooq v. Ibrar and 5 others* (PLS 2004 SC 917).

³⁵ *Zahid Imran and other v. The State and others* (PLD 2006 SC 109).

³⁶ *Ibid.* paragraph 31.

³⁷ *Naeem Akhtar and others v. The State and others* (PLD 2003 SC 396).

³⁸ *Ibid.* Paragraph 12.

³⁹ *Fazal Dad v. Col. (Retd.) Ghulam Muhammad Malik and other* (PLD 2007 SC 571).

⁴⁰ *Ibid.* Paragraph 5.

⁴¹ *Muhammad Yaqoob and others v. The State and others* (2009 SCMR 527).

reasoned that the incident was rooted in personal vendetta. As discussed above, the court did rule in certain cases of personal enmity that such cases involved act of terrorism.⁴² Another case, in which the court realized that personal enmity would not lead to terrorism, is *Mohabbat Ali and another v. The State and another*, decided in 2007.⁴³ In this case, one man was murdered, another injured. The background of the case was a dispute over landed property in which the complainant party had earlier murdered two tenants of the accused party.⁴⁴ Reiterating its earlier opinion, the court ruled that the crime, which was the result of personal enmity, did not pass the test of creation of sense of fear and insecurity.⁴⁵ In a 2009 case having a private criminal dispute in the background, the court held that:

Fear or insecurity must not be a by-product, fallout or unintended consequence of a private crime. As such, creation of fear and insecurity in society is not itself terrorism unless the same is coupled with the motive. Act of terrorism is desired to be determined with the yardstick and scale of motive and object, instead of its result or after effect. The definition of terrorism is not attracted if the offence has neither created any threat to, coerce or intimidate or overawe the government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society.

This case is of great significance for two reasons. First, it seeks to brush aside the view that a criminal act, no matter how much of a grave nature it may be, is not terrorism unless it aims at coercing and intimidating or overawing ‘the Government or the public or a section of the public or a sect...’. Second, it maintains the existing line of argument by giving weight to the creation of ‘a sense of fear or insecurity in society.’ None of the decisions examined above has referred to the first reason. Although this decision includes the court’s usual argument referred to in the second reason.

While it is established that the Supreme Court’s jurisprudence does not reflect consistency, arguably, the blame goes to the wordings of the definition only for lack of clarity and (over) breadth. Even the stress on ‘nexus’ by the *Mehram Ali* court does not appear to correct the course of jurisprudence. The reason is that the nexus must be between the criminal act and the object of sections 6, 7 and 8 of the ATA. In other words, it is the wordings of law which are imprecise and overbroad. Moreover, the law does not confine the action or its threat to mere coercing and intimidating or overawing the Government, but includes ‘the public or a section of the public or community or [a] sect or a foreign government or an international organization’. As was seen above, the courts have interpreted the words ‘create a sense of fear or insecurity in society’ mostly in relation to the words ‘public or a section of the public or community’. In almost all cases discussed above, accusations of violence in private disputes were brought under the ATA. These parts of the definition thus have either nothing or little in common with the terrorist

⁴² Ibid. Paragraph 10.

⁴³ 2007 SCMR 142.

⁴⁴ Ibid. Paragraph 2.

⁴⁵ Ibid. Paragraph 8.

attacks on Marriot hotel in Islamabad, the Sri Lankan cricket team in Lahore and the Army Public School in Peshawar.

