

Defining 'Terrorism' to Protect Human Rights



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Defining 'Terrorism' to Protect Human Rights

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February 2006

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Introduction

Few words are plagued by so much indeterminacy, subjectivity and political disagreement as 'terrorism'. The ordinary linguistic meaning of 'terrorism' is instantly evocative and emotive, referring to extreme fear, or intense fright or dread. By itself, a literal meaning is not particularly helpful in defining terrorism as a legal term, since many forms of violence, from mugging to warfare, can cause terror. The deceptively simple, literal meaning of terrorism is overlaid with centuries of political connotations, referring at different times to State and non-State conduct. A despite the shifting and contested meanings of 'terrorism' over time, its peculiar semantic power is its capacity to denigrate and dehumanise those at whom it is directed – including legitimate political opponents. As has often been noted, the term is ideologically and politically loaded; pejorative; implies moral, social and value judgment; and is often abused. In light of the kaleidoscopic uses of the term, it is fallacious to pragmatically assert that terrorism is recognisable without difficulty, or to intuitively claim that 'what looks, smells and kills like terrorism is terrorism'.¹ Disagreement about terrorism runs much deeper than technical disputes about drafting; it reflects doctrinal, ideological and jurisprudential arguments about who is entitled to exercise violence, against whom, and for what purposes.

The many attempts to define terrorism in international law since the 1920s have all ended in failure.² Terrorism remains a political term describing various acts and methods of political violence, a term which is too imprecise to trigger criminal legal liability. The failure of attempts at definition has led some commentators to argue that definition is both

technically impossible and/or undesirable on policy grounds. This paper first considers the policy reasons for why the international community should define terrorism, focusing on arguments that terrorism: (a) seriously violates human rights; (b) jeopardises the State and deliberative politics; (c) is politically or publicly motivated violence distinguishable from private violence; (d) threatens international peace and security; and (e) requires definition to control the operation of mandatory Security Council measures since 2001. Secondly, this paper briefly outlines recent proposals for an international definition of terrorism before extrapolating the basic elements of an international definition of terrorism from the policy reasons for definition discussed in the first part of this paper. Finally, claims that certain conduct should be excluded from any definition of terrorism are considered. A coherent legal definition of terrorism might help to confine the unilateral misuse of the term by national governments against their political opponents and in ways which seriously undermine fundamental human rights.

Reasons for Defining International Terrorism

A combination of pragmatic and principled arguments supports the case for defining terrorism in international law. The resilience of the term terrorism testifies not only to its political utility, but also to its popular symbolic resonance. The term seductively encapsulates a phenomenon of political violence widely condemned in many societies as anti-social, amoral, inhumane, and deviant. If criminal law is designed to protect social values, express popular repugnance at unjustifiable violence, and stigmatise immoral conduct, the term terrorism serves as a symbolic draw-card embodying many such judgments. The practice of States,

¹ UK Ambassador J Greenstock, UN Security Council, 1 October 2001.

² See generally B Saul, 'Attempts to Define 'Terrorism' in International Law' (2005) 52 *Netherlands International Law Review* 57.

evidenced through UN organs and other international organisations, provides a number of grounds for defining and criminalizing terrorism. While there are conceptual problems with each of these arguments, on the whole they provide coherent and principled reasons for defining terrorism, in order to protect vital international community values and interests.

A. Terrorism Seriously Violates Human Rights

International criminal law often prohibits conduct which infringes values protected by human rights law, without proclaiming those values directly.³ Many resolutions of the UN General Assembly⁴ and the Commission on Human Rights⁵ assert that terrorism seriously threatens or destroys basic human rights and freedoms, particularly life, liberty and security, but also civil and political, and economic, social and cultural rights. Regional anti-terrorism instruments,⁶ and the

³ A Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003), 23.

⁴ UN General Assembly resolutions 3034 (XXVII) (1972), 1; 32/147 (1977), 1; 34/145 (1979), 3; 38/130 (1983), 1; 40/61 (1985), preamble, 2-3; 42/159 (1987), preamble, 2-3; 44/29 (1989), preamble, 2; 46/51 (1991), preamble, 2; 48/122 (1993), preamble, 1; 49/60 (1994), preamble; 49/185 (1994), preamble, 1; 50/186 (1995), preamble, 2; 1996 Decl, preamble; 52/133 (1997), preamble, 2-3; 54/164 (2000), preamble, 2-3; 56/160 (2002), 2-3; 57/219 (2003), preamble; 58/174 (2004), 1; 58/187 (2004), preamble; 59/191 (2005), preamble; 59/195 (2005), 1; see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, 17.

⁵ UN Commission on Human Rights resolutions 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 1999/30; 2000/30; 2001/37; 2002/35; 2003/37; UN Sub-Commission for the Promotion and Protection of Human Rights resolutions 1994/18; 1996/20; 1997/39; 1998/29; 1999/26; 2001/18; 2002/24; UN Commission on the Status of Women resolution 36/7 (1992), 2.

⁶ 2002 EU Framework Decision, preamble (1)-(2); 1998 Arab Convention, preamble; 1999 Organisation of the Islamic Conference (OIC) Convention, preamble; 1971 Organisation of American States (OAS) Convention, preamble; 1999 Organisation of African Unity (OAU, now AU) Convention, preamble; see also OAS General Assembly, AG/RES 1840 (XXXII-0/02), preamble; OAS Declaration of Lima to Prevent, Combat, and Eliminate Terrorism, 26 Apr 1996, preamble and 1; Declaration of Quito, IX Meeting of the Rio Group, Sep 1995; OAU Ministerial Communiqué on Terrorism, 11 Nov 2001, Central Organ/MEC/MIN/Ex-Ord (V) Com, 3; Council of Europe (Committee of Ministers), Guidelines on Human Rights and the Fight against Terrorism, 11 Jul 2002, preamble [a]; European Parliament

preamble to the UN Draft Comprehensive Terrorism Convention,⁷ support this idea, while the UN Special Rapporteur on terrorism observes that 'there is probably not a single human right exempt from the impact of terrorism'.⁸

The notion of terrorism as a particularly serious human rights violation does not, by itself, constitute a sufficient reason for criminalizing terrorism. Many serious domestic crimes equally endanger life and undermine human rights, so this justification does not immediately present a persuasive, exceptional reason for treating terrorist activity differently. While some terrorist acts may be particularly serious human rights violations because of their scale or effects, not all terrorist acts are of such intensity, particularly many of the wide-reaching preparatory or inchoate offences adopted by many countries since 2001.

While some resolutions have condemned terrorism for violating the right to live free from fear,⁹ there is no explicit human right to 'freedom from fear', which a crime of terrorism might seek to protect. States which sought to add such a freedom to the Universal Declaration of Human Rights (UDHR) during its drafting were unsuccessful, and the right to liberty and security of person [UDHR, art 3 and later in the International Covenant on Civil and Political Rights (ICCPR), art 9(1)] was interpreted by most States as

resolution A5-0050/2000, 16 Mar 2000, 41-42; OIC (Foreign Ministers), Declaration on International Terrorism, Kuala Lumpur, 1-3 Apr 2002, 7; Non-Aligned Movement (NAM), XIV Ministerial Conference, Final Doc, Durban, 17-19 Aug 2004, 100; NAM, XIII Conference of Heads of State or Government, Final Doc, Kuala Lumpur, 25 Feb 2003, 107.

⁷ UN General Assembly Official Records (57th Sess), Ad Hoc Committee Report (2002), Supp 37 (A/57/37), annex I: bureau paper.

⁸ UN Sub-Commission for the Promotion and Protection of Human Rights (53rd Sess), Terrorism and Human Rights: Progress Report by Special Rapporteur K Koufa, 27 Jun 2001, UN Doc E/CN.4/Sub.2/2001/31, 28.

⁹ UN General Assembly resolutions 50/186 (1995), preamble; 52/133 (1997), preamble, 2; 54/164 (2000), 2; 56/160 (2002), preamble; 58/174 (2004), preamble; 59/195 (2005), preamble; UN Commission on Human Rights resolutions 1996/47, preamble; 1997/42, preamble; 1998/37, preamble, 2; 1999/27, preamble, 2; 2000/30, preamble, 2; 2001/37, preamble, 2; 2002/35, preamble, 1-2; 2003/37, preamble, 2; UN Sub-Commission of Human Rights resolutions 1996/26, preamble; 2001/18, preamble; 2002/24, preamble.

referring to *physical* security,¹⁰ rather than as a guarantee against the *psychological* insecurity caused by terrorism or other violence.

At best, the UDHR preamble states that 'freedom from fear' is part of 'the highest aspiration of the common people', while the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) preambles similarly refer to 'the ideal of free human beings enjoying freedom from fear'. The idea that freedom from fear is an international value deserving of protection has also been advanced by the United Nations Development Programme (UNDP) as an aspect of human development,¹¹ and the new African Court on Human and Peoples' Rights 'will address the need to build a just, united and peaceful Continent free from fear, want and ignorance'.¹² Generally, however, most States consider the idea of 'freedom from fear' as too imprecise to be legally operative.

A different objection is that terrorism cannot violate human rights as a matter of law (where terrorist acts are not attributable to a State),¹³ since only State parties, rather than non-State actors or individuals,¹⁴ can be bound by human rights treaties. This position was taken by the EU, the Nordic States and Canada, in supporting the adoption of the 1994 Declaration on terrorism, which argued that terrorism is a crime but not a rights violation, since only acts attributable to a State can

violate human rights.¹⁵ (The EU has since reversed its position in its 2002 EU Framework Decision.)

