INTRODUCTION

Concepts of Terrorism

Semantic instability, irreducible trouble spots on the borders between concepts, indecision in the very concept of the border: all this must not only be analysed as a speculative disorder, a conceptual chaos or zone of passing turbulence in public or political language. We must also recognize here strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.*

Few words are plagued by so much indeterminacy, subjectivity, and political disagreement as ‘terror’, ‘terrorize’, ‘terrorism’, and ‘terrorist’. The ordinary linguistic meanings of these variant terms are instantly evocative and highly emotive,1 referring at a literal level to intense fear, fright, or dread.2 By itself, a literal meaning is not particularly instructive in distilling a legal concept of terrorism, since ‘every form of violence is potentially terror-inspiring to its victim’,3 from mugging to warfare.

This deceptively simple, literal meaning is overlaid with centuries of political connotations in specific historical circumstances. While the word ‘terror’ stems from Latin, entering French and English in the fourteenth century, the notions of ‘terrorism’ and ‘terrorist’ entered political discourse in the late eighteenth century, referring to the system of intimidation and repression implemented by the Jacobins (the ‘Red Terror’ or ‘Reign of Terror’) in the French Revolution.4 The idea of terrorism as an instrument of State control persisted until the end of the Second World War. Bismarck


terrorized’ Prussia by using the army as a means of social control; Nazi Germany imposed a reign of terror across Europe; German and Allied air forces resorted to ‘terror bombing’ in the Second World War; and Stalin ruled Russia by terror.

Gradually terrorism also came to refer to non-State practices. In the late nineteenth century, revolutionaries and anarchists in tsarist Russia were commonly known as terrorists. The Bolshevik seizure of power is often described as revolutionary terror, and communists embraced terrorism as a means of class struggle. In the Balkans, ethnic separatists assassinated Archduke Franz Ferdinand in 1914, precipitating the First World War, and King Alexander of Yugoslavia in 1934, leading to a diplomatic crisis in the League of Nations. In the 1940s, Jewish extremists hastened Israeli independence by assassinating Lord Moyne in Cairo, and the UN mediator, Count Bernadotte, and by acts such as bombing Jerusalem’s King David Hotel.

After the Second World War, ‘terrorism’ became mired in the ideological cleavages and proxy violence of the Cold War. Whereas developed States focused on non-State terrorism, developing and socialist States emphasized ‘State terrorism’ by imperial powers, and regarded anti-colonial violence either as an exception to terrorism, or as justified by colonialism. Much post-war ‘terrorism’ was linked to specific situations of decolonization, and dissipated on independence, as in Algeria, although Palestinian self-determination remains a stumbling block. Allegations of terrorism were also used as a pretext for intervention; the Soviet Union was ‘invited’ into Afghanistan to suppress Afghan and mujahadeen ‘terrorists’. The magnitude, internationalization, and indiscrimination of modern terrorism set it apart from the targeted assassinations of the nineteenth century.

By the late twentieth century, new forms of fundamentalist religious terrorism emerged (such as Al-Qaeda), decoupled from particular territorial claims, specific demands like the release of prisoners, or restraint in tactics.
At the same time, ‘traditional’ assassinations continued to be used with devastating effect: the shooting down of an aircraft carrying Rwandan and Burundian leaders in 1994 was a flashpoint for the Rwandan genocide; the assassination of Laurent Kabila helped to bring peace to Congo.\(^{14}\) After 11 September 2001, there was a remarkable tendency to conflate disparate terrorist threats into an homogenous global pandemic,\(^{15}\) erasing the specificity of the concrete conditions giving rise to different situations of violence.