The definition may also be compared with those of other jurisdictions for ascertaining its consistency. Both ATA and UK law require that the use or threat of action must be ‘designed’⁴⁶ (meaning: ‘to draw; to plan and execute artistically; to form a plan of; to contrive, invent; to intend’)⁴⁷ ‘to coerce and intimidate or overawe the government...’ (ATA); ‘to influence the government...’ (the UK law). Australian⁴⁸ and Indian⁴⁹ laws have used the words ‘intention’ and ‘intent’, respectively. As the dictionary meaning shows ‘design’ includes ‘intention’. The ATA definition is similar to that of the UK, Australia and India with regard to disruption of an electronic system. The ATA’s clause (I) of sub section 2 of section 6 appears to have been mostly borrowed from the UK definition. The difference, however, is that the UK definition mention ‘an electronic system’, whereas the ATA uses the words ‘communication system or public utility service’. The ATA definition comes closer to those of Australia (mentioning the same words as those used in the ATA) and India (mentioning disruption of essential services). The ATA provides that the causing of death may involve ‘the doing of anything’. Australian law uses the words ‘causes a person’s death’. In the UK, the act shall ‘involve serious violence against a person’. The Indian law provides the act shall cause or likely to cause death. The UK maintains the words ‘serious violence against a person’ to include bodily injury, the ATA uses the words ‘grievous violence against a person or grievous bodily injury harm to a person’. India has used the word ‘injury’, which means even a simple injury would amount to terrorism. In the UK and Australia, it would be enough if the damage is ‘serious’ and caused to ‘property’; in Pakistan, the ‘damage’ must be ‘grievous’ and caused to both public (a wide range of public property, such as, ‘government premises, official installations’, etc) as well as ‘private’. In India, like in the UK and Australia, no distinction of public and private property is made; though with the word ‘damage’, the word ‘destruction’ is also added. While it will be fine in the UK and Australia if a criminal act ‘creates a serious risk to the health or safety of the public or a section of the public’, in Pakistan, an additional factor is that such act may also be ‘designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil life.’

Given the imprecise and over broad definition of ‘terrorism’, in Pakistan, the ATA evidence shows that the ATA has been applied in unwarranted circumstances, leading to misuse and abuse of the law. The Human Rights Commission of Pakistan has noted numerous instances in recent reports. A few may be in order here. Reporting from Sind province, for example, the HRCP’s 2011 Report has noted that 390 people, including three parliamentarians, were arrested while they were asking the government to release water in the rivers network of a rural district in order

⁴⁶ For the text, see The Terrorism Act, 2000, c. 11 (UK).

⁴⁷ Chambers Dictionary, Chambers Harrap Publishers Ltd, 2006, reprinted 2007, p 406.

⁴⁸ For the text, see The Australian Criminal Code Act 1995 (Cth), section 100.1.

⁴⁹ For the text, see The 2008 Amendment of the UAPA, 1967, section 15.

to resolve the issue of clean drinking water.⁵⁰ The same report has noted further instances. Examples are: the arrest of 100 lady health workers demanding regularization of their contract service, and the conviction of six labour leaders to a total 490 years in jail by the Anti-Terrorism Court in Punjab.⁵¹ In 2013, the case of 11 missing persons detained in Rawalpindi's Adiyala Jail, who were arrested by security forces after their acquittal on the charge of terrorism; four of them died in custody, raised a national outcry, particularly, when the matter was heard by the Supreme Court.⁵²

It was seen in chapter 3 that UK, Australia and India established mechanisms for their anti-terrorism legislation. Commentators have found that the Indian review mechanism is not adequately empowered to conduct review of the law, the review committee has limited jurisdiction and the states have resisted to the review mechanism. Like India, Pakistan has a review mechanism in the form of judicial review, such as appeal. The proscription of an organization by the Federal Government is subject to administrative review by a Proscription Review Committee comprising of three members including a chairperson, all from bureaucracy.⁵³ Pakistan's review mechanism, the like Indian one, is not comparable to those of the UK and Australia.

V. The ATA and the international legal framework

Pakistan is a party to 09 sectoral conventions referred to above. It has, however, entered reservations to the 1997 and 1999 conventions. The former relates to the struggle for self-determination, being a peremptory norm within the scope of article 53 of the 1969 Vienna Convention on the Law of Treaties.⁵⁴ The latter relates to extradition. The reservation declares that Pakistan 'does not take this Convention as the legal basis for cooperation on extradition with other States Parties (article 11), extradition to other countries shall be subject to the domestic Pakistan's domestic laws (article 14) and further that for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required (article 24).