Clearly, terrorist acts that are attributable to States under the law of State responsibility will violate States' human rights obligations.¹⁶ In contrast, private persons are not parties to human rights treaties, which do not have 'direct horizontal effects' in international law and are not substitutes for domestic criminal law.¹⁷ Nonetheless, in implementing the duty to 'ensure' rights, States must protect individuals from private violations 'in so far as they are amenable to application between private persons or entities'.¹⁸ This may require States to take positive measures of protection (including through policy, legislation and administrative action), or to exercise due diligence to prevent, punish, investigate or redress the harm or interference caused by private acts.¹⁹ These duties are related to the duty to ensure effective remedies for rights violations.²⁰ Such measures would support, for example, criminalizing terrorist acts committed by private violators.

¹⁵ UN General Assembly Official Records 49th Sess, 6th Committee Report on Measures to Eliminate International Terrorism, 9 Dec 1994, UN Doc A/49/743, 19-20 (Germany for the EU and Austria; Sweden for the Nordic States; Canada); see also Sec-Gen Report, Human Rights and Terrorism, 26 Oct 1995, UN Doc A/50/685, 5 (Sweden).

¹⁶ T Meron, 'When Do Acts of Terrorism Violate Human Rights?' (1989) 19 *Israel Yearbook on Human Rights* 271, 274.

¹⁷ UN Human Rights Committee, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, 8.

¹⁸ *Ibid.*

¹⁹ *Ibid.*; *Velasquez Rodriguez case*, Inter-American Court of Human Rights, Ser C, No 4, (1988) 9 *Human Rights Law Journal* 212, 172-173; T Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L Henkin (ed), *The International Bill of Rights* (Columbia University Press, NY, 1981), 72, 77-78; A Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1996), 105-106, 119; L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233, 240-241; D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1990) 13 *Fordham International Law Journal* 1; G Sperduti, 'Responsibility of States for Activities of Private Law Persons', in R Bernhardt (ed), *Encyclopaedia of Public International Law*, Instalment 10 (1987), 373, 375; Shelton, n164, 47; J Paust, 'The Link between Human Rights and Terrorism and its Implications for the Law of State Responsibility' (1987) 11 *Hastings International and Comparative Law Review* 41; Koufa (2001), n7, 29; Schorlemer, n13, 270.

²⁰ 1966 ICCPR, art 2(3).

¹⁰ UN General Assembly Official Records (3rd Sess), 3rd Committee Summary Records of Meetings, 21 Sep—8 Dec 1948, 190 (United States, France), 157 (Netherlands), 189 (Haiti), 191 (China), 192 (Guatemala), 194 (Philippines).

¹¹ UNDP, *Human Development Report 1994* (Oxford University Press, NY, 1994), 23.

¹² 2003 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 30 Dec 2003.

¹³ T Meron, 'When Do Acts of Terrorism Violate Human Rights?' (1989) 19 *Israel Yearbook on Human Rights* 271, 275.

¹⁴ H Steiner, 'International Protection of Human Rights', in M Evans (ed), *International Law* (Oxford University Press, Oxford 2003), 757, 776; S von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War on Terror' (2003) 14 *European Journal of International Law* 265, 265; D Pokempner, 'Terrorism and Human Rights: The Legal Framework', in M Schmitt and G Beruto (eds), *Terrorism and International Law* (IIHL and George C Marshall European Center, 2003) 19, 22-23; P Hostettler, 'Human Rights and the 'War' against International Terrorism', in Schmitt and Beruto (eds), *infra*, 30, 32.

If private actors themselves cannot violate human rights in a strict legal sense (and this is debatable),²¹ the rights of victims of terrorism will only be violated in a descriptive,²² or philosophical, sense—since rights inhere in the human person by virtue of their humanity, not by virtue of a legal text—but no rights remedy will lie against the terrorists themselves. Yet, even descriptive violations of rights are a sufficient ground on which to support criminalizing terrorism by non-State actors.

B. Terrorism Jeopardises the State and Deliberative Politics

Since the 1990s, the General Assembly and the UN Commission on Human Rights have frequently described terrorism as aimed at the destruction of democracy,²³ or the destabilising of 'legitimately constituted Governments' and 'pluralistic civil society'.²⁴ Some resolutions state that terrorism 'poses a severe challenge to democracy, civil society and the rule of law'.²⁵ The 2002 EU Framework Decision, the 2002 Inter-American Convention, and the Draft Comprehensive Convention are similarly based on the premise that terrorism jeopardises democracy.²⁶ Most regional treaties are, however, silent on the effects of

terrorism on democracy—including those of the Organisation of African Unity, Organisation of American States, Organisation of Islamic Conferences, South Asian Association for Regional Cooperation, Commonwealth of Independent States and Council of Europe—suggesting that they do not regard terrorism as an offence specifically against democracy.²⁷

The idea of terrorism as a threat to 'democracy' or 'legitimately constituted governments' seems to set terrorist acts apart from other conduct that seriously violates human rights. One argument for criminalizing terrorism is that it directly undermines democratic values and institutions, especially the human rights underlying democracy such as political participation and voting, freedom of speech, opinion, expression and association.²⁸ Terrorists violate the ground rules of democracy, by coercing electors and candidates, wielding disproportionate and unfair power through violence, and subverting the rule of law.²⁹ Terrorist violence may also undermine legitimate authority; impose ideological and political platforms on society; impede civic participation; subvert democratic pluralism, institutions and constitutionalism; hinder democratisation; undermine development; and encourage more violence.³⁰

As Hannah Arendt argues, humans are political beings endowed with speech, but 'speech is helpless when confronted with violence'.³¹ For Michael Ignatieff, terrorism 'kills politics, the one process we have devised that masters violence in the name of justice'.³² Boutros Boutros-Ghali stated that terrorism reveals

21 Clapham, n18, 124.

22 Steiner, n13, 776.

23 UN General Assembly resolutions 48/122 (1993), 1; 49/60 (1994), 2; 49/185 (1994), 1; 50/186 (1995), 2; 52/133 (1997), 3; 54/164 (2000), 2-3; UN Commission on Human Rights resolutions 1995/43, 1; 1996/47, 1-2; 1997/42, 1-2; 1998/47, 3; 1999/27, 1; 2000/30, 1; 2001/37, 1; 2002/35, 1; 2003/37, 1; UN Sub-Commission for the Promotion and Protection of Human Rights resolutions 1994/18, 1; 1996/20, 1; 1997/39, 1; 2001/18, preamble; 2002/24, preamble; 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, 17.

24 UN General Assembly resolutions 48/122 (1993), 1; 49/185 (1994), 1; 50/186 (1995), 2; 52/133 (1997), 3; 54/164 (2000), 2-3; UN Commission on Human Rights resolutions 1995/43, 1; 1996/47, 2; 1997/42, 2; 1998/47, 2; 1999/27, 1; 2000/30, 1; 2001/37, 1; 2002/35, 1; 2003/37, 1; UN Sub-Commission on the Promotion and Protection of Human Rights resolutions 1994/18, 1; 1996/20, 1.

25 Preambles to UN Commission on Human Rights resolutions 1998/47; 1999/27; 2000/30; 2001/31; 2002/35; 2003/37; UN Sub-Commission for the Promotion and Protection of Human Rights resolutions 1999/26; 2001/18; 2002/24.

26 2002 EU Framework Decision, recitals 1-2; Draft Comprehensive Convention, preamble; 2002 Inter-American Convention.

27 Though the Council of Europe stated that terrorism 'threatens democracy': Guidelines, n6, preamble [a].

28 1948 UDHR, art 29(2); 1966 ICESCR, arts 4, 8(1)(a); 1966 ICCPR, arts 14(1), 21, 22(2); see UN Commission on the Status of Women res 36/7 (1992), preamble.

29 T Honderich, *Three Essays on Political Violence* (Basil Blackwell, Oxford, 1976), 103.

30 UN Sub-Commission on the Promotion and Protection of Human Rights, *Terrorism and Human Rights: Preliminary Report by Special Rapp K Koufa* (1999), UN Doc E/CN.4/Sub.2/1999/27, 32.

31 H Arendt, *On Revolution* (Penguin, London, 1990), 19.

32 M Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69 *Social Research* 1137, 1157; see also M Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press, Edinburgh, 2005), 110-1.

the unwillingness of terrorists 'to subject their views to the test of a fair political process'.³³ Thus, terrorism replaces politics with violence, and dialogue with terror. On this view, terrorism should be specially criminalized because it strikes at the constitutional framework of deliberative public institutions which make the existence of all other human rights possible. Doing so would also concretise and protect the 'emerging right to democratic governance' which is progressively coalescing around the provisions of human rights treaties:³⁴ 'since 1989 the international system has begun to take the notion of democratic rights seriously'.³⁵

Yet this explanation for criminalizing terrorism gives rise to immediate difficulties. First, there is no entrenched legal right of democratic governance in international law. At best, such a right is emerging or 'inchoate',³⁶ not to mention much denied.³⁷ The existing right of self-determination permits peoples to choose their form of government, but it does not specify that government must be democratic and a people is free to choose authoritarian rule. International rights of participation in public affairs and voting fall far short of establishing a right to a comprehensive democratic system, unless a particularly 'thin', procedural or formal conception of democracy is accepted.³⁸ Further, the customary criteria reflected in the 1933 Montevideo Convention do not posit democracy as a precondition of statehood. Rather, effective territorial government of a permanent

population is sufficient, and international law tolerates most varieties of governance (excepting those predicated on apartheid, genocide or colonial occupation).

