THE STATUS OF THE PROHIBITION OF TERRORISM IN INTERNATIONAL LAW: RECENT DEVELOPMENTS

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ABSTRACT

This Note examines and assesses recent developments in the jurisprudence of the prohibition of terrorism in international law. Although the lack of consensus on a definition has long inhibited the emergence of a comprehensive universal norm in international law, key decisions by the Special Tribunal for Lebanon (STL) in 2011, the French Court of Cassation that same year, and the England Court of Appeal (invoking the STL judgment in 2012) indicate the crystallization of an international crime of terrorism in customary international law. From this baseline, this Note considers whether the prohibition against terrorism satisfies the elements of a norm belonging to jus cogens *as per the formal source of peremptory norms delineated in the Vienna Convention on the Law of Treaties. Finding that it does, this Note then assesses the legal effects of* jus cogens *arising from the prohibition against terrorism as evidence corroborating the emergence of a peremptory norm.*

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I. INTRODUCTION

Terrorism is a tactic that—in both war and peace—shocks the conscience of humanity. It has been suggested that terrorism "is a term without legal significance," because it is merely "shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned."[1] On the contrary, however, terrorism has emerged in international law as a term of great legal import. It has been observed that "terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis*—an enemy of all mankind."[2] This language, from the U.S. District Court for the District of Columbia,[3] is evocative of the doctrine of *jus cogens*, which constitutes norms accepted and recognized by the international community of states as a whole from which no derogation is permitted.[4] Norms belonging to this category—such as the prohibitions of slavery, genocide, and torture—reflect the universal condemnation by the international community of certain definable categories of acts, and implicate particular legal consequences.[5] This Note explores the status of the prohibition of terrorism in international law and the extent to which it has emerged as a freestanding peremptory norm of international law, separate and apart from any armed conflict.

To identify peremptory norms, the International Law Commission (ILC) proposed looking to "State practice and in the jurisprudence of

1. Rosalyn Higgins, *The General International Law of Terrorism*, *in* TERRORISM AND INTERNATIONAL LAW 13, 13-28 (Rosalyn Higgins & Maurice Flory eds., 2003).

2. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998).

3. *Id.*

4. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

5. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5, 1970).

international tribunals."[6] Following that guidance, this Note focuses on the emergence of a norm of customary international law prohibiting terrorism, and international judicial opinion indicating that this norm belongs to *jus cogens*. While the *jus cogens* status of a norm is a function of its subject matter, confirmation of the existence of a peremptory norm by international judicial organs provides the most authoritative indication of its emergence. Determining the extent to which the prohibition of terrorism carries with it legal effects peculiar to *jus cogens* will reinforce or weaken evidence in customary international law and international judicial opinion that the norm belongs to *jus cogens*. This methodology informs the focus of this Note.

Section II of this Note presents a brief history of the prohibition against terrorism in international law. Section III assesses U.S. jurisprudence in the D.C. and Second Circuit Courts of Appeals to highlight the perils of uncertainty with respect to the legal status of terrorism. Section IV contemplates the crystallization of terrorism as an international crime under customary international law. The final section, Section V, considers the emergence of this crime in the context of the formal source of peremptory norms under Article 53 of the Vienna Convention on the Law of Treaties and considers the extent to which the legal effects of peremptory norms are evidenced in the contemporary law of terrorism. Finally, this note concludes with some final thoughts on the international crime of terrorism.

II. Definitions of Terrorism in International Law

The international community has historically struggled to articulate a common definition of terrorism. In 1937, the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism, to which was annexed a Convention for the Creation of an International Criminal Court with jurisdiction over individuals for crimes of terrorism.[7] The inability of states to reach an agreement on a definition of terrorism prevented the Convention from entering into force and has stifled subsequent efforts to draft a comprehensive

6. *Documents of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 248, ¶ 3, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (Commentary to Draft Article 50 on the Law of Treaties).

7. Convention for the Prevention and Punishment of Terrorism, League of Nations Doc. C.546(I).M383(I) 1937 V (1938); *see also id.*, Annex art. 1.

international convention on the prohibition of terrorism.[8] This definitional issue prevented inclusion of the crime of terrorism in the Rome Statute, which established the International Criminal Court and the crimes of genocide, crimes against humanity, war crimes, and aggression as falling within its competence.[9] While these impediments have not been absolute, the historic absence of a common definition is reflected in the disparate criminalization of terrorism in three domains: domestic law, the law of war, and international law.

A. *The Domestic Crime of International Terrorism*

Virtually every nation in the world has adopted domestic legislation criminalizing international terrorism.[10] This practice has been viewed as indicative of the "international criminalization of terrorism," a crime that generally constitutes three elements under domestic law: (1) an illegal violent act, (2) intended to terrorize or coerce, (3) of an international nature.[11] U.S. law exemplifies this trend, defining "international terrorism" as activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended-
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> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

8. *See* Robert Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law*, 50 REVUE HELLENIQUE DE DROIT INT'L 43, 48-58, 70 (1997).

9. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, G.A. Res. E, Annex 1, U.N. Doc. A/CONF.183/10 (July 17, 1998) ("[N]o generally acceptable definition of the crime[] of terrorism . . . could be agreed upon for the inclusion, within the jurisdiction of the Court.").

10. *See Terror Legislation Database*, UNITED NATIONS OFFICE OF DRUGS AND CRIME, https://www.unodc.org/tldb (last updated 2013).

11. *See* Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 92 n.156 (Special Trib. for Leb. Feb. 16, 2011), 145 I.L.R. 232 (2012) [hereinafter STL Interlocutory Decision].

> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[12]

Under the U.S. Code, domestic terrorism is defined in identical terms, with the exception of a "locus" element, (C), which is substituted with the qualification that the acts in question "occur primarily within the territorial jurisdiction of the United States."[13] Under such a definition, the *actus reus* and *mens rea* of terrorism are constant in terrorism of either a domestic or international nature. These elements of the crime of international terrorism in U.S. law, which are representative of domestic law provisions more broadly,[14] illustrate the domestic approach to criminalizing international terrorism.

B. *The War Crime of Terrorism*

The international law of war prohibits terrorism as a specific protection of civilians in times of armed conflict. Terrorism is prohibited under the Geneva Conventions,[15] and is defined as a war crime within the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR)[16] and the Special Court for Sierra Leone (SCSL).[17] Although not expressly defined in the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICTY prosecuted terrorism as a war crime; a "specific prohibition within the general

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12. 18 U.S.C. § 2331(1) (2001).

13. 18 U.S.C. § 2331(5) (2001).

14. STL Interlocutory Decision, *supra* note 11, at ¶ 92 n. 156.

15. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(2), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13(2), 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

16. S.C. Res. 955 art. 4, U.N. Doc. S/RES/955 (Nov. 8, 1994) (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II).

17. Agreement for and Statute of the Special Court for Sierra Leone art. 3, U.N. S.C.O.R., U.N. Doc. S/2002/246 appended to letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council (adopted Jan. 16, 2002) (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II).

prohibition of attack on civilians."[18] In *Prosecutor v. Galić*, the ICTY Trial Chamber convicted Stanislav Galić, commander of Serbian forces that carried out a protracted sniping and bombing campaign on the city of Sarajevo,[19] of the war crime of terrorism.[20] The Trial Chamber distilled the elements of the crime of terrorism as:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[21]

On appeal, the Appeals Chamber was required to determine whether or not terrorism had emerged in customary international law as an international crime with sufficient precision to uphold Galić's conviction.[22] The Appeals Chamber determined that the prohibition of terrorism enshrined in the Additional Protocols to the Geneva Conventions belongs to customary international law,[23] that this prohibition imposes individual criminal liability as per the standard set out in the *Prosecutor v. Tadić* Jurisdiction Decision,[24] and endorsed the elements

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18. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

19. Prosecutor v. Galić, Case No. IT-98-29-I, Indictment, ¶¶ 1-5 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 26, 1999).

20. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 769 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (Count 1).

21. *Id.* at ¶ 133.

22. *Galić*, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 79. The Trial Chamber did not find it necessary to reach this question. *See Galić*, Case No. IT-98-29-T, Judgment, ¶ 138.

23. *Galic*, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 90.

24. *Id.* ¶ 98. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (finding that, in order to constitute a violation of international humanitarian law subject to Article 3 of the ICTY Statute, an offence must (1) constitute a violation of a rule of international humanitarian law, (2) the rule must, *inter alia*, belong to conventional or customary international law, (3) the violation must be "serious," and (4) such violation must entail individual criminal responsibility under conventional or customary international law).

applied by the Trial Chamber.[25] The Appeals Chamber further affirmed the Trial Chamber's conclusion that the *mens rea* of the crime of terrorism is the specific intent to spread terror among the civilian population by threats or acts of violence.[26] Finding that Galić satisfied these elements and was on sufficient notice at the trial level of these elements of the war crime of terrorism, the Appeals Chamber sustained the conviction.[27] In its decision, the Trial Chamber went so far as to postulate that the prohibition against terrorism constitutes "a peremptory norm of customary international law."[28]

C. *The International Crime of Terrorism*

In the absence of a comprehensive convention addressing international terrorism,[29] fourteen multilateral "sectoral" conventions have been concluded regarding specific acts of terrorism.[30] In addition,

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25. *Galić*, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

26. *Id.* at ¶ 104.

27. *Id.* at ¶ 109.

28. *Galić*, Case No. IT-98-29-T, Judgment, ¶ 98.