In compliance with the Council's 1373 resolution, Pakistan has submitted several reports to the Counter Terrorism Committee (CTC). Among those, 05 are publically available.⁵⁵ A critical reading of these reports would show that they contribute very little to the definition in Pakistan.

⁵⁰ The Human Rights Commission of Pakistan (HRC), Annual Report (AR) 2011, p 113.

⁵¹ Ibid. p114.

⁵² HRCP AR 2013, p 71.

⁵³ The ATA, section 11 C.

⁵⁴ Many countries objected to Pakistan's reservation. They were: Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Netherlands, New Zeland, Norway, Spain, Sweden, UK and US. See details at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en#EndDec (Last accessed 8 February 2015).

⁵⁵ See UNSC S/2001/1310 (10 Jan. 2002); S/2002/797 (19 July 2002); S/2003/307 (13 March 2003); S/2004/21 (13 Jan. 2004) and S/2005/524 (11 Aug. 2005).

The contribution appears to be only in regard to financing of terrorism. In the third report (2003), Pakistan answered certain queries raised by the CTC. The queries pertained to criminalization of (1) financing terrorism, (2) terrorist act directed against member state and their citizens, (3) terrorists' recruitment and (4) supply of weapons to terrorists within and outside of Pakistan. Pakistan responded that queries 1 to 3 are covered by the 1997 Anti Terrorism Act in many provisions (Sections 11 O (c) & 2 (z) (aa) (i) (a) and ii (b), 11 V and 121 and 125 of the Penal Code). The 4th and 5th reports reflect responses to the CTC queries on examples of cases in which the afore-mentioned provisions of law were applied and an update on the proposed legislation on anti-money laundering.

It was noted above that Pakistan supported Council's resolution 1566, which, though not formally defined 'terrorism', is seen as a significant step towards definition. Pakistan suggested a long-term strategy for a response to terrorism and hoped that the resolution 'would strengthen global cooperation against Al-Qaida and the Taliban and extend also to other sources of terror.'⁵⁶

Conclusion

The chapter has analyzed the definition of 'terrorism' in its historical perspective, the recent amendments and tested it against the principle of legality in light of the jurisprudence of the Supreme Court of Pakistan. The analysis has shown that until 1997, in Pakistan, governments have used anti-terrorism legislation as an instrument of political oppression. The roots of political disgruntlement lie in Pakistan's two main pressing problems: the role of religion in politics, and an effective federation. The disgruntlement has adopted several ways of expression of terrorism: 'sectarian, racial nationalism, ethno-linguistic and religious.'⁵⁷ Regional and international conflicts have further fuelled the fire. As a key justice sector response to the rising wave of terrorism, the original anti-terrorism law—the ATA—was amended in two phases. The first phase of amendments runs from 1998 till August 2001. The second phase started from the events post 9/11 and still continues. Obviously, the main thrust for the second phase comes from the international environment. While, like many other countries, Pakistan has been keen in striving hard to strengthen and solidify its criminal justice response to terrorism, it is still far away from any visible success in the fight against terrorism. The definition of 'terrorism' remains as much a challenge for Pakistan as it is for any other country; indeed, the challenge is of a global nature. The analysis in this chapter has established that perhaps the policy and law makers need to set the response in a direction that helps ensure the fulfilment of the principle of legality. Like other countries, such as, Australia and the UK, Pakistan may seriously consider putting in place a free and independent mechanism for effective review of its anti-terror legislation. Of great significance is also the role of the courts, particularly, the higher courts to put a strict interpretation of the ATA so as to effectively prevent its misuse and abuse.

⁵⁶ Security Council Press Release, SC/8214, dated 08 Oct. 2004, <http://www.un.org/press/en/2004/sc8214.doc.htm> (accessed 30 Jan 15).

⁵⁷ RSIL 2013 at 8.