As a result, terrorism can hardly be recognised as an *international* crime against democratic values when democracy is not an accepted international legal right. In contrast, within a more homogenous regional community such as the EU, member States are freer to declare that terrorism violates established community values and indeed, democracy has emerged as a precondition of European Community membership.³⁹ Even still, there is significant variation between EU member States in forms of democracy, and it is not clear what it means to speak of terrorism as a crime against 'democracy' as a uniform phenomenon. It goes without saying that conceptions of democracy are radically contested in both theory and practice.⁴⁰

Second, if terrorism is indeed characterised as a crime against 'democracy', it begs the historically intractable question of whether terrorist acts directed to subverting non-democratic regimes, or against those which trample human rights, remain permissible. It is notable that some of the above UN resolutions refer to terrorism as 'destabilising legitimately constituted Governments', implying that terrorism is not objectionable against *illegitimate* governments, particularly those oppressing self-determination movements. Over time, UN resolutions also asserted that 'all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed' are criminal and unjustifiable. Thus even just causes pursued against authoritarian regimes were not permitted to use terrorist means: 'terrorism... can never be justified as a means to promote and protect human rights'.⁴¹ Though seeming

³³ Quoted in Koufa (1999), n29, 31.

³⁴ T Franck, 'The Emerging Right of Democratic Governance' (1992) 86 *American Journal of International Law* 46; G Fox 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539; G Fox and B Roth (eds), *Democratic Governance in International Law* (Cambridge University Press, Cambridge, 2000).

³⁵ J Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P Alston (ed), *Peoples' Rights* (Oxford University Press, Oxford, 2001), 7, 25.

³⁶ S Chesterman, *Just War or Just Peace?* (Oxford University Press, Oxford, 2002), 89.

³⁷ In 2003, Freedom House regarded only 88 States as democratic, 55 States as part-democratic, and 49 States as 'not free': www.freedomhouse.org.

³⁸ For analysis of different conceptions of democracy, see S Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), chs 3-5.

³⁹ EC, Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 Dec 1991, in (1991) *British Yearbook of International Law* 559.

⁴⁰ See B Roth, 'Evaluating Democratic Progress: A Normative Theoretical Perspective' (1995) 9 *Ethics and International Affairs* 55; Marks, n210.

⁴¹ Preambles to UN Commission on Human Rights resolutions 1996/47; 1997/42; 1998/47; 1999/27; 2000/30; 2001/31; 2002/35.

to condemn terrorism unequivocally and against *any* State, these resolutions were still not intended to apply to self-determination movements in the views of many States who voted for them.⁴²

Indeed, most regional instruments view terrorism as a crime against the State and its security and stability, sovereignty and integrity, institutions and structures, or economy and development, rather than as a specific anti-democratic crime.⁴³ Even in a community of democracies such as the EU, the distinguishing feature of terrorist offences is the underlying motive to seriously alter or destroy the political, economic or social structures of a State, including its fundamental principles and pillars.⁴⁴

Consequently, the balance of international opinion makes it difficult to argue that terrorism should be criminalized as an offence against democratic politics, since it must also be regarded as criminal and unjustifiable against tyrannical regimes. The minimum shared international conception of terrorism encompasses violence against politics and the State (including its security and institutions), but regardless of its democratic character. There is far less support for the narrower idea of terrorism as a threat to democracy, reflecting the international diversity of political systems.

⁴² See, eg, Non-Aligned Movement (NAM), XIV Ministerial Conf, Final Doc, Durban, 17-19 Aug 2004, 98-99, 101-102, 104; NAM, XIII Conf of Heads of State or Government, Final Doc, Kuala Lumpur, 25 Feb 2003, 105-06, 108, 115; NAM, XIII Ministerial Conference, Final Doc, Cartagena, 8-9 Apr 2000, 90-91; Organisation of Islamic Conferences resolutions 6/31-LEG (2004), 5; 7/31-LEG (2004), preamble, 1-2; 6/10-LEG(IS) (2003), 5; 7/10-LEG (IS) (2003), 1-2; OIC, Islamic Summit Conference (10th Sess), Final Communiqué, Malaysia, 16-17 Oct 2003, 50; OIC (Extraordinary Session of Foreign Ministers), Declaration on Intl Terrorism, Kuala Lumpur, 1-3 Apr 2002, 8, 11, 16 and Plan of Action, 2-3.

⁴³ 1999 Organisation of African Unity Convention, preamble; 1998 Arab League Convention, preamble; 1999 Organisation of Islamic Conferences Convention, preamble; South Asian Association of Regional Cooperation Convention, preamble; Organisation of Islamic Conferences resolutions 6/31-LEG (2004), preamble; 6/10-LEG(IS) (2003), preamble; OAS General Assembly, AG/RES 1840 (XXXII-0/02), preamble; Non-Aligned Movement Final Doc (2004), n136, 100; Non-Aligned Movement Final Doc (2003), n136, 107-109; NAM, XIII Ministerial Conference, Final Doc, Cartagena, 8-9 Apr 2000, 88-89.

⁴⁴ EU Commission, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 Sep 2001, COM(2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 6-7.

C. Differentiating Public from Private Violence

While terrorism is not universally regarded as a crime limited to attacks on democracies, there is considerable support for the view that terrorism is *political* violence. In its influential 1994 Declaration on Measures to Eliminate International Terrorism, the General Assembly distinguished terrorism from other violence because of its motivation 'for political purposes'.⁴⁵ In contrast, since the early 1960s, the numerous 'sectoral' anti-terrorism treaties have avoided any general definition of terrorism. Instead, most of the treaties require States to prohibit and punish in domestic law certain physical or objective acts—such as hijacking, hostage taking, misuse of nuclear material, or bombings—regardless of whether such acts are motivated by private or political ends. Proof of the motive(s) behind the act (as distinct from the *intention* to commit the act) is thus not required as an element of the offences.

Dealing with terrorist acts by resort to sectoral treaties or ordinary criminal offences arguably lacks 'specific focus on terrorist per se', since it fails to differentiate between privately motivated violence (including violence motivated by profit, hatred, family disputes and so on) and violence committed for political reasons.⁴⁶ Overreach undermines 'the moral and political force of these instruments as a counter-terrorism measure'⁴⁷ and dilutes the special character of terrorism as a crime against non-violent politics. As Jürgen Habermas says, terrorism 'differs from a private incident in that it deserves public interest and requires a different kind of analysis than murder out of jealousy'.⁴⁸ Prosecuting an individual for politically

⁴⁵ UN General Assembly resolution 49/60 (1994), annexed Decl, 3.

⁴⁶ G Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 *Ohio Northern University Law Review* 97, 115. Attention seeking is also a private motive, as was argued by one suspect, Hussein Osman, in the failed London bombings of 21 July 2005: 'Entire alleged bomb ring held', *Guardian Weekly*, 5-11 Aug 2005, 8.

⁴⁷ Levitt, *ibid*.

⁴⁸ J Habermas, 'Fundamentalism and Terror: A Dialogue with Jürgen Habermas', in G Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (University of Chicago Press, Chicago, 2003), 25, 34.

motivated 'terrorism', rather than for common crimes like murder or sectoral offences like hijacking, may help satisfy public indignation at terrorist acts, better express community condemnation, and placate popular demands for justice. There is arguably a *moral difference* in convicting a person of 'terrorism' rather than murder or hijacking.

Recently, the international community has been increasingly willing to differentiate different kinds of violence according to its motivation. The very idea of just war theory (surviving in the law of self-defence, and resurfacing in debates about humanitarian intervention) privileges certain kinds of violence based on motivation. More pointedly, the 2000 UN Convention against Transnational Organised Crime defines transnational organised crime as serious crime that is motivated by 'financial or other material benefit'.⁴⁹ During its drafting, some States argued that the definition should not cover terrorist organisations, although others hoped that it could be used against terrorist groups when they act for profit.⁵⁰ The resolution adopting the Convention urged the drafters of the UN Draft Comprehensive Terrorism Convention to take into account the Convention when framing its provisions.⁵¹ Defining terrorism by reference to its underlying political motives would help to conceptually distinguish terrorism from profit-oriented transnational organised crime (or profit-based piracy in the maritime context). This distinction does not always imply that terrorism is morally *worse* than organised crime (a mafia hit may cause as much fear as a terrorist act), but it does suggest that it is morally *different*.⁵²

49 2000 UN Convention against Transnational Organised Crime (adopted by UNGA res 55/25 (2000) on 15 Nov 2000, entered into force 29 Sep 2003; 114 parties and 147 signatories by Nov 2005), arts 2 and 5. The UN General Assembly has often expressed concern at links between terrorist groups and violent organised crime: preambles to UN General Assembly resolutions 44/29 (1989); 46/51 (1991); 48/122 (1993); 49/60 (1994); 49/185 (1994); 50/186 (1995); 54/164 (2000); 58/136. Since the 1980s the categories have increasingly converged: W Laqueur, *The New Terrorism* (Phoenix Press, London, 2001), 210-225.