29. *But see* U.N. Working Group of the Sixth Committee, Report of the Working Group on Measures to Eliminate International Terrorism, Annex I.B, Informal Text of Article 2, U.N. Doc. A/C.6/56/L.9 (Oct. 29, 2001).

30. International Convention for the Suppression of Acts of Nuclear Terrorism, *opened for signature* Apr. 13, 2005, 2445 U.N.T.S. 89 (entered into force July 7, 2007); International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002); International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1997, 2149 U.N.T.S. 256 (entered into force May 23, 2001); Convention on the Safety of United Nations and Associated Personnel, *opened for signature* Dec. 15, 1994, 2051 U.N.T.S. 363 (entered into force Jan. 15, 1999); Convention on the Marking of Plastic Explosives for the Purpose of Detection, *opened for signature* Mar. 1, 1991, I.C.A.O. Doc. 9571 (entered into force June 21, 1998); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *opened for signature* Feb. 24, 1988, I.C.A.O. Doc. 9518 (entered into force Aug. 6, 1989); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 304 (entered into force Mar. 1, 1992); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (entered into force Mar. 1, 1992); Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 101 (entered into force Feb. 8, 1987); International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977); Convention for the

every region of the world has concluded a multilateral treaty combatting terrorism.[31] The definition of international terrorism found in the International Convention for the Suppression of the Financing of Terrorism (1999), ratified by 179 States at the time of writing, has been adopted as an authoritative definition of international terrorism.[32] That convention defines terrorism as any:

> act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to

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Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971); Convention on Offences and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969).

31. Association of South East Asian Nations, ASEAN Convention on Counter Terrorism, *opened for signature* May 27, 2011; Council of Europe, Convention on the Prevention of Terrorism, *opened for signature* May 16, 2005, C.E.T.S. No. 196 (entered into force June 1, 2007); South Asian Association for Regional Cooperation, Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism Convention, *opened for signature* Jan. 4, 2004, SAARC/SUMMIT.12/SC.29/27, Annex-III (entered into force Jan. 12, 2006); Organization of the African Union, Protocol to the OAU Convention on the Prevention and Combating of Terrorism, July 8, 2004; European Union, Protocol Amending the European Convention on the Suppression of Terrorism, *opened for signature* May 15, 2003, C.E.T.S. No. 190; Council Framework Decision 2002/475 on Combating Terrorism, 2002 O.J. (L 164) 3 (EC); Organization of American States, Inter-American Convention Against Terrorism, June 3, 2002, AG/RES. 1840 (XXXII-O/02); Organization of the Islamic Conference, Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, Annex to Resolution No. 59/26-P; Organization of African Unity, OAU Convention on the Prevention and Combating of Terrorism, June 14, 1999; Commonwealth of Independent States, Treaty on Cooperation among States members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999; League of Arab States, The Arab Convention on the Suppression of Terrorism, Apr. 22, 1998; South Asian Association for Regional Cooperation, SAARC Regional Convention on Suppression of Terrorism, *opened for signature* Nov. 4, 1987 (entered into force Aug. 22, 1988); European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, C.E.T.S. No. 090 (entered into force Aug. 4, 1978); Organization of American States, Convention to Prevent and Punish Acts of Terrorism taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, O.A.S.T.S. No. 37.

32. *See, e.g.*, Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 (Can.) ¶¶ 96-98.

> compel a government or an international organization to do or to abstain from doing any act.[33]

The 1999 Convention definition contains elements of the wartime and peacetime definitions of terrorism. The definition retains the civilian element embodying the humanitarian law principle of distinction between civilians and combatants, and omits the international nature element, while broadening the *mens rea* element to include intimidation and coercion of a range of actors. As discussed below, combining the domestic and war crimes definitions of terrorism to form an international standard risks obscuring the two distinct functions served; for example, this definition forecloses any non-civilian protection against terrorism.[34] In the context of recent jurisprudence, it is unclear that the common conventional definition of the crime of terrorism adequately expresses the international crime of terrorism, suggesting that the proliferation of treaty law on the subject has been insufficient to alleviate the definitional issue.[35]

III. U.S. Jurisprudence and the Problem of Uncertainty

The direct effect of distinct, and to some extent competing, definitions of the crime of terrorism in international law has resulted in inconsistent precedent in the prosecution of terrorism. This Section briefly considers recent U.S. jurisprudence in the D.C. and Second Circuits to illustrate the difficulties arising from the absence of an established definition of terrorism in customary international law.

A. *The D.C. Circuit*

In *Tel-Oren v. Libyan Arab Republic* (1984), the D.C. Circuit ruled on an Alien Tort Statute (ATS) claim brought by survivors and representatives of victims of an armed attack on civilian buses in Israel by Palestinian Liberation Organization "terrorists."[36] The three-judge panel of the Circuit unanimously dismissed the suit in large part due to disharmony over the definition of terrorism as a crime under interna-

33. International Convention for the Suppression of the Financing of Terrorism art. 2(1)(b), *opened for signature* Dec. 10, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

34. *See infra* Section IV.B.

35. *See infra* Section IV.

36. Tel–Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

tional law.[37] Judge Edwards, in considering whether terrorism is a violation of the law of nations, concluded that uncertainty in the law of nations precluded finding that the act violated international law, "no matter how repugnant it might be to our legal system."[38] Judge Bork similarly observed that the appellant's claim of violation of a customary principle prohibiting terrorism "concerns an area of international law in which there is little or no consensus," and that "no consensus has developed on how to properly define 'terrorism' generally."[39]

The D.C. Circuit revisited the enforceability of the international law prohibition against terrorism in *United States v. Yunis* (1991), where the court contemplated jurisdiction over an individual for sabotage of an aircraft with an explosive device.[40] The district court relied in part on the Restatement (Third) of Foreign Relations Law to assert jurisdiction, which indicates that "attacks on or hijacking of aircraft . . . and perhaps certain acts of terrorism" are subject to the exercise of universal jurisdiction.[41] The court concluded that "aircraft hijacking may well be one of the few crimes clearly condemned under the law of nations [over which] states may assert universal jurisdiction to bring offenders to justice . . . ."[42] In this instance, the D.C. Circuit recognized an international crime not encompassing terrorism generally, but instead, narrowly including a specific offence that itself constitutes a form of terrorism.

In *Flatow v. Islamic Republic of Iran* (1998), the U.S. District Court for the District of Columbia considered the international prohibition against terrorism.[43] The suit was brought against Iran by the estate of an American university student who was killed by a suicide bomber on a tourist bus in Israel.[44] Judge Lamberth observed the difficulty in establishing "a fixed, universally accepted definition of international terrorism" due to "changes in terrorist methodology and the lack of any precise definition of the term 'terrorism'."[45] Nevertheless, the court determined that "terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist

37. *Id.*

38. *Id.* at 795-96 (Edwards, J., concurring).

39. *Id.* at 806 (Bork, J., concurring).

40. United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

41. *Id.* at 1091 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)).

42. *Id.* at 1092.

43. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

44. *Id.* at 6-8.

45. *Id.* at 17.

is the modern era's *hosti humani generis*—an enemy of all mankind."[46] Consequently, the court concluded that fair play and substantial justice would be served by exercising jurisdiction over a foreign state sponsor of terrorism.[47] Arguably, this holding marks a departure from the D.C. Circuit's finding in *Tel-Oren* rendered more than a decade earlier and a step beyond the D.C. Circuit's *Yunis* decision, reflecting crystallization of the prohibition of terrorism in international law.[48]

B. *The Second Circuit*

Five years after the *Flatow* decision, the Second Circuit, in *United States v. Yousef*, considered appeals by three defendants from convictions of terrorism in cases concerning a conspiracy to bomb commercial airliners and involvement in the 1993 World Trade Center bombings in New York.[49] The Second Circuit rejected the imposition of universal jurisdiction by the Southern District of New York, concluding that customary international law does not provide for such prosecution "in part due to the failure of States to achieve anything like consensus on the definition of terrorism."[50] Therefore, relying in part on *Tel-Oren*, the Second Circuit concluded that the "indefinite category of 'terrorism' is not subject to universal jurisdiction."[51] To uphold the convictions, the Second Circuit set aside the term "terrorism" and determined that the conduct in question by Yousef in particular was proscribed by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and its implementing legislation, sustaining prosecution and conviction pursuant to U.S. treaty obligations, domestic law, and the protective principle of jurisdiction.[52]

Two years later, in *Almog v. Arab Bank* (2007), the U.S. District Court for the Eastern District of New York ruled on a claim brought under the ATS and Anti-Terrorism Act (ATA) by victims and survivors of terrorist attacks in Israel against a Jordanian bank alleged to have knowingly provided services to a terrorist organization.[53] Arab Bank sought in part

46. *Id.* at 23.

47. *Id.*

48. *Compare* Flatow, 999 F. Supp. at 23, *with Tel–Oren*, 726 F.2d at 775, *and Yunis*, 924 F.2d at 1086.

49. United States v. Yousef, 327 F.3d 56, 77-78 (2d Cir. 2003).

50. *Id.* at 97-98.

51. *Id.* at 103-08.

52. *Id.* at 97-98.

53. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 262, 276-77 (E.D.N.Y. 2007).

to deflect these charges due to the lack of consensus over the meaning of "terrorism" in international law, citing *Yousef* to support the proposition.[54] The court sidestepped the definitional issue, finding that although the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism refer to acts such as suicide bombing as "terrorism," "the pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled."[55] Citing a series of ATS cases, the court concluded that "the specific conduct alleged—organized, suicide bombings and other murderous attacks on innocent civilians intended to intimidate or coerce a civilian population—are universally condemned."[56] To reach this conclusion, the court had to effectively abandon any norm prohibiting terrorism and, in a manner mirroring the fourteen multilateral conventions addressing terrorism,[57] considered the specific terrorist act in question apart from a more general norm.

A brief gloss of the jurisprudence of the D.C. and Second Circuits is illustrative of the prosecutorial inconsistency arising from the absence of a common international legal standard by which to define terrorism. Instead of firmly establishing an international norm prohibiting terrorism, the alternative criminalization of terrorism over three decades across domestic, humanitarian, and public international law sowed confusion into the emergence of an international norm enabling the prosecution of the crime. Three recent cases signal the emergence of a prohibition of terrorism in customary international law. The following sections consider those cases, and the implications of an international norm prohibiting terrorism.

IV. Toward an International Crime under Customary International Law

Two recent judgments suggest the crystallization of a customary international law norm prohibiting terrorism. The first, issued in 2011 by Judge Antonio Cassese as President of the Special Tribunal for Lebanon, established a clear legal foundation for the international crime of terrorism in customary international law. The second, by the Court of Appeal of England, adopts the STL decision and applies the

54. *Id.* at 280.
55. *Id.*
56. *Id.* at 281.
57. *See supra* note 30.

norm in such a way as to elucidate the interaction between the three post-2011 definitions of terrorism discussed in Section I. A third judgment, issued in the interim by the French Court of Cassation, suggests that this norm belongs to *jus cogens*.

A. *Interlocutory Decision on the Applicable Law* [*STL 2011*]

The United Nations Security Council established the Special Tribunal for Lebanon (STL) under its Chapter VII authority in 2007 to prosecute those responsible for the 2005 bombings that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others.[58] The Tribunal's "principal *raison d'etre*" was "the crime of terrorism."[59] While the Tribunal was to apply provisions of the Lebanese Criminal Code, the STL found it necessary in its 2011 Interlocutory Decision on the Applicable Law to look to international conventional and customary law for "guidance to the Tribunal's interpretation of the Lebanese Criminal Code."[60] Following a comprehensive examination of treaties, U.N. resolutions, and state practice, the Appeals Chamber concluded that "a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged."[61]

The Appeals Chamber, in determining the emergence of this customary norm, looked appropriately to the elements of *opinio juris* and state practice to substantiate its conclusion.[62] Interestingly, the judgment reflects the contemporary shift in the doctrine of the elements of customary international law, which had historically emphasized the "constant and uniform" state practice as a sort of aggregation reflecting a supposed belief in law.[63] In this classical sense, custom emerges as the product of a "mistaken belief."[64] Instead, the Tribunal identified "a belief of States that the punishment of terrorism responds to a social

58. S.C. Res. 1757, para. 1, U.N. Doc. S/RES/1757, at 2 (May 30, 2007).

59. STL Interlocutory Decision, *supra* note 11, ¶ 42

60. *Id.* ¶¶ 44-45.

61. *See id.* ¶¶ 29-89 (especially ¶ 85).

62. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27) ("The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.").

63. *Cf.* Colombian-Peruvian Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20); Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131, 138 (Dec. 18); North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, 41 ("Custom practically emerges through evidence of 'constant and uniform usage' reflecting general conviction accepted as law.").

64. Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15:3 EUR. J. INT'L L. 523, 534 (2004).

necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*),"[65] a conclusion evidenced by state practice. This formulation places *opinio juris* logically before state practice and suggests that social need is at the core of customary international law, which forms a rule that is evidenced by the practice of states. That the STL employed this methodology with respect to the elements of customary international law marks the culmination of a decades-long doctrinal shift that has particular implications for the status of the norm in international law.

Following a survey of state practice evidencing *opinio juris* across the three domains assessed in Section II of this Note—domestic, humanitarian, and international law—the STL concluded that state practice evidencing *opinio juris sive necessitatis* "share[s] a core concept: terrorism is a criminal action that aims at spreading terror or coercing governmental authorities and is a threat to the stability of society or the State."[66] To aid its assessment of *opinio juris*, the STL looked to a series of national judicial opinions—from Italy,[67] Mexico,[68] Argentina,[69] and the United States[70]—which, over the past decade, pronounced on the emergence of a customary rule prohibiting terrorism.[71] It concluded that, in such instances, "courts thereby intend to apply at the domestic level a notion that is commonly accepted at the international level," thus evidencing the element of *opinio juris*.[72] Judge Cassese dedicated a portion of his analysis to domestic state practice, which is not necessarily expressive of the *opinio juris sive necessitatis* of states in the collective sense defined by the STL.[73] State practice that contributes to the emergence of customary international law must not merely be incidental, but instead, derive from (and evidence) the common *opinio juris* in

65. STL Interlocutory Decision, *supra* note 11, ¶ 102.

66. *Id.* ¶ 97.

67. *Id.* ¶ 86 n. 133 (citing Italy v. Abdelaziz & ors, Final Appeal Judgment, No. 1072; I.L.D.C. 559 (IT 2007) (referring to "customary international rule").

68. *Id.*

69. *Id.* (citing Enrique Lautaro Arancibia Clavel Case, No. 259, Arg., Supreme Court, 24 Aug. 2004, 51-52 (¶¶ 21-22, Boggiano, J., concurring)).

70. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

71. STL Interlocutory Decision, *supra* note 11 ¶ 86 n.133.

72. *Id.* ¶ 100.

73. *Id.* ¶¶ 86-87, 93-99 (State practice contributing to the crystallization of customary international law must arise from *opinio juris sive necessitatis*, and state practice not arising from such *opinio* does not contribute to the formation of customary international law. Therefore assessing state practice in isolation is not necessarily indicative of customary international law.).

question.[74] For this reason, as acknowledged by the STL,[75] state practice in international fora is superior evidence of *opinio juris*, as compared with the potentially incidental convergence of domestic practice; this recognition was reflected in the Appeals Chamber's reasoning.[76] The extent to which domestic State practice—not necessarily expressive of the *opinio juris* of states—was nevertheless relied upon to articulate a definition of terrorism under customary international law appears to sustain, rather than undermine, the Tribunals disposition.

The STL applied the test set out by the ICTY in *Tadić* to determine that individual criminal liability attaches to the customary norm prohibiting terrorism.[77] The Appeals Chamber set forth a standard that will become especially relevant in the context of *jus cogens* below:

> To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime.[78]

The Tribunal found sufficient evidence in the practice of states to indicate the intent to *criminalize* terrorism.[79] As an international crime, which imposes duties upon the individual as a matter of international law, such conduct imposes obligations upon the State to enforce the norm through prevention and punishment at the domestic level.[80] The crime of terrorism under customary international law, according to the tribunal, contains three elements:

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74. *See, e.g.*, Colombian-Peruvian Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20).

75. STL Interlocutory Decision, *supra* note 11, ¶ 87.

76. *Id.* ¶¶ 88-92.

77. *Id.* ¶ 103 (quoting Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (Element iv: "the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.")).

78. STL Interlocutory Decision, *supra* note 11, ¶ 91.

79. *See id.* ¶¶ 128-37.

80. *Id.* ¶ 105.

> (i) the perpetration of a criminal act . . . or threatening such an act;
> (ii) the intent to spread fear among the population . . . 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.[81]

The criminal elements set out by the Interlocutory Decision closely track the elements common to the domestic criminalization of international terrorism.[82] Like the definitions of domestic and international terrorism common to domestic legal orders—as exemplified in the U.S. Code—the STL observed that the first two elements are common to both international and domestic terrorism (which are distinguished by the third "locus" element), and therefore a distinction in the third element "does not detract from the essential communality of the concept of terrorism in international and domestic criminal law."[83] This suggests that terrorism generally is prohibited as a crime under international law, rendering the third element a distinguishing feature without a difference with respect to the *actus reus* and *mens rea* elements of the crime.

The STL's omission of certain elements from this depiction of the international crime of terrorism warrants special mention. Although the "political purpose" element has been included by both the Policy Working Group on the U.N. and Terrorism,[84] and academic literature,[85] the STL considered the element to be insufficiently expressed in state practice to "rise to the level of customary law."[86] Moreover, as a general and universal crime, the international prohibition against terrorism appears to reject any exception for "freedom fighters," rendering states adhering to such an exception either "persistent objectors,"[87] or in breach of certain international obliga-

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81. *Id.* ¶ 85.

82. *See supra* Section II.

83. STL Interlocutory Decision, *supra* note 11, ¶¶ 89-90.

84. U.N. Report of the Policy Working Group on the U.N. and Terrorism, ¶ 13, U.N. Doc. A/57/273 (Annex), S/2002/875 (Aug. 6, 2002).

85. *See, e.g.*, Antonio Cassese, *Terrorism as an International Crime*, *in* INTERNATIONAL CRIMINAL LAW 162, 218 (Antonio Cassese ed., 2d ed. 2008).