Chapter 5

Conclusion

The main purpose of this work was to critically study the legal definition of ‘terrorism’ enunciated in the 1997 ATA, including all amendments till date. The objectives of the work and key issues selected for investigation have been described in chapter 1. Being in the nature of a desk-based study, it followed a qualitative approach drawing on analytical, critical, prescriptive and investigative techniques. The study investigated the definitional issue from the perspective of international, regional and national anti-terrorism regimes and the problems faced in developing an effective definition of ‘terrorism’. The efforts of the international community, particularly at the UN and the EU and SAARC organizations at the regional level to define ‘terrorism’ were studied and analyzed in a critical fashion. National laws of selected common law countries—UK, India and Australia—were also studied, using the principle of legality as a prescriptive tool to ascertain if the definitions enunciated in the laws of these countries could be judged as appropriate (chapter 3). This helped create a background for an in-depth study of the definition offered in Pakistan’s ATA (chapter 4). The study traced the history of Pakistan’s anti-terrorism laws, particularly the geo-political dynamics for the introduction of the 1997 ATA. It then studied the definitional issue in greater details, reflecting on the amendments made since 1998 till 2013, applied the principle of legality to the current definition in light of the jurisprudence developed by Pakistan’s Supreme Court. The study, however, did not attempt to propose a definition of its own. Though its findings may influence any attempt to define ‘terrorism’ in Pakistan.

The study has found that failure of the international efforts to offer a consensus definition could be seen in different perspectives. First, terrorism is not an ordinary crime. It is an organized crime. It is political in nature. A crime of political nature is non-extraditable in international law. Recently, terrorism, as a political crime has been removed from the list of non-extraditable crimes. Because of its political nature, terrorism is so complex a phenomenon that it is used, and supported, as a pretext for social and political change, particularly when it appears that the normal course for such change is either not adopted or thought not workable. As seen in chapter 3, a rebel group during the French Revolution resorted to it as a means to achieve what they called justice. The Jews used it as a cudgel to carve out a Zionist state. The US propped it up to bleed Russia in Afghanistan. So goes the statement: one man’s terrorist is another man’s freedom fighter. This complex nature of terrorism has a negative impact on international law as the states have been pursuing their political interest rather than genuinely struggling for peace and justice. Second, on the legal side, there is a growing scholarly inquiry whether ‘terrorism’ is recognized as a crime in (both customary and formal) international law. The process of customary

international law is complex normatively as well as practically. In formal international law, consensus is usually guided by the political interests of the states generally and hegemonic role of powerful states, particularly. The political interests also shrouded in some cases in hegemonic designs force states to follow a double standard policy. This requires a policy change.

Third, the most telling impact of the absence of a consensus on internationally acceptable definition is that the states have to pursue anti-terrorism policies and enforce anti-terrorism laws on their own. In the absence of an international definition, the states feel free to define 'terrorism' in a manner that best suits to their domestic political and security environment and, in some respects, regional security concerns. The state has a primary obligation to ensure that its anti-terrorism laws fulfil the principle of legality and human rights standards. Chapters 3 and 4 have established that even in developed countries like the UK and Australia, the definition of 'terrorism' are found to be not satisfactory on the criteria of the principle of legality and human rights standards. However, as compared to those countries, in developing countries like India and Pakistan, the misuse and abuse of the offence of 'terrorism' is more rampant and serious.

Fourth, the definition of 'terrorism' in Pakistan's ATA is imprecise, overbroad and inconsistent with other jurisdictions. There is evidence that the law has been causing human rights abuses. While terrorism as an organized crime requires extraordinary criminal justice response, there is a growing international concern about consideration for human rights standards. The guidelines issued by the 2006 UN Global Counter-Terrorism Strategy may be followed at the national level. Section 6 of the ATA may be suitably amended to bring about clarity and ensure that the definition is not applied for the purpose not intended by the law. This may help the courts while interpreting the definition. But the courts themselves have to realize that being a criminal law, the ATA may be construed strictly. Last, but not the least, a meaningful independent review mechanism would further help ensure safeguard against the abuse and misuse of the law, on the one side, and a regular review of the promise and pitfalls of the law, on the other.

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