50 See J Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law (2005) 27 *Houston Journal of International Law* 267.

51 UN General Assembly resolution 55/25 (2000), 7.

52 Cf Moore, n49, who suggests that organised crime is a 'distinct' but also a 'lesser' crime than terrorism and thus should be kept separate.

While motive is normally irrelevant to criminal responsibility in most domestic legal systems,⁵³ in a sophisticated criminal justice system an element of motive can promote a more finely calibrated legal response to specific types of socially unacceptable behaviour. Where society decides that certain social, ethical or political values are worth protecting, the requirement of a motive element can more accurately target reprehensible infringements of those values.⁵⁴ Requiring proof of motive may, however, give rise to practical evidentiary difficulties where motives are unclear, mixed, or deliberately misleading.

While some States have been historically reluctant to mark out offenders as 'political' – fearing that this would legitimise them or transform them into martyrs for a cause – the political demands of terrorists will usually become prominent regardless of their ventilation in a courtroom, whether through the media or over the internet. While the elucidation of political motives in court may amplify them, it equally allows erroneous, misconceived or poisonous ideas to be confronted and dissipated. The expressive function of the criminal law cannot be overstated; a conviction for *political* violence sends a symbolic message that certain kinds of violence, *as such*, cannot be tolerated, and reinforces the ethical values of the political community. For these reasons, it is important to ensure that any definition of terrorism is not overbroad and excludes violent resistance that has legitimate public policy justifications.

Terrorist violence is distinguishable from private violence not only because it may be *political*, but also where it stems from a range of additional *public-oriented* motives. This is the approach to definition in UK, Canadian, Australian and New Zealand law, which require an intention to advance a *political, religious* or

53 K Kittichaisaree, *International Criminal Law* (Oxford University Press, Oxford, 2001), 92; J Smith, *Smith & Hogan: Criminal Law* (10th ed, Butterworths, London, 2002), 96; W Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge, 2002), 245.

54 See A Candebub, 'Motive Crimes and Other Minds' (1994) 142 *University of Pennsylvania Law Review* 2071, 2113.

ideological cause, while this is supplemented by 'philosophical' motives in a draft South African law.⁵⁵ In many cases, religious or ideological motives would already be covered by giving a broad meaning to 'political',⁵⁶ but the more comprehensive approach has the dual advantages of relative prospective certainty and of capturing violence which cannot be characterised as 'political'. It also neatly covers anarchic and nihilistic violence (as ideological), or eschatological or millenarian violence (as religious). Consider, for instance, the beheadings of three Christian girls on their way to school in Indonesia, in 2005, designed to strike fear into that religious community.⁵⁷

Given the breadth of the term 'political' and of these additional categories of motive, it is arguably unnecessary to separately prohibit violence motivated by a more ambiguous category of 'social' objectives (as in the US FBI's definition).⁵⁸ On the other hand, while much ethnic violence will also have a political, religious or ideological aspect, this is not always the case. For example, spontaneous racial or communal violence may be triggered by private disputes, historical enmities or retribution, rather than because of political disputes (about the distribution of power, land or resources, or about discrimination), ideological causes (such as eugenics or organised ethnic chauvinism or supremacy) or religious differences. It is preferable to add 'ethnic' motives as an element defining violence which precipitates terror.

⁵⁵ *Terrorism Act 2000* (UK), s 1(1)(c); *Criminal Code 1985* (Canada), s 83.1(1); *Criminal Code Act 1995* (Australia), s 100.1(1); *Terrorism Suppression Act 2002* (NZ), s 5; South African Protection of Constitutional Democracy against Terrorism and Related Activities Bill 2003, cl 1(1)(xxiv)(c); see also C Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, Oxford, 2002), 20-30.

⁵⁶ Walker, *ibid*, 26.

⁵⁷ A Rina and T Soetjipto, 'Teenagers beheaded on the way to school', *Sydney Morning Herald*, 31 Oct 2005.

⁵⁸ Walker, n54, 21-22 (UK law-makers thought that this expression was too broad and might cover mere blackmail or extortion).

D. Terrorism Threatens

International Peace and Security

A further rationale for criminalizing terrorism is the threat it may present to international peace and security. Resolutions of the General Assembly since the 1970s,⁵⁹ and of the Commission on Human Rights since the 1990s,⁶⁰ have stated that international terrorism may threaten international peace and security, friendly relations among States, international cooperation, State security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention and the Draft Comprehensive Convention take a similar position, while numerous regional instruments also highlight the threat to peace and security presented by terrorism,⁶¹ particularly given access to modern technology, weapons, transport, communications, and links to organised crime.⁶²

The General Assembly has also recalled 'the role of the Security Council in combating international terrorism whenever it poses a threat to international peace and security'.⁶³ From the early 1990s, the Security Council increasingly acknowledged in general or specific terms

⁵⁹ UN General Assembly resolutions 38/130 (1983), 1; 40/61 (1985), preamble, 2-3; UN General Assembly resolution 42/22 (1987), annexed Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, preamble; 42/159 (1987), preamble, 2-3; 44/29 (1989), preamble, 1-2; 46/51 (1991), preamble, 1-2; 48/122 (1993), 1; 49/60 (1994), preamble, 1-3; 49/185 (1994), 1; 50/53 (1995), 7; 50/186 (1995), 2; 1996 Decl, preamble, 1-2; 52/133 (1997), 3; 54/164 (2000), 2-3; UN General Assembly (60th Sess), 2005 World Summit Outcome, UN Doc A/60/L.1 (20 Sep 2005), 81.

⁶⁰ UN Commission on Human Rights resolutions 1995/43, 1; 1996/47, 2; 1997/42, 2; 1998/47, 3; 1999/27, 1; 2000/30, 1; 2001/37, 1; 2002/35, 1; 2003/37, 1; UN Sub-Commission on Human Rights resolutions 1994/18, 1; 1996/20, 2; 1997/39, 1; see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, 17.

⁶¹ 2002 Inter-American Convention, preamble; 1971 OAS Convention, preamble; SAARC Convention, preamble; Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan 2004; Non-Aligned Movement Final Doc (2004), n136, 100; Non-Aligned Movement Final Doc (2003), n136, 107, 110; Association of South East Asian Nations, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, preamble; Organisation of Security and Cooperation in Europe, Bucharest Plan of Action for Combating Terrorism, 4 Dec 2001, MC(9).DEC/1, annex, 1; Decision on Combating Terrorism (MC(9).DEC/1).

⁶² EU Commission, n43, 3, 8.

⁶³ UN General Assembly resolution 50/53 (1995), 7.

that acts of international terrorism may, or do, constitute threats to international peace and security.⁶⁴ After the terrorist attacks of 11 September 2001, the Council's language shifted to regarding 'any' or 'all' acts of terrorism as a threat to peace and security⁶⁵—regardless of their severity or international effects.

At first glance it seems obvious that, by definition, 'international' terrorism must have some negative impact on international relations. To some extent, the 11 September events attacked the 'structures and values of a system of world public order, along with the international law that sustains it'.⁶⁶ Yet, such consequences cannot be assumed for all terrorist acts. Before 11 September, the Council reserved the right to assess whether particular acts of international terrorism, in the circumstances, were serious enough to threaten peace and security. That measured and calibrated approach has been abandoned in the Council's rush to condemn any act, irrespective of its gravity, as a threat.⁶⁷

For example, a low level international terrorist incident—such as the attempted assassination of a public official by a foreign perpetrator, without the complicity of a foreign State—may not appreciably threaten peace or security, remaining localised or contained. In the absence of an advance definition of terrorism before late 2004, the Council's expansive approach condemned acts of prospectively unknown—and unknowable—scope. Even with a definition in 2004, it is not clear that sectoral offences committed to provoke terror, intimidate a population, or compel a government or organisation, will always be sufficiently grave to affect international peace or security.

64 Preambles to UN Security Council resolutions 731 (1992); 748 (1992); 1044 (1996); 1189 (1998); 1267 (1999); 1333 (1999); 1363 (2001); 1390 (2002); 1455 (2003); 1526 (2004), 1535 (2004); see also 1269 (1999), 1.

65 UN Security Council resolutions 1368 (2001), 1; 1611 (2005), 1; 1617 (2005), preamble; 1618 (2005), 1; 1624 (2005), preamble; 1636 (2005), preamble.

66 M Reisman, 'In Defense of World Public Order' (2001) 95 *American Journal of International Law* 833, 833.

67 See B Saul, 'Definition of 'Terrorism' in the UN Security Council: 1985-2004' (2005) 4 *Chinese Journal of International Law* 141.

Whereas previously the Council only referred to acts of *international* terrorism as threats to peace and security, since 2003 the Council has condemned 'any act', 'all acts', and 'all forms' of terrorism,⁶⁸ without qualifying such acts as *international*. The Council has involved itself in domestic terrorism, such as the Madrid bombing (wrongly attributed to ETA), and Chechen terrorism in Russia.⁶⁹ By expanding its sphere of concern to domestic as well as international terrorism, the Council has further pursued the liberal reading of its mandate developed in the 1990s.⁷⁰

Yet such an interpretation is unduly elastic. While domestic terrorism *may* threaten peace and security, it claims too much to assert that *any* act of domestic terrorism does so, just as not all *international* terrorism threatens peace or security. Although all terrorism (domestic or international) is of international *concern*—if it is universally accepted that it is morally repugnant—that is not equivalent to regarding all terrorism as a threat to *peace and security* under the Charter.