86. STL Interlocutory Decision, *supra* note 11, ¶ 106.

87. Persistent objection is the theory according to which a state might evade customary legal obligation by consistent denunciation; the theory is not, however, applicable to norms belonging to *jus cogens*. *See, e.g.*, Yoram Dinstein, *The Interaction Between Customary International Law and*

tions.[88] This reflects the idea that "[a] definition of terrorism that admits justification or excuse has missed the core of what makes terrorism a forbidden act."[89] Indeed, international law has grappled with the identification of an objective standard of the crime of terrorism, and elements of political motive (which would otherwise enable subjective exception) appear in fundamental contradiction to an objective norm. Notwithstanding the classification of terrorism as a war crime by the ICTY and SCSL, the Tribunal determined that the customary norm—a peacetime prohibition—was at best "incipient (*in statu nascendi*) with respect to its application in times of armed conflict,"[90] an exception confronted by the England Court of Appeals in its application of the STL Judgment.

B. *Regina v. Gul* [*England Court of Appeal 2012*]

The year after the STL issued its Interlocutory Decision, the England Court of Appeal adopted the Tribunal's conclusion of a customary international law norm prohibiting terrorism, and contemplated the application of this norm to armed conflict.[91] The case, *Regina v. Gul*, concerned a Libyan-born citizen of Britain who uploaded videos to the Internet that included scenes of insurgent attacks on Coalition forces in Iraq and Afghanistan, "accompanied by praise for and encouragement of such attacks."[92] Gul was convicted of disseminating terrorist publications under the United Kingdom's amended 2000 Terrorism Act and sentenced to five years in prison.[93] Gul appealed the conviction and the sentence in part on the basis that the definition of terrorism under international law "excluded those engaged in an armed struggle against a government who attacked the armed forces of that government," and that this position was supported by the distinction between

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Treaties, 322 RECUEIL DES COURS 285-87 (2007); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 276, 284-90 (1993); Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 19 n.81 (1985).

88. STL Interlocutory Decision, *supra* note 11, ¶ 110. This "freedom fighter exception" appears to have been the principal source of tension in the emergence of a general crime of terrorism. *See, e.g.*, Cassese, *supra* note 85, at 214.

89. *See* BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 69-128 (2006).

90. STL Interlocutory Decision, *supra* note 11, ¶¶ 106-09.

91. Regina v. Gul, [2012] EWCA Crim 280 (appeal taken from Eng.), 152 I.L.R. 568 (2012) [hereinafter Regina v. Gul].

92. *Id.*

93. *Id.* ¶ 5 (citing Terrorism Act, 2006 (Eng.)).

civilians and military personnel in the war crime of terrorism under international humanitarian law.[94] In this sense, Gul sought shelter from the customary norm articulated by the STL by invoking the *in statu nascendi* (in the state of being born) character of its application to armed conflict. The case turned not on the extraterritorial application of the U.K. statute, nor the status of the armed conflicts in Iraq and Afghanistan, but instead, on the development of the international crime of terrorism and its application to armed conflict.

Citing the 2011 STL Decision, the Court of Appeal concluded that "[i]t was common ground that international law has developed so that there is an international crime of terrorism at least in time of peace . . . ."[95] While there was "no doubt" of this norm, the Court of Appeal repeated the hesitation by the STL in its finding that "customary law has not yet developed so as to make such attacks on civilians in time of armed conflict the international crime of terrorism."[96] Without comment on the soundness of this conclusion, the Court of Appeal emphasized the broader question at issue in its case: "whether, under international law, the definition of terrorism under customary international law has developed so that an attack by insurgents on military forces of a government is not terrorism."[97] The court therefore looked not to the limits of prohibition of terrorism, but instead, to the emergence of a parallel exception to the norm that would exempt certain acts—otherwise satisfying the elements of terrorism—from the scope of the international crime.[98] In effect, the prohibition against terrorism as applied to the case was reframed, shifting the inquiry away from the applicability of the prohibition of terrorism to armed conflict (which the court conceded was "incipient")—instead, the court considered whether customary international law provides a competing "freedom fighter" norm providing that the conduct in question *does not constitute* terrorism under international law.

The Court of Appeal addressed at length the interaction between the prohibition of terrorism as a war crime and the domestic-type definition of terrorism adopted by the STL, an interaction that had complicated the emergence of a comprehensive definition of terrorism under international law.[99] The court recalled in particular that, according to

94. *Id.* ¶ 27.
95. *Id.* ¶ 32-35.
96. *Id.* ¶ 36.
97. *Id.* ¶ 37.
98. *Id.* ¶¶ 38-41.
99. *See supra* Section II.

the law of armed conflict, terrorism is understood as violence directed at civilians, which is prohibited by extension of the general principle of distinction between civilians and combatants.[100] This principle of distinction raises the very real question of whether attacks on military forces constitute terrorism by application of the customary norm to armed conflict. It is precisely in this sense that a "freedom fighter" exception would exempt certain irregular non-state "combatants" in armed conflict who target military forces consistent with the principles of international humanitarian law as lawful, while attacks on civilians by such actors would constitute terrorism but not the war crime of terrorism because those actors would not be bound by the law of armed conflict.[101] This issue warrants parsing. Because the law of armed conflict permits the use of force between combatants mutually bound by the law of war, violent conduct not illegal in the context of armed conflict would therefore fall outside the scope of the first element of the international crime of terrorism, rendering the norm inapplicable and leaving an illegal space of violence directed at civilians that is defined and prohibited by the international humanitarian law prohibition of terrorism. However, as persons not qualifying as combatants do not enjoy the former exemption,[102] the Court of Appeal was essentially left to determine whether a separate exception applied to those engaged in armed hostilities whose actions would consequently fall within the scope of the international crime terrorism because their use of force would not be made "legal" by the law of war.

The England Court of Appeal determined that state practice and *opinio juris* had not established an exception for insurgent attacks on government forces from the definition of terrorism.[103] By the framing of the question presented—considering the emergence of a contrary norm rather than the reach of the general norm—the court exploited the tension confronted by the STL when considering the application of the customary norm against terrorism to protect armed forces during armed conflict. That is, faced with uncertainty whether the definition of terrorism includes certain insurgent attacks during armed conflict,

100. Regina v. Gul, *supra* note 91, ¶¶ 42-46.

101. *Id.* ¶ 45 (citing Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933 (2006)).

102. *See, e.g.*, Anthony P. V. Rogers & Paul Malherbe, INTERNATIONAL COMMITTEE OF THE RED CROSS MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES, ¶ 610 (1999) ("Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity.").

103. Regina v. Gul, *supra* note 91, ¶¶ 37, 47.

the court focused on the absence of a permissive "freedom fighter" norm instead of the outer boundary of a prohibitive "general" norm applicable in such instances. In so doing, the court relied on the uncertainty that had previously hampered the emergence of a customary norm against terrorism to find no exception to the "general" customary norm for "freedom fighters." Accordingly, the court was limited by no permissive international legal norm exempting insurgents from the international crime of terrorism during armed conflict in applying the U.K. Terrorism Act to such conduct.[104]

Universal application of the STL definition of terrorism, while providing clarity, is problematic. The breadth of the STL definition, when applied generally to non-international armed conflict, effectively forecloses the legality of the use of force by individuals not qualifying as combatants under the law of armed conflict.[105] The elements of the crime of terrorism set out by the STL reflect the elements common to the domestic criminalization of international terrorism,[106] a definition crafted to buttress state sovereignty. Consequently, any domestic uprising involving "the perpetration [or threat] of a criminal act," with "the intent to . . . directly or indirectly coerce a national . . . authority," where it "involves a transnational element," will fall within the scope of the international crime of terrorism.[107] While this consequence is an ostensibly positive development for the cause of international stability, the effect of such a broad definition and application of terrorism as an international crime automatically classes freedom fighters as terrorists, irrespective of their adherence to the law of armed conflict.[108] This underscores the rationale the behind support for a "freedom fighter" exception to the international crime of terrorism during armed conflict,[109] an allowance that might be achieved by recognizing specific defenses applicable to acts falling within the scope of the international crime of terrorism.[110] This latter option is of course foreclosed in the context of a *jus cogens* prohibition of terrorism, which by definition

104. *Id.* ¶¶ 48-50 (citing *The Case of the S.S. Lotus*, 1927 P.C.I.J. Series A, No. 10, 28 (providing, *inter alia*, what is not prohibited is permitted)).

105. *See, e.g.*, *supra* Section IV.B.

106. *Compare* STL Interlocutory Decision, *supra* note 11, ¶ 85, *with* Section I.

107. STL Interlocutory Decision, *supra* note 11, ¶ 85.

108. Armed conflict has traditionally called for a particular definition of terrorism. *See supra* Section I.B.

109. Regina v. Gul, *supra* note 91, ¶¶ 42-46.

110. *See* Aleksandar Marsavelski, *The Crime of Terrorism and the Right of Revolution in International Law*, 28 CONN. J. INT'L L. 243, 246 (2013).

would admit no derogation.[111] To the extent that the STL correctly interpreted the crystallization of the prohibition of terrorism under customary international law, this consequence may not be of *legal* concern, but its practical implications are potentially significant. As a matter of construction, it is far from clear that this broad application of the international crime of terrorism is desirable for the cause of human dignity, which the norm purports to advance. The impact of this effect on the application of the STL definition of the international crime of terrorism remains to be seen.