To the extent that terrorist acts do threaten peace and security, criminalization is one appropriate means of suppressing it, supplementing the range of other measures available to States and the Security Council. Even where terrorism is directed against an authoritarian State, criminalization may be justified if it helps to avert more serious harm to international peace or security, such as the escalation of regional violence.

68 Respectively: UN Security Council resolutions 1516 (2003), 1, 1530 (2004), 1; 1515 (2003), preamble; and 1516 (2003), 4, 1526 (2004), preamble, and 1530 (2004), 4.

69 Respectively: UN Security Council resolutions 1530 (2004), 1 (though ETA has transboundary links), 1440 (2002), 1.

70 See, eg, Chesterman, n35, 121-162, examining Security Council practice in relation to internal conflicts, humanitarian crises, and disruptions of democracy; R Gordon, 'United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond' (1994) 15 *Michigan Journal of International Law* 519; M Berdal, 'The Security Council, Peacekeeping and Internal Conflict after the Cold War' (1997) 7 *Duke Journal of Comparative and International Law* 71.

E. Controlling Security Council Measures

A related argument for definition and criminalization is the pragmatic need for legal controls on political discretions in efforts against terrorism. Soon after the terrorist attacks of 11 September 2001, the Security Council exercised its enforcement powers under Chapter VII of the UN Charter to compel all States to adopt wide-ranging counter-terrorism measures.⁷¹ Yet, terrorism was not defined in resolutions after 11 September,⁷² nor were lists of terrorists established.⁷³ The lack of definition was deliberate, since consensus on key resolution 1373 depended on avoiding definition.⁷⁴

Prior to these resolutions, the lack of a definition was legally inconsequential, since no international rights or duties hinged on the term 'terrorism'. Since 11 September 2001, that has changed. The absence of a definition is not merely of theoretical interest, because the terms 'terrorism' and 'terrorist' have operative legal significance in resolution 1373, triggering obligations to criminalize financing of *terrorism*; suppress *terrorist* groups; deny refugee status to *terrorists*; prevent the movement of *terrorists*; bring *terrorists* to justice; and, vitally, establish *terrorist acts* as serious domestic crimes. Resolutions have also implicitly referred to self-defence against terrorism, so the lack of definition may allow States to unilaterally target 'terrorists' in military operations.⁷⁵

In supervising implementation of Council measures, the UN Counter-Terrorism Committee (CTC) also decided not to define terrorism, 'although its members had a fair idea of what was blatant terrorism'.⁷⁶ The CTC did not want to interfere in the competence of other UN bodies by defining it, or by adjudicating on specific acts.⁷⁷ Instead, the CTC took an ad hoc approach, deciding whether an act is terrorism 'where necessary' and referring controversies to the Council or other bodies.⁷⁸ It pragmatically asserted that terrorism can be combated without agreement on its criminality in all situations.⁷⁹ While Resolution 1373 was drafted partly on the basis that sectoral treaties provided a framework definition,⁸⁰ the CTC openly allowed States to unilaterally define terrorism.⁸¹ Commonwealth model laws to implement resolution 1373 have defined terrorism by sectoral offences but also generically.⁸²

While flexibility in implementation is warranted due to variations in domestic legal systems, this effectively means that each State unilaterally defines terrorism,⁸³ without any outer legal boundaries set by the international community. Far from urging States to confine overly broad legislation, the CTC has advocated that *domestic* terrorism laws be jurisdictionally widened to cover *international* terrorism,⁸⁴ even though some domestic crimes more closely resemble broad national security or public order offences. The absence of a definition also makes it difficult to resolve disputes about whether particular persons or groups

71 See UN Security Council resolution 1373 (2001); see also Saul, n66.

72 E Rosand, 'Security Council resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) 97 *American Journal of International Law* 333, 339-340; J Stromseth, 'The Security Council's Counter-Terrorism Role: Continuity and Innovation' (2003) 97 *ASIL Proc* 41, 44; N Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11' (2002) 35 *Cornell International Law Journal* 475, 484; S Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 35, 49.

73 Although the CTC blithely urged States to use lists to 'eliminate the need for proof of actual involvement' in terrorism: J Wainwright, CTC Expert Opinion, 24 Nov 2002, 8.

74 L Bondi, 'Legitimacy and Legality: Key Issues in the Fight against Terrorism', Fund for Peace, Washington DC, 11 Sep 2002, 25.

75 US Congress, Authorisation for Use of Military Force, Pub L 107-40, 115 Stat 224 (18 Sep 2001).

76 CTC Chair (Ambassador Greenstock), Presentation to Symposium: 'Combating International Terrorism: The Contribution of the United Nations', Vienna, 3-4 Jun 2002; see also W Lacquer, 'We Can't Define "Terrorism" but We Can Fight It', *Wall Street Journal*, 12 Jul 2002, A12.

77 Greenstock, *ibid*.

78 *Ibid*.

79 Rostow, n71, 487.

80 *Ibid*.

81 UN Human Rights Committee, PR HR/CT/630, 27 Mar 2003 (CTC Expert, C Ward); C Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 *Journal of Conflict and Security Law* 289, 294-295.

82 Commonwealth Secretariat, Model Legislative Provisions on Measures to Combat Terrorism, part I.

83 Rosand, n71, 339-340; Stromseth, n71, 44.

84 Greenstock, n75; W Gehr, 'Recurrent Issues: CTC Briefing for Member States', 4 Apr 2002.

qualify as terrorist.⁸⁵ The situation has been exacerbated by a lack of procedural fairness in the Security Council's listing and delisting of terrorist groups and the freezing of their assets.

The failure to define terrorism has provoked mixed reactions from Council members. Colombia believed definition was unnecessary, since terrorism was defined in Assembly resolution 49/60.⁸⁶ Whereas Mauritius did not want to 'quibble' about definition,⁸⁷ other States have placed more value on it.⁸⁸ Syria stated that non-definition had encouraged violations of human rights and international humanitarian law, and encouraged 'selective accusations of terrorism'.⁸⁹ Arab and Islamic States have insisted that terrorism be distinguished from self-determination struggles; that 'State terrorism' be covered; and that root causes be addressed.⁹⁰

As Amnesty International notes, 'the terms "terrorists" and "terrorist acts" in resolution 1373 are open to widely differing interpretations' and may facilitate rights violations.⁹¹ National anti-terrorism laws are widely divergent, with some very broad or vague definitions in play.⁹² Some States have deployed the international legitimacy conferred by Council authorisation to define

terrorism to repress or de-legitimise political opponents, and to conflate them with Al-Qaeda.

Thus, China bluntly characterises Uighur separatists in Xinjiang as terrorists; Russia asserts that Chechen rebels are terrorists, even though many are fighting in an internal conflict; and India seldom distinguishes militants from terrorists in Kashmir.⁹³ In Indonesia, insurgencies in Aceh and West Papua have been described and combated as terrorism, as have a Maoist insurgency in Nepal and an Islamist movement in Morocco.⁹⁴ Israel has identified Palestinians with Al-Qaeda, with Ariel Sharon calling Arafat 'our Bin Laden'.⁹⁵ In the Maldives, an opposition politician was convicted of terrorism offences and sentenced to ten years' imprisonment for peacefully protesting against rights violations by the government.⁹⁶ Similarly, in Uzbekistan 15 men were convicted of vague terrorism offences for organising public demonstrations, at which the government indiscriminately fired upon the crowd.⁹⁷

85 Rosand, n71, 340.

86 UN Security Council, 4845th meeting, Press Release SC/7900, 16 Oct 2003.

87 UN Security Council, 4413th meeting, Press Release SC/7207, 12 Nov 2001.

88 UN Security Council, 4453rd meeting, Press Release SC/7276, 18 Jan 2002 (including Syria; Costa Rica for the Rio Group; Morocco for the Arab Group; Qatar for the OIC; Pakistan; Israel); 4512th and 4513th meetings, Press Release SC/7361, 15 Apr 2002 (Syria; Malaysia); 4792nd meeting, Press Release SC/7823, 23 Jul 2003 (Pakistan); 4845th meeting, Press Release SC/7900, 16 Oct 2003 (Pakistan; Libya; Yemen; Armenia).

89 UN Security Council, 4512th and 4513th meetings, PR SC/7361, 15 Apr 2002.

90 UN Security Council, 4453rd meeting, Press Release SC/7276, 18 Jan 2002 (including Syria; Qatar for the Organisation of Islamic Conferences; cf Israel); 4734th meeting, PR SC/7718, 4 Apr 2003 (Pakistan; Syria); 4512th and 4513th meetings, Press Release SC/7361, 15 Apr 2002 (Malaysia); 4792nd meeting, Press Release SC/7823, 23 Jul 2003 (Pakistan); 4845th meeting, Press Release SC/7900, 16 Oct 2003 (Pakistan; Libya; Yemen).

91 Amnesty International, Statement on the Implementation of UNSC res 1373, 1 Oct 2001.

92 See B Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford, forthcoming 2006), chapter 4.

93 Concerning China: UN Security Council, 4688th meeting, Press Release SC/7638, 20 Jan 2003 (China); Chinese Information Office of State Council, "'East Turkistan' Terrorist Forces Cannot Get Away with Impunity', 21 Jan 2001; J Yardley, 'China puts minorities on terrorist watch list', *Sydney Morning Herald*, 17 Dec 2003; Amnesty International, 'Rights at Risk: Concerns Regarding Security Legislation and Law Enforcement Measures', 18 Jan 2002, AI Index ACT 30/002/2002, 5; C-P Chung, 'China's "War on Terror": September 11 and Uighur Separatism' (Aug 2002) *Foreign Affairs* 8; R Menon, 'The New Great Game in Central Asia' (2003) 45 *Survival* 187, 192, 198-199; J Watts, 'China turns war on terror to its strategic advantage', *Guardian Weekly*, 16-22 Sep 2005. Concerning Russia: UN Security Council, 4688th meeting, Press Release SC/7638, 20 Jan 2003 (Russia); 'Ivanov denies war in Chechnya, calls it fighting with terrorism', *Itar-Tass*, 4 Mar 2004; 'Struggle in Chechnya—struggle against international terrorism', *Itar-Tass*, 12 Nov 2002. In 1995 the Russian Constitutional Court declared that Chechnya was an internal armed conflict governed by Protocol II: in (1996) 17 *Human Rights Journal* 133; P Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court' (1996) 7 *European Journal of International Law* 563. Concerning India: UN Security Council, 4618th meeting, Press Release SC/7522, 4 Oct 2002 (India).

94 J Aglionby, 'Jakarta orders attack on Aceh', *Guardian*, 19 May 2003; ABC TV (Australia), Foreign Correspondent, 'West Papua: Ambushed', 3 Aug 2004; R Ramesh, 'Maoists tighten grip on Kathmandu', *Guardian*, 21 Aug 2004; Reuters, 'One thousand prisoners released for each tiny finger', *Sydney Morning Herald*, 10 May 2003.

95 'Arafat accuses bin Laden of exploiting Palestinians', *ABC News*, 15 Dec 2002; Pokempner, n13, 23.

96 International Commission of Jurists, 'Maldives: Human rights defender Jennifer Latheef should be released immediately and unconditionally', Press Release, Geneva, 18 Oct 2005.

97 'Uzbekistan: UN rights experts concerned about rights of defendants', UN News, 26 Oct 2005.

The Council has initiated a fight not against terrorism, but 'different terrorisms'.⁹⁸ This devolution of discretionary power is unprincipled and dangerous. Combating terrorism 'without defining it remained possible for as long as the word itself was not uttered'.⁹⁹ In contrast, operatively deploying the term without defining it creates uncertainty and allows States to make 'unilateral determinations geared towards their own interests'.¹⁰⁰ Few States have objected to Council measures because they align (rather than interfere) with their sovereign interests.¹⁰¹ It was only in May 2005, after three years of excessive counter-terrorism responses, that governments in the UN Commission on Human Rights mandated an international expert to examine the impact of counter-terrorism measures on human rights.

Whether one is sceptical of definitions or regrets that the term was ever inflicted on us is irrelevant;¹⁰² the term now has legal consequences and cannot be ignored, as merely of academic interest, or washed away. Defining terrorism would help to confine the term and prevent its abuse, providing a yardstick against which to contest spurious claims by governments that certain people or groups are terrorists.

F. Incidental Benefits of Defining Terrorism

There are also incidental benefits which flow from criminalizing terrorism, which provide subsidiary justifications for its definition. Definition encourages harmonisation of national criminal laws, reducing

'differences in legal treatment' between States.¹⁰³ Definition would assist in satisfying the double criminality rule in extradition requests, and in establishing and fulfilling a 'prosecute or extradite' regime for terrorist crimes.¹⁰⁴ Definition might also help confine the political offence exception to extradition for terrorist offences, should that be considered desirable by the international community.¹⁰⁵ Definition would further assist in excluding 'terrorists' from refugee status, if terrorism qualifies either as serious non-political crime, or is contrary to UN purposes and principles.¹⁰⁶ To the extent that sectoral offences are enumerated within a generic definition, definition would widen the substantive implementation of sectoral treaties.¹⁰⁷

¹⁰³ EU Commission, n43, 3. Whether harmonisation is desirable as an end in itself is beyond this discussion.

¹⁰⁴ J Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13, 35.

¹⁰⁵ See generally G Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff, Dordrecht, 1998); C Van den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the Terrorist's Loophole' (1989) *Israeli Yearbook on Human Rights* 297; C Van den Wijngaert, *The Political Offence Exception to Extradition* (Kluwer, Boston, 1980); M Bassiouni and E Wise, *Aut Dedere Aut Judicare* (Martinus Nijhoff, Dordrecht, 1995); A Sofaer, 'The Political Offence Exception and Terrorism' (1986) 15 *Denver Journal of International Law and Policy* 125; M Shapiro, 'Extradition in the Era of Terrorism: The Need to Abolish the Political Offence Exception' (1986) 61 *NYU Law Review* 654.

¹⁰⁶ 1951 Refugee Convention, arts 1(F)(b)-(c); see also 2002 Inter-American Convention, arts 12-13; EU Council, Common Position on Combating Terrorism (2001/930/CFSP), OJ L344/90 (28 Dec 2001), arts 16-17; UN General Assembly resolution 49/60 (1994), 5(f); 1994 Declaration, 3, 5(f); 1996 Declaration, 3; UN Security Council resolutions 1269 (1999), 4; 1373 (2001), 3(f)-(g), 5; 1377 (2001), preamble; *Gurung v Home Secretary* [2003] Imm AR 115; *Pushpanathan v Canada* [1998] 1 SCR 982; *T v Home Secretary* [1996] AC 742; B Saul, 'Exclusion of Suspected Terrorists from Asylum', IIIS Discussion Paper 26, Dublin, Jul 2004; M Zard, 'Exclusion, Terrorism and the Refugee Convention' (2002) 13 *Forced Migration Review* 32; G Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E Feller et al (eds), *Refugee Protection in International Law* (CUP, Cambridge, 2003), 425; W Kälin and J Künzli, 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes' (2000) 12 *International Journal of Refugee Law* (Special Supp) 46.

¹⁰⁷ EU Commission, n43, 5.

⁹⁸ Laqueur, n48, 79.

⁹⁹ G Guillaume, 'Terrorism and International Law', Grotius Lecture, British Institute of International and Comparative Law, London, 13 Nov 2003, 4-5.

¹⁰⁰ Ibid; see also J-M Sorel, 'Some Questions about the Definition of Terrorism and the Fight against its Financing' (2003) 14 *American Journal of International Law* 365, 370.

¹⁰¹ N Krusch, 'Hegemony and the Law on the Use of Force', Paper at ESIL Conference, Florence, 13-15 May 2004, 15.

¹⁰² A Roberts, 'Can We Define Terrorism?' (2002) 14 *Oxford Today* 18 and R Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974) 7 *Akron Law Review* 380 respectively.

Current Proposals for Defining Terrorism

Currently, a number of definitions of terrorism have been proposed at the international level. Since 1994, the General Assembly (politically) described terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'. Security Council resolution 1566 (2004) shares this basic approach, but adds that terrorism also includes criminal acts (endangering life or property) designed to 'intimidate a population or compel a government or an international organisation to do or to abstain from doing any act'. It also limits terrorism to acts of this nature which are already offences under counter-terrorism treaties. Unlike the General Assembly definition, however, the Council does not require a political motive, thus encompassing private acts which terrorise, intimidate or coerce. Consequently, some of the distinctiveness of terrorism is lost.

In March 2005, the UN Secretary-General's report, *In larger freedom*, proposed yet another definition of terrorism, drawn from the report of the UN High-Level on Threats, Challenges and Change of December 2004. Terrorism is defined as any act 'intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act... is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act'. Unlike the Security Council's definition, this definition is not limited to offences under existing treaties, nor even to criminal acts. On the other hand, it is narrower than the Council's definition because it covers only acts against people and excludes violence against property or infrastructure. It also contains no reference to acts intended to provoke a 'state of terror', unlike the definitions of the Council and the General Assembly.

Since 2000, governments in the UN Sixth (Legal) Committee of the General Assembly have also been

trying to negotiate a treaty definition of terrorist crimes. The draft treaty currently defines terrorism as intentionally causing death or serious injury, or serious damage to public or private property, 'to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act'. Again, there is no reference to causing a 'state of terror', or any requirement that acts be motivated by political aims. It is also not clear whether the whole population must be intimidated, or whether it is sufficient to intimidate just a part of it.

Basic Elements of a Definition of Terrorism

It is possible to sketch the contours of a rational definition of terrorism based on the policy reasons for definition and criminalization discussed above, to reflect existing agreement on the wrongfulness of terrorism. To fully reflect the consensus on what is wrong with terrorism, each of the elements outlined below is necessarily conjunctive, thus increasing the specificity of terrorist offences.

A. Prohibited Means and Methods: Serious Violence

If terrorism is thought to seriously violate human rights, a definition must contain elements reflecting this judgment. In particular, if terrorism infringes the right to life and security of a person, a definition should prohibit serious violence intended to cause death or serious bodily injury to a person. The prohibition should also extend to attacks on public or private property where intended or likely to physically endanger people, including acts against essential utilities and public infrastructure. Threats to commit such acts could constitute an ancillary offence with lesser penalties,

rather than being regarded as a terrorist act in itself.¹⁰⁸

To increase certainty, the element of 'serious violence' could be qualified by enumerating prohibited violent acts, such as by listing the offences in existing sectoral terrorism treaties, and specifying additional acts not covered by those treaties (such as murder or physical assault by any means and in any context). At the same time, the element of 'serious violence' could remain as an open-ended 'catch-all' category to ensure that offenders do not evade liability by perpetrating violence by new or unanticipated methods.