C. *Réunion Aérienne v. Libya* [*France Court of Cassation 2011*]

Just weeks after the STL issued its Interlocutory Decision, the French Court of Cassation considered limits to the jurisdictional immunity of a foreign State for failure to punish, and possibly for supporting, acts of terrorism.[112] The 2011 case, *Réunion Aérienne v. Socialist People's Libyan Arab Jamahiriya*, arose from the bombing over Niger of a French airliner traveling from Brazzaville to Paris on September 19, 1989, killing 170 people.[113] Six Libyan nationals were convicted *in absentia* by the Paris *Cour d'assises* in connection with the bombing and received life sentences.[114] The case in question concerned intervention in related civil proceedings by the insurance companies that had insured the French airliner and compensated victims of the bombing, in order to collect reimbursement from the six Libyan nationals and the Libyan State itself. Before the Court of Cassation, claimants challenged a 2009 judgment by the Court of Appeal, which held that the actions against Libya were inadmissible on the basis of the jurisdictional immunity of the State.[115]

While the Court of Cassation upheld the lower court's finding of State immunity for terrorism in accordance with contemporary jurispru-

111. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

112. Réunion Aérienne v. Socialist People's Libyan Arab Jamahiriya, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ, Mar. 9, 2011, Bull. Civ. II, No. 09-14743 (Fr.), 150 I.L.R. 630 (2012) [hereinafter, Réunion Aérienne].

113. *Id.* at 631.

114. *Id.*

115. *Id.* at 632. Both Claimants and the Court appear to conflate State responsibility for attribution of terrorist acts and State responsibility arising from the breach of obligations arising from peremptory norms (*erga omnes*) to prevent and punish such acts.

dence,[116] it was prepared to assume that the prohibition on acts of terrorism could be ranked as a *jus cogens* norm of international law.[117] In the translation of the decision provided by the International Court of Justice,[118] the Court of Cassation referred to "acts of terrorism" in broad terms not expressly linked to "certain" acts, such as the bombing of a civilian airliner at issue:

> Whereas, assuming that the prohibition on acts of terrorism can be ranked as a *jus cogens* norm of international law, which takes precedence over other rules of international law and can constitute a legitimate restriction on jurisdictional immunity, such a restriction would in this case be disproportionate in the light of the aim pursued, given that the proceedings against the foreign State are not founded on the commission of acts of terrorism but on its moral responsibility.[119]

As *Réunion Aérienne* presented an issue of the jurisdictional immunity of the State in the first instance, the Court of Cassation appears to have used the opportunity to contribute to the highly contested contemporary debate over the interaction between *jus cogens* and sovereign immunity by proposing a balancing test, though further discussion of this matter is beyond the scope of this Note.[120] The willingness of the Court of Cassation to assume the *jus cogens* status of the prohibition against terrorism in its terse, six-page decision supports the proposition that the emergence of the crime of terrorism in customary international law may belong to *jus cogens*. The observation reinforces acceptance of the concept of *jus cogens* by the French judiciary[121] and opens a

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116. *Id.* at 633-34. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 139 (Feb. 3).

117. *Réunion Aérienne, supra* note 112, at 634.

118. *Id.* at 635.

119. *Id.* at 634. This evidently follows because the case concerned Libya's failure to prosecute defendants rather than attribution of underlying acts in question to the Libyan state.

120. *See* Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶¶ 92-97 (Feb. 3) (denying an exception to the jurisdictional immunity of the state where *jus cogens* violations are at issue). *See also* Corte Costituzionale (Corte Cost.) (Constitutional Court), 22 Oct. 2014, n.238 (It.) (declaring legislation conforming to the 2012 I.C.J. Judgment unconstitutional).

121. *Compare* Lydienne X v. Prosecutor, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 19, 2013, Bull. crim., No. 12-81676 (Fr.), I.L.D.C. 2035, ¶¶ 10.4, 14 (2013) (recognizing that the prohibition of torture belongs to *jus cogens* and authorizing extra-territorial investigation), *with* AFP & PLO v. Alstom & Veolia, Cour d'appel [CA] [regional court of appeal]

dialogue concerning the status of the prohibition of terrorism in international law.

Jurisprudence of the international crime of terrorism indicates significant progress toward a workable definition of terrorism. The STL Interlocutory Decision and England Court of Appeal Decision in *Gul* mark a potential juncture in the crystallization of an international crime of terrorism under customary international law. The STL Judgment clearly articulated a prohibition of terrorism in customary international law, the violation of which constitutes an international crime imputing individual responsibility.[122] The invocation of the STL Judgment and its elements by the England Court of Appeal indicates early endorsement of the STL formulation as an expression of customary international law. The scope of application of the norm by the Court of Appeal—without exception in times of peace or war, which goes beyond the STL holding—raises potential problems as applied to what might otherwise be considered legitimate revolutionary action. Notwithstanding this potential issue, the three cases discussed above provide strong support for the crystallization of the prohibition of terrorism in customary international law. Just weeks after the STL issued its Interlocutory Decision, the French Court of Cassation released a decision assuming the *jus cogens* status of the prohibition of terrorism in international law. It is to this conclusion that the Note now turns.

V. A METHODOLOGY OF *JUS COGENS*

The final sections of this Note contemplate the status of the international norm prohibiting terrorism. Taking the reasoning of the England Court of Appeal as correct—that there is "no doubt" that the international crime of terrorism has emerged as customary international law[123]—this Note now considers the assumption by the French Court of Cassation that the prohibition of terrorism belongs to *jus cogens*. This Section looks first to the formal source of peremptory norms and then to the legal effects common to *jus cogens* that are evidenced by the prohibition against terrorism.

Versailles, 3e ch., Mar. 22, 2013, No. 11-05331 (Fr.), 52 I.L.M. 1161, 1181 (2013) ("The existence of a superior international public policy characterised as '*jus cogens*' to which the humanitarian rules invoked would belong and which should be mandatorily applied, is not established.").

122. STL Interlocutory Decision, *supra* note 11, ¶ 85.

123. Regina v. Gul, *supra* note 91, ¶ 36.

A. *Formal Sources*

The doctrine of *jus cogens* was codified by Article 53 of the Vienna Convention on the Law of Treaties (1969) as a category of peremptory norms "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted."[124] The terms "accepted" and "recognized" were deliberately selected by the drafters of the Vienna Convention to ground peremptory norms in the positive sources of international law.[125] They track the language of Article 38 of the I.C.J. Statute, which defines customary international law "as evidence of a general practice accepted as law" and general principles of law "recognized by civilized nations."[126] It is in this sense that Hersch Lauterpacht, in his 1953 First Report on the Law of Treaties, articulated peremptory norms as not "customary international law pure and simple, but . . . [customary law reflecting] overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)."[127] The U.S. delegation to the Second Session of the U.N. Conference on the Law of Treaties in 1969 indicated its understanding that peremptory norms were "customary international law [norms of] a peremptory character."[128] By this rationale, peremptory norms are a subset of customary international law arising from particular general principles common to the international community; this latter element would therefore account for the non-derogable nature of the particular customary norms in question. Alternative explanations for the formal source of peremptory norms advocate a "new source" of international law apart from those delineated in Article 38 of the I.C.J. Statute.[129]

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124. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

125. United Nations Conference on the Law of Treaties, Vienna, Austria, Mar. 26–May 24, 1968, ¶ 4, U.N. Doc. A/CONF.39/11/Add.1, 1st Sess. (May 21, 1968) (Statement by Mr. Yasseen); *see, e.g.*, SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 219 (1984). Treaties are also "recognized" by states, however it is clear that a treaty is an inapposite formal source of a norm permitting no derogation by treaty.

126. Statute of the International Court of Justice art. 38(b)-(c), June 26, 1945, 15 U.N.C.I.O. 355.

127. *Documents of the Fifth Session including the Report of the Commission to the General Assembly*, [1953] 2 Y.B. Int'l L. Comm'n 154–56, U.N. Doc. A/CN.4/SER.A/1953/Add 1.

128. United Nations Conference on the Law of Treaties, Vienna, Austria, Apr. 9–May 22, 1969, ¶¶ 20-21, U.N. Doc. A/CONF.39/11/Add.1, 2d Sess. (May 12, 1969) (Statement by the United States).

129. *See* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 110-11 (2006); Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2:1 EUR. J. INT'L. L. 42, 46-49

However Article 38 of the I.C.J. Statute contains the universe of formal sources of international law,[130] and deliberate reference to those formal sources by the drafters of Article 53 to link *jus cogens* to Article 38 militates against a new source of international law.[131]

As a subset of customary international law, special attention must be paid to the *opinio juris sive necessitatis* that drives State practice pursuant to the formation of peremptory norms.[132] The particular conception of *opinio juris sive necessitatis* articulated by the STL divided this element of customary international law into two components—*opinio juris* and *opinio necessitatis*—depicting the latter to respond to a social necessity (*opinio necessitatis*) and thereby generating an obligatory norm requiring certain conduct (*opinio juris*).[133] Judge Cançado Trindade has alluded to this distinction in the context of *jus cogens*:

> It has, at last, been recognized that conscience refers to superior values which stand above the "will", and that Law emanates from the common conscience of what is juridically necessary *(opinio juris communis necessitatis)*. Distinctly from the formal "sources" of International Law, which are nothing more than the means or vehicles of formation of its norms, conscience (expressed in the *opinio juris communis*) appears distinctly, in my understanding, as its *material* "source" *par excellence*, affirming the binding character of such norms. It is therefrom, i.e., from the universal juridical conscience, that the peremptory norms of International Law (*jus cogens*) ultimately emanate.[134]

The "superior values" to which the judge refers are the general principles of humanity and human dignity,[135] which, when giving rise to norms of customary international law, render these norms non-

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(1991); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUS. Y.B. INT'L L. 82, 99 (1988).

130. *See, e.g.*, MALCOLM SHAW, INTERNATIONAL LAW 67 (5th ed. 2003); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (5th ed. 1998).

131. United Nations Conference on the Law of Treaties, Vienna, Austria, Mar. 26–May 24, 1968, ¶ 4, U.N. Doc. A/CONF.39/11/Add.1, 1st Sess. (May 21, 1968) (Statement by Mr. Yasseen).

132. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27) ("The Court must satisfy itself that the existence of the rule [of customary international law] in the *opinio juris* of States is confirmed by practice.").

133. STL Interlocutory Decision, *supra* note 11, ¶ 102.

134. *Id.* ¶ 176 (footnotes omitted).

135. *See, e.g.*, Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶¶ 84, 182 (July 20) (separate opinion of Judge Cançado Trindade).

derogable. Seven such norms acknowledged by the I.C.J. are the prohibitions of slavery,[136] war crimes,[137] crimes against humanity,[138] aggression,[139] genocide,[140] systematic racial discrimination,[141] and torture;[142] all are prohibitions arising from social need informed by the general principle of human dignity.[143] It is in this sense that the ILC suggested that "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*."[144]

The prohibition against terrorism in international law evinces with clarity the *opinio necessitatis* element that distinguishes *jus cogens* from customary international law more generally. Terrorism constitutes a threat to the basic dignity of the human person and its prohibition

136. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, ¶ 93 (Feb. 3).

137. *Id.* ¶ 95 (Feb. 3) (noting that the *Arrest Warrant Case* concerned 'criminal violations of rules which undoubtedly possess the character of *jus cogens*'); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, ¶ 157 (July 9); Arrest Warrant of 11 April 2000 (Dem. Rep. Cong. v. Belg.), 2002 I.C.J. Reports 3, ¶ 13 (Feb. 14).

138. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, ¶ 95 (Feb. 3); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Reports 3, ¶ 13 (Feb. 14).

139. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 81 (July 22).

140. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), 2007 I.C.J. 43, ¶¶ 147, 162 (Feb. 26); Armed Activities on Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. Reports 6, ¶¶ 64, 125 (Feb. 3).

141. Armed Activities on Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. Reports 6, ¶ 78 (Feb. 3).

142. *See, e.g.*, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶ 99 (July 20).

143. *See* Reservations to Convention on Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. 15, 16 (May 28) ("[P]rinciples underling the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."); Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶¶ 84, 182 (July 20) (separate opinion of Judge Trindade) ("The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from . . . general principles of law enshrining common and superior values shared by the international community as a whole.").

144. *Documents of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 248, ¶ 2, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (Commentary to Draft Article 50 on the Law of Treaties).

reflects "the general will of the international community."[145] The Supreme Court of Argentina has conveyed this notion:

> [T]errorism involves the commission of cruelties upon innocent and defenseless people causing unnecessary suffering and danger against the lives of the civilian population. It is a system of subversion of order and public security that, although the commission of certain isolated events could be fixed to a particular State, has recently been characterized by ignoring the territorial limits of the affected State, constituting in this way a serious threat to the peace and security of the international community. This is why its prosecution is not the exclusive interest of the State directly injured by it, but rather it is an aim whose achievement benefits, ultimately, all civilized nations, who are thereby obligated to cooperate in the global fight against terrorism . . . .[146]

The U.N. Security Council has concluded similarly that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and . . . any acts of terrorism are criminal and unjustifiable."[147] In this sense, just as with other norms belonging to the category of *jus cogens*, the prohibition against terrorism arises as a protection of human dignity. By virtue of this quality of the norm, a customary norm expressive of general principles of humanity and human dignity, the prohibition against terrorism in international law satisfies the formal sources indicated in Article 53 of the Vienna Convention. This conclusion is captured in Canadian legislation amending the country's State Immunity Act and Criminal Code in 2007:

> [T]he prohibition against terrorism, as well as the prevention, repression and elimination of terrorism, are peremptory norms

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145. Andrea Bianchi, *Enforcing International Law Norms Against Terrorism: Achievements and Prospects*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 491, 526 (Andrea Bianchi & Yasmin Naqvi eds., 2004).

146. STL Interlocutory Decision, *supra* note 11, ¶ 86 n.133 (citing Enrique Lautaro Arancibia Clavel Case, No. 259, Arg., Supreme Court, 24 August 2004, 51-52 (¶¶ 21-22, per Boggiano, J., concurring)).

147. U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2003/17 (Oct. 16, 2003); S.C. Res. 1373, preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001) ("[S]uch acts, like any act of international terrorism, constitute a threat to international peace and security.").

> of international law (*jus cogens*) accepted and recognized by the international community of States as a whole as norms from which no derogation is possible.[148]

As indicated at the outset of this Note, affirmative judicial opinion provides the most authoritative confirmation of the emergence of a peremptory norm.[149] Apart from the French Court of Cassation's assertion in *Réunion Aérienne*,[150] there remains no authoritative articulation by an international juridical organ confirming the *jus cogens* status of the prohibition of terrorism. Although the ICTY Trial Chamber indicated in *Galić* that the prohibition against terrorism constitutes "a peremptory norm of customary international law,"[151] it did so in the context of international humanitarian law (war crimes) rather than as a freestanding preemptory norm. Thus while international judicial opinion favors the prohibition of torture as belonging to *jus cogens*, it is fairly limited in its support for the proposition.

B. *Legal Effects*

To evaluate evidence of the prohibition against terrorism as a peremptory norm of international law, it follows to look to the legal effects of *jus cogens* to determine the extent to which the prohibition exhibits the characteristics of a peremptory norm. Several legal effects characterize peremptory norms in international law: (i) the violation of a peremptory norm constitutes an international crime; (ii) peremptory norms generate obligations owed to the international community (*erga omnes*); (iii) universal jurisdiction empowers the prosecution of individuals for the violation of a peremptory norm; and (iv) states may legally undertake collective action in response to violations of a peremptory norm. The following Section considers each of these legal effects in the context of the prohibition against terrorism.

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148. An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism), S.C. 2007, preamble (Can.).

149. *See supra* notes 5-6.

150. *See supra* Part IIV.C.

151. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

1. Individual Criminal Responsibility

The term "international crime" has evolved to refer exclusively to acts of the individual that violate a peremptory norm.[152] This premise may be traced to the definition of "international crime" established by the International Military Tribunal at Nuremberg: "An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[153] The international criminality attaching to the violation of a norm of international law is a reflection of the importance of that norm to the international community and a general legal interest in ensuring its prosecution. Moreover, the *criminal* nature of such a violation of international law is unique to the responsibility of individuals, who are exclusively capable of the requisite *mens rea* to impute criminal responsibility.[154] Consequently, this element of criminal responsibility arises from the *jus cogens* nature of a norm, as articulated by the ICTY in *Furundžija*: "at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition . . . is that every State is entitled to investigate, prosecute and punish or extradite individuals accused."[155] Imputing responsibility to individuals in such a way is necessary for international law to achieve the goals of deterrence, punishment, retribution, rehabilitation, and incapacitation that animate criminal law more generally.[156]

The criminalization of terrorism, even before the STL Interlocutory Decision, had been evidenced by the attachment of individual criminal responsibility in both the war crimes context[157] and multilateral trea-

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152. Jochen Frowein, *Jus Cogens*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 65, 68 (Rudolf Bernhardt ed., 1997) ("A crime in this sense is seen as a violation of basic rules of *jus cogens*.").

153. United States v. List et al. (The Hostage Case), *in* 11 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 759, 1241 (1950).

154. James Crawford, *International Crimes of States*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 405, 405-14 (James Crawford, Alain Pellet & Simon Olleson, eds., 2009).

155. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

156. *See, e.g.*, Ewing v. California, 538 U.S. 11, 25 (2003) (*citing* 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, pp. 30-36 (1986) (explaining theories of punishment)).

157. *See e.g.*, Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment ¶ 28 (Special Ct. for Sierra Leone Aug. 2, 2007); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 769 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

ties prohibiting particular acts of terrorism.[158] Since 2006, the U.N. Security Council has consistently identified terrorism as "criminal and unjustifiable."[159] The STL, in establishing the *raison d'être* of the tribunal to prosecute the crime of terrorism, recognized the customary international law prohibition of terrorism as an international crime imputing individual criminal responsibility.[160] The England Court of Appeal, in its broad application of the STL Interlocutory Decision, indicated "no doubt" as to the emergence of an international crime of terrorism,[161] notwithstanding the contours (if any) of the crime as applied to peacetime and armed conflict. These developments strongly

158. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation art. 10, *opened for signature* Sept. 10, 2010, I.C.A.S. Doc. No. 21; International Maritime Organization, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 6(4), Nov. 1, 2005, I.M.O. Doc. LEG/CONF.15/21; International Convention for the Suppression of Acts of Nuclear Terrorism art. 11, *opened for signature* Apr. 13, 2005, 2445 U.N.T.S. 89 (entered into force July 7, 2007); International Convention for the Suppression of the Financing of Terrorism art. 10, *opened for signature* Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002); International Convention for the Suppression of Terrorist Bombings art. 8, *opened for signature* Jan. 12, 1998, 2149 U.N.T.S. 256 (entered into force May 23, 2001); Convention on the Safety of United Nations and Associated Personnel art. 14, *opened for signature* Dec. 15, 1994, 2051 U.N.T.S. 363 (entered into force Jan. 15, 1999); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation art. 3, *opened for signature* Feb. 24, 1988, I.C.A.O. Doc. 9518 (entered into force Aug. 6, 1989); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf art. 3(4), *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 304 (entered into force Mar. 1, 1922); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 10(1), *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (entered into force Mar. 1, 1992); Convention on the Physical Protection of Nuclear Material art. 10, *opened for signature* Mar. 3, 1980, 1456 U.N.T.S. 101 (entered into force Feb. 8, 1987); International Convention against the Taking of Hostages art. 8, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents art. 7, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977); Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971); Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 3, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969).