Certainty could also be increased by qualifying 'serious violence' as that which is already 'criminal' under international or national law, thus excluding violence which is lawfully justified or excused by legal defences. The seriousness of criminal violence could remain a matter of appreciation in individual cases, just as 'serious non-political crime' in exclusion cases under international refugee law is interpreted by reference to comparative national law. This approach may, however, be challengeable for lack of specificity under human rights law and a definition may be more predictable if it attempts to particularise all prohibited physical acts.

B. Prohibited Purposes or Aims: Motives and Objectives

There are a number of possibilities for framing a definitional element to reflect the normative consensus that terrorism undermines the State and the political process. A narrow approach would be to criminalize only violence directed at State officials, institutions, or interests. This approach would fail to cover acts directed at individuals, groups or populations unconnected to State interests, and would thus omit to address a significant proportion of acts commonly understood as terrorism.

¹⁰⁸ Cf the Australian Criminal Code Act 1995 (Cth), s 100.1, which defines a threat to commit a terrorist act as a terrorist act in itself, thus blurring essentially different gradations of criminal harm.

To meet this problem, a number of recent international definitions of terrorism have supported protecting both the State and the broader population, by requiring that the *purpose* of an act, 'by its nature or context', must be 'to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.¹⁰⁹ One difficulty is that mere *intimidation* of a population, or *compulsion* of a government, seems to fall short of the severe impact implied by the term 'terrorism'.¹¹⁰ It may be questioned why such conduct is not described more precisely as crimes of 'intimidation' (as in some national laws)¹¹¹ or 'compulsion'. This problem is arguably cured by the European Union's solution of requiring an aim to *seriously* intimidate a population or *unduly* compel a government or international organisation.¹¹² Alternatively, New Zealand modifies this approach by replacing the 'intimidation' of a population with a graver intention 'to induce terror in a civilian population', while also according with the EU's element of undue compulsion.¹¹³

Even so, it remains the case that intimidation of a population or compulsion of a government may be motivated by private concerns such as blackmail, extortion, criminal profit or even personal disputes. Consequently, if a definition of terrorism is to reflect the real nature of the harm that terrorism inflicts on the political process, it must differentiate publicly-oriented violence from private violence. As discussed earlier, a terrorist act is committed not only where it has a political purpose,¹¹⁴ but wherever there is a

¹⁰⁹ 1999 Terrorist Financing Convention, art 2(1)(b); see also UN Security Council resolution 1566(2004); UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004); UN Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN General Assembly (59th Sess), 21 Mar 2005, UN Doc A/59/2005; UN Draft Comprehensive Convention, art 2(1).

¹¹⁰ In the UK, it is enough merely to 'influence' a government: Terrorism Act 2000 (UK), s 1(b).

¹¹¹ Eg, in Australia, under the *Crimes Act* 1900 (NSW), s 545B, the crime of 'intimidation by violence' is committed where a person uses violence or intimidation against another person to compel the person to do or abstain from doing any lawful act, carrying a penalty of two years' imprisonment.

¹¹² 2002 EU Framework Decision, art 1(1).

¹¹³ Terrorism Suppression Act 2002 (NZ), s 5(2)(a)-(b).

¹¹⁴ UN General Assembly resolutions 49/60 (1994), annexed Declaration on Measures to Eliminate International Terrorism.

public motive, aim, objective or purpose broadly defined: political, ideological, religious, ethnic or philosophical. The presence of a public motive distinguishes terrorism from private violence which also intimidates a population or compels governments.

C. The Threat to International Security: An International Element

If terrorism is thought to threaten international peace or security, an international definition must be limited to acts capable of that result—for instance, because of its cross-border or multi-national preparation or effects, the involvement of State authorities, or injury to other vital international community values or interests. This need not preclude a definition from covering domestic terrorism, where such conduct is thought to injure international values and attract international concern.

On the other hand, historically the weight of international opinion has only supported the definition and criminalization of *international* terrorism. The offences in the sectoral anti-terrorism treaties adopted since 1963, typically do not apply to purely domestic terrorism, although the international element required is formulated in various ways.¹¹⁵ The most recent sectoral treaties have followed a common formula, building on that found in the 1979 Hostages Convention. The 1997 Terrorist Bombings Convention, the 1999 Terrorist Financing Convention and the 2005 Nuclear Terrorism Convention do not apply where an offence is committed in a single State, the offender and victims are nationals of that State, the offender is found in the State's territory and no other State has jurisdiction under those treaties.¹¹⁶ Article 3 of the UN Draft Comprehensive Convention follows the same formula.

¹¹⁵ 1963 Tokyo Convention, art 1(3); 1970 Hague Convention, art 3(4)-(5); 1971 Montreal Convention, art 4(2)-(4); 1988 Rome Convention, art 4(1)-(2); 1973 Protected Persons Convention, art 1(a)-(b); 1979 Hostages Convention, art 13; 1980 Vienna Convention, art 2(1)-(2); 1991 Montreal Convention, arts 2-3.

¹¹⁶ Common art 3 of the four Geneva Conventions.

It is clear that a relatively liberal approach has been taken to construing the international element of offences, with only purely domestic terrorism being excluded. If international regulation of terrorism is limited to international terrorist acts, then the international element of offences should encompass the diverse ways in which terrorism may affect international interests. These may include where an act occurs in more than one State, or outside the jurisdiction of any State, or has effects in other States; where an act affects nationals of more than one State or internationally protected persons; or where the perpetrator is a foreign national.

D. Plain Textual Meaning: Creating Terror or Extreme Fear

Finally, as a matter of language, it is inherent in the term 'terrorism' that any definition must reflect that some person, or group of people, felt *terror* or were intended to feel *terror*. Otherwise, the term becomes disassociated from its linguistic origin and its ordinary or plain textual meaning. A crime of terrorism that lacks an element of terror would be better described by more accurate terminology. As mentioned earlier, proposals to define terrorism as mere 'intimidation' or 'coercion' imply much weaker conduct than 'terrorism', and might be more constructively described precisely as crimes of 'intimidation' or 'coercion'. While words do not possess fixed meanings, and are necessarily socially constructed, terrorism cannot be defined so elastically as to depart altogether from its ordinary textual foundation.

There has been considerable support for including such an element in an international definition of terrorism, commonly formulated in official proposals as either an intention 'to create a state of terror',¹¹⁷ or 'to provoke a state of terror',¹¹⁸ in particular persons, groups of

¹¹⁷ 1937 League of Nations Convention, art 1(2); 1991 ILC Draft Code of Offences against the Peace and Security of Mankind, art 24; 1998 Draft Rome Statute, art 5.

¹¹⁸ UN Security Council resolution 1566 (2004); 1994 UNGA Declaration on Measures to Eliminate International Terrorism.

persons, or the general public. Despite the circularity in defining 'terrorism' as involving a 'state of terror', international tribunals have recently interpreted terror as meaning 'extreme fear' and have been assisted by expert psychiatric evidence in determining the causes and symptoms of extreme fear.¹¹⁹ The serious social stigma which attaches to labelling an offender a 'terrorist', should be reserved only for those people who cause the grave psychological harm and distress which is signified by the term terrorism. That label should not be deployed too easily to describe violent offenders who generate lesser forms of social harm.

Exceptions to the Definition of Terrorism

Agreement on exceptions to any definition of terrorism has proved more difficult than agreement on the definition itself. In particular, two controversies have plagued the debate: whether national liberation or self-determination movements should be exempt, and whether State violence causing terror should be covered. The wider the definition of terrorism, the more likely a broader range of exceptions or defences should be available. If international law is to avoid criminalizing legitimate violent resistance to political oppression, agreement on the lawful boundaries of political violence is an essential first step before agreement on definition can be properly reached. The variety of possible exceptions and defences to, and justifications and excuses for, terrorism under international law has been considered fully elsewhere.¹²⁰

¹¹⁹ *Galic* case ICTY-98-29-T (5 Dec 2003); see also B Saul, 'Crimes and Prohibitions of 'Terror' and 'Terrorism' in Armed Conflict: 1919-2005' (2005) 4 *Journal of the International Law of Peace and Armed Conflict* 264.

¹²⁰ See B Saul, 'Defending Terrorism: Justifications and Excuses for Terrorism in International Criminal Law' (forthcoming) *Australian Year Book of International Law*.

Briefly, for present purposes, in the view of the author, international humanitarian law (IHL) is the appropriate legal framework for dealing with *all* self-determination conflicts (through the universal application of Protocol I), and for internal rebellions rising to the level of an armed conflict. Those who target military objectives in accordance with the laws of war would thus not be liable to prosecution as 'terrorists', but would be accorded combatant immunity. Any breaches of the laws of war would be punishable as war crimes (including under specialised prohibitions on acts of terror, spreading terrorism and measures of terrorism under IHL)¹²¹ or as crimes against humanity. All violent acts committed in connection with an international or internal armed conflict, whether by State or non-State forces, should be excluded from the scope of any general international crime of terrorism, to prevent such a crime interfering in the carefully constructed parameters of permissible violence in IHL. Excluding conduct in armed conflicts has the added advantage of removing the moral criterion of 'innocence' from definitions of terrorism, depoliticising it by applying the combatant/non-combatant framework of IHL.