159. U.N. President of the S.C., Statement by the President of the Security Council, preamble, U.N. Doc. S/PRST/2003/17 (Oct. 16, 2003) ("[T]errorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable."). *See, e.g.*, S.C. Res. 1963, U.N. Doc S/RES/1963 (Dec. 20, 2010); S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1787, U.N. Doc. S/RES/1787 (Dec. 10, 2007); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

160. STL Interlocutory Decision, *supra* note 11, ¶¶ 91-105.

161. Regina v. Gul, *supra* note 91, ¶ 36.

support individual criminal responsibility for acts of terrorism in international law.

2. Obligations Owed to the International Community (*Erga Omnes*)

The concept of obligations owed by States to the international community as a whole is captured by the concept of obligations *erga omnes*.[162] These obligations arise from international norms as a function "of the importance of the rights involved, [whereby] all States can be held to have a legal interest in their protection . . . ."[163] In short, the concept of *erga omnes* represents a common legal interest in the performance of certain obligations.[164] Therefore, as indicated before the ILC in 1996, "[i]t was clear that there were *jus cogens* rules which, though not themselves *erga omnes*, had *erga omnes* effects,"[165] and notwithstanding this distinction, obligations *erga omnes* are "virtually coextensive" with peremptory norms.[166] The performance of such obligations owed to the international community arising from *jus cogens* is articulated to require States to prevent and punish violations of peremptory norms.[167]

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162. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5); Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶ 69 (July 20); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), 2007 I.C.J. 43, ¶¶ 147, 162 (Feb. 26); Armed Activities on Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, ¶¶ 64, 125 (Feb. 3); Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 88, 155-57 (July 9); East Timor (Port. v. Aust.), 1995 I.C.J. 90, ¶ 29 (June 30).

163. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 33 (Feb. 5).

164. *See* Special Rapporteur on State Responsibility, *Fourth Report on State Responsibility*, 19, ¶ 49, Int'l Law Comm'n, U.N. Doc. A/CN.4/517 (Aug. 10, 2001) (by James Crawford), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n (Part 1) 1, ¶ 49, U.N. Doc. A/CN.4/SER.A/2001/Add.1 ("In the context of peremptory norms the emphasis is on the primary rule itself and its non-derogable or overriding status. . . . By contrast the emphasis with obligations to the international community is on the universality of the obligation and the persons or entities to whom it is owed, specifically all States and legal entities.").

165. *Summary Records of the Second Part of the Seventeenth Session*, [1966] 1 Y.B. Int'l L. Comm'n (Part 1) 1, ¶ 26, U.N. Doc. A/CN.4/SER.A/1966 (Part 1) (comment by Mr. Villagrán Kramer).

166. *See* Special Rapporteur on State Responsibility, *Third Report on State Responsibility*, Int'l Law Comm'n, UN Doc. A/CN.4/507 (Aug. 18, 2000) (by James Crawford), [2000] 2 Y.B. Int'l L. Comm'n (Part 1) 3, ¶ 106(a), U.N. Doc. A/CN.4/SER.A/2000/Add.1.

167. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), Preliminary Objections, 1996 I.C.J. 615-16, ¶ 31 (July 11) ("[I]rrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the

The obligation of states to prevent and punish terrorism was articulated in a clear—and legally binding—fashion by the U.N. Security Council in Resolution 1373, which identified international terrorism as "a threat to international peace and security."[168] According to the President of the Security Council, the resolution "made the fight against terrorism a mandatory obligation of the international community, consistent with the United Nations Charter and international law."[169] As obligations *erga omnes*, however, these obligations arise not from the Security Council, but by virtue of the legal indivisibility of the norm itself. To this end, the STL indicated that the prohibition of terrorism under customary international law "impose[s] on any State . . . the obligation to prevent and repress terrorism, and in particular to prosecute and try persons on its territory or in territory under its control who are allegedly involved in terrorism . . . ."[170] By this articulation of the customary norm prohibiting terrorism, the STL effectively delineated the parameters of obligations *erga omnes* arising from peremptory norms, which in the present context requires States to prevent and punish acts of terrorism. In *Réunion Aérienne*, the Court of Cassation contemplated Libya's failure to perform its duty to punish its own nationals for acts of terrorism.[171] This is the same duty envisaged by the series of multilateral conventions criminalizing certain forms of terrorism,[172] and it is unsurprising that a customary norm emerging in part from this state practice would reflect parallel obligations of enforcement.[173]

Convention remain identical. . . . It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.").

168. S.C. Res. 1373, preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

169. U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/25 (Dec. 11, 2002).

170. STL Interlocutory Decision, *supra* note 11, ¶ 102.

171. Réunion Aérienne, *supra* note 91, at 632-33 (finding this failure constituted sovereign act enjoying sovereign immunity in French courts).

172. *See* An Act to amend the State Immunity Act and the Criminal Code, *supra* note 148 (discussing Canada's State Immunity Act and Criminal Code).

173. *See, e.g.*, Robert Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law*, 50 REVUE HELLENIQUE DE DROIT INT'L 43, 70 (1997).

3. Universal Jurisdiction

The duty to punish arising from the performance of obligations *erga omnes* is understood to constitute an obligation to prosecute or extradite.[174] This alternative obligation requires states to take action to submit perpetrators of international crimes to the judgment of law.[175] The ILC envisaged this obligation to arise from certain norms that "affect the international community as a whole," including terrorism, as reflected in both treaty and customary international law.[176] The obligation to extradite or prosecute is dependent upon universal jurisdiction,[177] which enables states to prosecute persons alleged to have committed international crimes on the basis of a common legal interest in enforcing the law breached. Accordingly, universal jurisdiction provides an alternative to traditional bases of jurisdiction (territory, nationality, protection, and passive personality) that attaches specifically to international crimes to ensure justiciability.[178]

As early as 1987, the Restatement (Third) of Foreign Relations Law suggested that "perhaps certain acts of terrorism" could be counted among "offences recognized by the community of nations as of universal concern," supporting universal jurisdiction to define and punish those acts.[179] This position likely reflected the treaty-based universal jurisdiction regimes established by the several sectoral conventions outlawing certain acts of terrorism.[180] Yet U.S. federal courts have

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174. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 1, ¶ 95 (July 20); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), Preliminary Objections, 1996 I.C.J. 515, ¶ 31 (July 11).

175. *See* Special Rapporteur on the Obligation to Extradite or Prosecute, *Preliminary Report on the Obligation to Extradite or Prosecute ("aut dedere aut judicare")*, 15, ¶ 49, Int'l L. Comm'n, U.N. Doc. A/CN.4/571 (June 7, 2006) (by Zdzislaw Galicki).

176. Special Rapporteur on the Obligation to Extradite or Prosecute, *Second Report on the Obligation to Extradite or Prosecute ("aut dedere aut judicare")*, 9, ¶ 31, Int'l L. Comm'n, U.N. Doc. A/CN.4/585 (June 11, 2007) (by Zdzislaw Galicki).

177. *See* LUC REYDAMS, UNIVERSAL JURISDICTION 28-80 (2003); BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT 105 (2003); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 789 (1998).

178. *See, e.g.*, Regina v. Bartle and the Commissioner of Police for the Metropolis and others *ex parte* Pinochet, 38 I.L.M. 581, 589 (House of Lords, 1999) (England) (per Browne-Wilkinson, L.) ("[T]he *jus cogen*s nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.").

179. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

180. *See* Robert Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law*, 50 REVUE HELLENIQUE DE DROIT INT'L 43, 43-88 (1997).

invoked universal jurisdiction over acts of terrorism beyond such conventional regimes.[181] Because the STL was not directly applying international law, but rather Lebanese law, the Tribunal cannot be said to exercise universal jurisdiction. Nevertheless, the STL indicated the parameters of an obligation to prosecute in its Interlocutory Decision, observing that the prohibition against terrorism:

> confer[s] on any State (and other international subjects endowed with the necessary structures and judicial machinery) the right to prosecute and repress the crime of terrorism, as defined in the rule, perpetrated on its territory (or in territory under its control) by nationals or foreigners, and an obligation on any other State to refrain from opposing or objecting to such prosecution and repression against their own nationals . . . .[182]

Although the permissive prosecutorial regime articulated by the STL falls short of a clear expression of an obligation to prosecute or extradite, universal jurisdiction appears uncontroversial as a basis for the prosecution of terrorism under international law. For example, Security Council Resolution 1373 appears also to assume the availability of jurisdiction in its direction to states to broadly criminalize terrorist activities in their domestic laws without regard to any traditional basis of jurisdiction.[183]

4. Collective Action

The final aspect of peremptory norms to be considered in the context of terrorism is recourse to collective action (*actio popularis*)

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181. *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991) ("Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved.") (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998).

182. STL Interlocutory Decision, *supra* note 11, ¶ 102.

183. S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001) ("*The Security Council . . . [a]cting* under Chapter VII of the Charter of the United Nations . . . *[d]ecides* that all States shall . . . [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.").

under international law. The logic of the concept with respect to *jus cogens* can be found in the 1970 Separate Opinion of Judge Ammoun in *Barcelona Traction*: the violation of a peremptory norm provides the basis for "an action brought in defence of a collective or general interest, the objective being to safeguard legality or the respect due to principles of an international or humane nature, translated into imperative legal norms (*jus cogens*)."[184] The premise that particular international norms arising from the interests of the international community as a whole confer certain legal powers to third-states to respond to breaches of such norms was echoed in the drafting of the Articles on State Responsibility. According to *special rapporteur* Riphagen,

> . . . the introduction of extra-State interests as the object of protection by rules of international law tends towards the recognition of an *actio popularis* of every State having participated in the creation of such extra-State interests, the other possibilities of enforcement being either only self-enforcement, or enforcement by the subject to which the extra-State interest is allocated for this purpose.[185]

This reasoning departs from the court's denial of a concept of *actio popularis* in *South West Africa Cases (Second Phase)* (1966),[186] and is found in the ILC Articles on State Responsibility, which delineates particular consequences of serious breaches of obligations under peremptory norms of general international law.[187] These consequences include non-recognition and cooperation to bring an end to such violations by lawful means,[188] as well as the invocation of responsibility by any state.[189] The ILC Commentary to Article 41 of the Articles on State Responsibility interpreted the legal consequences for serious breaches of obligations arising from peremptory norms as extending beyond the

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184. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 286, ¶ 34(c) (Feb. 5) (separate opinion of Judge Ammoun).

185. Special Rapporteur on the Content, Forms, and Degrees of State Responsibility, *Third Report on the Content, Forms, and Degrees of State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/354 and Corr.1 and Add. 1 and 2 (May 5, 1982) (by Willem Riphagen), *reprinted in* [1982] 2 Y.B. Int'l L. Comm'n (Part 1) 37, U.N. Doc. A/CN.4/SER.A/1982/Add.1.

186. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 6, ¶ 88.

187. *Responsibility of States for Internationally Wrongful Acts* arts. 40-41, [2001] 2 Y.B. Int'l L. Comm'n (Part 2) 26, 29, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

188. *Id.*

189. *Id.* art. 48(1).

state in breach to impose "a positive duty [for third-States] to cooperate in order to bring to an end serious breaches in the sense of article 40."[190]

Two instances of such action in response to the crime of terrorism illustrate the legality of recourse to collective action. Perhaps the most obvious instance of collective action to bring an end to serious breaches of obligations arising from the prohibition against terrorism is the NATO operation in Afghanistan in response to the terrorist attacks of September 11, 2001. In a series of binding Chapter VII Resolutions, the Security Council called on "the international community to redouble their efforts to prevent and suppress terrorist attacks including by increased cooperation."[191] The U.N. Security Council articulated the obligations of states to prevent and punish acts of terrorism,[192] and made ready the Counter-Terrorism Committee to assist states in the implementation of these obligations.[193] The primary collective response was directed at Afghanistan, where the Taliban government had "allow[ed] Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network" in contravention of its obligations to prevent and punish terrorism under international law.[194] The Security Council, in support of "international efforts to root out terrorism," called on the U.N. to assist in the formation of a new government in Afghanistan,[195] directed donors to coordinate support for the Afghan Interim Authority,[196] and approved the International Security Assistance Force to assist the transitional government.[197]

A second important example of collective action in response to terrorism is the establishment of the STL by the Security Council in 2007 to prosecute certain acts of terrorism.[198] The STL was established pursuant to a request by the Prime Minister of Lebanon in connection with the assassination of Lebanese Prime Minister Rafiq Hariri; Fuad Siniora "ask[ed] the Security Council . . . [t]o establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated

190. *Id.* art. 41 (cmt. ¶ 2).
191. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).
192. S.C. Res. 1373, U.N. Doc. S/RES /1373 (Sept. 28, 2001).
193. *See* S.C. Res. 1377, U.N. Doc. S/RES /1377 (Nov. 12, 2001).
194. S.C. Res. 1378, U.N. Doc. S/RES /1378 (Nov. 14, 2001).
195. *Id.*
196. *See* S.C. Res. 1383, U.N. Doc. S/RES /1383 (Dec. 6, 2001).
197. *See* S.C. Res. 1386, U.N. Doc. S/RES /1386 (Dec. 20, 2001).
198. S.C. Res. 1757, para. 1, U.N. Doc. S/RES/1757, at 2 (May 30, 2007).

against Prime Minister Hariri."[199] The Security Council subsequently requested the U.N. Secretary-General to negotiate with Lebanon to establish "a Tribunal based on the highest international standards of criminal justice."[200] Reaffirming that the "terrorist act [in question] constitute[s] a threat to international peace and security," the Security Council established the STL under its Chapter VII authority.[201] The significance of the establishment of a tribunal of "an international character" by the Security Council should not be understated: such an institution represents the prosecution of acts of terrorism within the jurisdiction of the STL by the international community as a whole. The formation of an international tribunal under the auspices of the U.N. is viewed as "an expression of the will of the international community" even where such a tribunal is established by agreement between the U.N. and the state in question.[202] The legal and symbolic authority of adjudication by such a regime is a profound form of collective action on the part of the international community that unambiguously reflects the criminality of terrorism under international law.

VI. Conclusion

There is strong evidence that the prohibition of terrorism has emerged as a peremptory norm of international law belonging to the category of *jus cogens*. For decades, the inability of the international community to establish a comprehensive definition of terrorism impeded the justiciability of the crime in international law. The coexistence of three distinct, and arguably competing, definitions of the crime in various contexts exacerbated a degree of normative uncertainty sufficient to inhibit consistent enforcement of the prohibition of terrorism, as demonstrated by U.S. jurisprudence. The 2011 Interlocutory Decision of the STL marked a potentially critical point in the crystallization of the prohibition against terrorism in customary international law, a conclusion echoed by two national courts within a year of its decision. The formal sources of peremptory norms indicate that the prohibition against terrorism satisfies the elements of a norm belong-

199. Letter dated Dec. 13, 2005 from Fuad Siniora to the United Nations addressed to the Secretary General, in letter dated Dec. 13, 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, U.N. Doc. S/2005/783 (Dec. 13, 2005).

200. S.C. Res. 1757, U.N. Doc. S/RES /1757, at 1 (May 30, 2007).

201. *Id.* at 2.

202. Prosecutor v. Charles Taylor, Case No. SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, ¶ 38 (Special Ct. of Sierra Leone May 31, 2004).

ing to *jus cogens*, and the legal effects of the prohibition against terrorism in international law reflect those peculiar to *jus cogens*. The foregoing discussion supports the proposition that the prohibition against terrorism has emerged as a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted.

This conclusion has a number of meaningful implications for the international prohibition against terrorism. First, it relieves the definitional issue that has undermined effective prosecution of the norm in domestic and international fora, advancing the struggle against impunity for acts of terrorism. Second, as a peremptory norm, the prohibition permits no derogation and clearly denies the existence of a "freedom fighter" *exception* that would exempt the use of force by insurgents during armed conflict from the scope of the international crime of terrorism. Given the fundamental values of humanity and human dignity enshrined by peremptory norms, as evidenced by the prohibition against terrorism, an objective definition rightly admits no exception. Third, a unified definition, and non-derogability, serve to clarify the obligations of individuals and states under international law and make readily available the legal effects of *jus cogens*: individual criminal responsibility for acts of terrorism, universal jurisdiction over such acts, obligations owed by states requiring the prevention and punishment of terrorism, and collective action by the international community in response to serious violations of these obligations.

The prohibition of terrorism, as it crystalized in 2012, is not without issue. Resolving the definitional issue by adopting in large part the domestic law conception of terrorism has the potential to class any revolutionary conduct as terrorism. The England Court of Appeal, by denying a permissive "freedom fighter" norm in the context of non-international armed conflict, in effect indicated that a domestic uprising must remain wholly domestic, lest it take on a "transnational element" and thereby violate the prohibition of terrorism under customary international law. Where a revolutionary movement is considered legitimate by the international community—after a government has forfeited its legitimate claim to sovereignty (e.g., following a Lockean "long train of abuses"[203])—it is desirable that this uprising be supported by international law not condemned as terrorism. It is conceiv-

203. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 199 (Ian Shapiro ed., Yale University Press 2003) (1690).

able that such conduct would simply not be considered "criminal" for one reason or another, thereby falling outside the elements of terrorism in the same way that combatants engaged in armed conflict are not considered to be perpetrating criminal acts. Alternatively, recognizing defenses to acts of terrorism for revolutionary activity requires justifying *jus cogens* violations, which is antithetical to the premise of a *jus cogens* norm in any circumstance. Failure to resolve this issue in a way consistent with both the doctrine of *jus cogens* and the self-determination of peoples to revolt against oppressive and abusive regimes risks undermining the international crime of terrorism.

Peremptory norms emerge as legal responses to the needs of international society to prohibit conduct that shocks the conscience of humanity. Historically, terrorism has been condemned as an affront to the dignity of the human person: human beings cannot be reduced to instruments of political gain through violence and incitement of fear. The foregoing discussion indicates that the prohibition against acts of terrorism is the most recent peremptory norm to emerge in response to historical exigencies, providing the legal framework through which the international community is empowered to authoritatively confront terrorism.