Where terrorism is committed in peace-time (or in situations not covered by IHL), in order to maintain moral symmetry¹²² and broaden its legitimacy, a definition should cover acts of both State officials and non-State actors. Thus extrajudicial assassinations of political opponents by State officials,¹²³ or collusion in

¹²¹ See 1949 Fourth Geneva Convention, art 33(1); 1977 Protocol I, art 51(2); 1977 Protocol II, arts 13(2) and 4(2)(d); see also ICTR Statute, art 4(2)(d); 2000 Statute of the Special Court for Sierra Leone (annexed to UN Security Council resolution 1315 (2000), art 3(d).

¹²² MC Bassiouni, 'A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"', in MC Bassiouni (ed), *Legal Responses to International Terrorism* (Martinus Nijhoff, Dordrecht, 1988), xv, xxxix.

¹²³ See, eg, S Jeffery, 'Abbas accuses Israel of "terrorist" attack', *Guardian*, 10 Jun 2003; AFP, 'Mossad switches from analysis to action', *Sydney Morning Herald*, 4 Apr 2003; W Pincus, 'Yemen aided CIA strike on 6 Al Qaeda suspects', *International Herald Tribune*, 7 Nov 2002; J Risen and D Johnston, 'Bush has widened authority of CIA to Kill Terrorists', *New York Times*, 15 Dec 2002; D Priest, 'Drone missile kills al-Qaeda suspect', *Sydney Morning Herald*, 16 May 2005 (possibly in Pakistan and outside the conflict in Afghanistan). Where committed in armed conflict, the targeting of civilians not taking an

such killings,¹²⁴ might gainfully be qualified as terrorism, as might suicide bombings by non-State actors outside armed conflict. As Primoratz argues, acts which exhibit 'the same morally relevant traits' should be morally understood in a similar way.¹²⁵

Any international crime of terrorism must also accommodate reasonable justifications, excuses and defences for a limited range of terrorist conduct. Individual defences in international criminal law, and group circumstances precluding responsibility (such as the defence of necessity), drawn by analogy from the law of State responsibility, may excuse a very limited range of terrorist-type acts. In other cases not covered by any of the forgoing exceptions—such as in internal rebellions beneath an armed conflict—the international community may still regard some terrorist-type violence as 'illegal but justifiable'. In such cases, consideration might be given to excusing such conduct, and mitigating penalties for it, where it was committed in the 'collective defence of human rights'. Concrete examples might include the assassination of a military dictator, or politicians who forcibly refuse to cede power following defeat in a democratic election. Political amnesties and pardons may also play a role in responding to terrorism where higher public goods such as peace or reconciliation are at stake.

What can rarely, if ever, be justified, however, is the instrumental killing of non-harmful civilians, including killing to indulge religious passions. International law is a secular and pluralist normative system—which partly derives its universality from its secularity—and

cannot admit monotheistic claims to violence without unravelling its own coherence. While religious doctrines find a place in some national legal systems (consider sharia punishments),¹²⁶ even religious States explicitly reject religious justifications for terrorist violence,¹²⁷ including in criminal cases.¹²⁸

In addition, some recent national definitions of terrorism create an exception for acts of advocacy, protest, dissent or industrial action which are not intended to cause death, serious bodily harm, or serious risk to public health or safety.¹²⁹ Such exclusions are useful devices to prevent criminalizing as 'terrorism' comparatively minor harm (limited to property damage), such as when protestors at a union demonstration smashed the foyer of the Australian Parliament House in 1996; when anti-Iraq war protesters painted 'No War' on the shell of the Sydney Opera House in 2003 (requiring expensive repairs);¹³⁰ or when urban rioters cause extensive property damage, as at G8 anti-globalisation protests, or in the Paris suburbs in late 2005. While such destruction to property may exceed the limits of freedom of expression and amount to public order offences, they should fall short of being labelled as terrorism. This is particularly important in the construction of an international crime of terrorism, since States that are not democratic or generally rights-respecting are far less likely to exercise prosecutorial restraint in selecting appropriate criminal charges.

active part in hostilities (or after they have taken part) would amount to a war crime: A Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, prepared for the petitioners in the *Public Committee against Torture et al v Israel et al*, available at www.stoptorture.org.il (21 Dec 2005); but see D Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 171.

124 N Hopkins and R Cowan, 'Scandal of Ulster's secret war', *Guardian*, 17 Apr 2003.

125 I Primoratz, 'State Terrorism and Counter-terrorism' in I Primoratz (ed), *Terrorism: The Philosophical Issues* (Palgrave Macmillan, Hampshire, 2004), 113, 114.

126 Cf *Adelaide Company of Jehovah's Witnesses Inc v Australia* (1943) 67 CLR 116 (religion is not a justification for criminal violence).

127 1999 OIC Convention, preamble; 1998 Arab League Convention, preamble; General Pervez Musharraf, Address to the Nation (Pakistan), 12 Jan 2002: www.pak.gov.pk/public/President_address.htm.

128 'Religion doesn't justify violence: judges', *Sydney Morning Herald*, 6 Aug 2003; A Spillius, 'Bali bomber greets death sentence with thumbs-up', *Telegraph*, 8 Aug 2003 (an Indonesian court found that the killing of 202 people in the Bali bombing by a member of Jemaah Islamiyah betrayed Islam).

129 See, eg, Canadian Criminal Code s 83.01(1)(E); Australian Criminal Code s 100.1(3); Terrorism Suppression Act 2002 (New Zealand), s 5(5).

130 M Brown, "'No war'" sail painters sent for trial', *Sydney Morning Herald*, 16 Jul 2003.

Towards Definition in 2006?

The World Summit of September 2005 failed to resolve the impasse on the definition of terrorism, although negotiations in the General Assembly's Ad Hoc Committee on International Terrorism will continue in early 2006. For both principled and pragmatic reasons, definition of terrorism is more urgent than ever before. 'Terrorism' currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of non-retroactivity. If the law is to admit the term, advance definition is essential on grounds of fairness, and it is not sufficient to leave definition to the unilateral interpretations of States. Legal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately, it must do so without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression.

Criminalization is a powerful symbolic mechanism for delineating internationally unacceptable behaviour, even if deterrence of ideologically motivated offenders is not always likely. Definition of terrorism could satisfy community demands that 'terrorists' be brought to justice, without surrendering justice to populist vengeance, or criminalizing trivial harms. By defining terrorism, it is possible to structure and control the use of a term which, historically, has been politically and ideologically much abused. Rather than remaining an ambiguous and manipulated synonym for 'evil'—justifying all manner of repressive responses—legal definition would help to confine the term within known limits.

Based on the international community's identification of the underlying wrongfulness of international terrorism, it can be deductively defined as follows:

1. Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
2. where committed outside an armed conflict;
3. for a political, ideological, religious or ethnic purpose; and
4. where intended to:
 - (a) create extreme fear in a person, group, or the general public; and
 - (b) seriously intimidate a population or part of a population; or
 - (c) unduly compel a government or an international organisation to do or to abstain from doing any act.
5. Advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act.

Such a definition embodies the international community's core normative judgments about the wrongfulness of terrorism, while minimising interference in the existing law governing violence in armed conflicts. It also neatly correlates with some of the most common characteristics found in a 1983 study of 109 definitions of terrorism.¹³¹ The cumulative elements of this definition ensure that the stigma of the terrorist label is reserved for only the most serious kinds of unjustifiable political violence. Its limited application also prevents the symbolic power of the term from being diluted or eroded.

¹³¹ 84% of those definitions referred to violence or force; 65% to a political dimension; and 51% to fear or terror: A Schmidt and A Jongman, *Political Terrorism* (North Holland Publishing Co, Amsterdam, 1983, 76-7. On the other hand, only 6% of those definitions referred to the 'criminal' features of terrorism, and merely 17% to any element of 'intimidation'.

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Despite numerous efforts since the 1920s, the international community has consistently failed to define or criminalize 'terrorism' in international law, and there is not yet any discrete concept of terrorism in customary international law. This paper first explores the policy reasons for defining and criminalizing terrorism, before proposing the basic elements of an international definition of terrorism. Terrorism should be defined and criminalized because it seriously undermines fundamental human rights, jeopardises the State and peaceful politics, and may threaten international peace and security. Definition would also help to distinguish political from private violence, eliminating the overreach of the many 'sectoral' anti-terrorism treaties. A definition might also help to confine the scope of Security Council resolutions since 11 September 2001, which have encouraged States to pursue unilateral and excessive counter-terrorism measures. Defining terrorism as a discrete international crime normatively recognises and protects vital international community values and interests, symbolically expresses community condemnation, and stigmatises offenders. Secondly, this paper briefly outlines recent proposals for an international definition of terrorism before extrapolating the basic elements of an international definition of terrorism from the policy reasons for definition discussed in the first part of this paper. Finally, any definition of terrorism must also accommodate reasonable claims to political violence (particularly against repressive governance) and this paper highlights the range of exceptions, justifications, excuses, defences and amnesties potentially available to 'terrorists', as well as purported exceptions (such as self-determination struggles, 'State terrorism' and armed conflicts). Ultimately, a coherent legal definition of terrorism might help to confine the unilateral misuse of the term by national governments against their political opponents and in ways which seriously undermine fundamental human rights.

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