Despite the shifting and contested meanings of ‘terrorism’ over time, the peculiar semantic power of the term, beyond its literal signification, is its capacity to stigmatize, delegitimize,\(^{16}\) denigrate, and dehumanize those at whom it is directed, including legitimate political opponents. The term is ideologically and politically loaded;\(^{17}\) pejorative;\(^{18}\) implies moral, social, and value judgment;\(^{19}\) and is ‘slippery and much-abused’.\(^{20}\) In the absence of a definition of terrorism, the struggle over the representation of a violent act is a struggle over its legitimacy.\(^{21}\) The more confused a concept, the more it lends itself to opportunistic appropriation.\(^{22}\)

The term ‘terrorism’ has been erratically deployed to describe all manner of evils, such as the nuclear ‘balance of terror’;\(^{23}\) rape by ‘sex terrorists’;\(^{24}\) and the Spanish inquisition.\(^{25}\) It has also been used to describe things that are not evils at all: refugees in Sabra and Shatila;\(^{26}\) loggers who caused flooding in Sumatra;\(^{27}\) and even parliamentary colleagues who sought to release asylum


\(^{16}\) Sorel, n 2, 366.

\(^{17}\) Lambert, n 1, 13; T Franck and B Lockwood, ‘Preliminary Thoughts Towards an International Convention on Terrorism’ (1974) 68 AJIL 69, 89.


\(^{19}\) Koufa, n 9, 8.

\(^{20}\) Wilkinson, n 1, 47.


\(^{26}\) Kapitan, n 18, 58 (referring to Israeli statements).

seekers from detention.\textsuperscript{28} What is not called terrorism is equally instructive; UK Prime Minister Thatcher was reluctant to label as terrorism the bombing in New Zealand of the Greenpeace ship, \textit{Rainbow Warrior}, for fear of alienating France, despite her Transport Secretary calling it ‘an outrageous act of terrorism’.\textsuperscript{29} It is clear that public or official attitudes ‘can change radically toward certain political crimes when their immorality and harmful quality become dubious or ambiguous’.\textsuperscript{30}

In the light of the kaleidoscopic uses of the term, it is fallacious to assert pragmatically that terrorism is recognizable without difficulty,\textsuperscript{31} or to claim intuitively that ‘what looks, smells and kills like terrorism is terrorism’.\textsuperscript{32} 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 resilience of the term terrorism testifies not only to its political utility, but also to its popular symbolic resonance. The term is seductive because it seems to encapsulate 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 stigmatize immorality, the idea of terrorism serves as a symbolic draw-card embodying many such judgments. The prosecution of an individual for ‘terrorism’, \textit{as such} (rather than for common crimes like murder), might go some way towards satisfying public indignation at terrorist acts, and placating popular demands for justice. Dismissing ‘terrorism’ as \textit{inherently} legally useless is unproductive, since the term serves popular expressive functions in the national and international communities.

On the other hand, 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 principles of non-retroactivity and specificity in criminal law. If the law is to admit such concepts, advance definition is essential on grounds of fairness. Legal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept.

\textsuperscript{28} ‘Rebel MPs behaving like “political terrorists”’, \textit{Sydney Morning Herald}, 15 June 2005.
\textsuperscript{29} H Muir and M Milner, ‘Ministers seek to broker BA strike deal’, \textit{Guardian Weekly}, 26 Aug–1 Sept 2005, 10.
\textsuperscript{32} UNGAOR (56th Sess), 12th plenary mtg record, 1 Oct 2001, UN Doc A/56/PV.12, 18 (UK).
This is no easy task. In the past, international attempts to define terrorism in legal terms have been exceedingly difficult, for ideological and political reasons, but also because of the ‘prodigious’ technical difficulties of definition.33 There are no clean lines between terrorism and other forms of political violence,34 and the debate about defining terrorism is also a debate about the classification of political violence in all its myriad forms: riot, revolt, rebellion, war, conflict, uprising, revolution, subversion, intervention, guerilla warfare, and so on. Analysis is clouded by the absence of international agreement on ‘the circumstances in which it is legitimate to use violence for political ends’,35 typified by the great variation in national interpretations of the political offence exception to extradition.

Even so, there is new urgency to the quest for definition. Previously, the lack of definition was legally inconsequential—no international rights or duties hinged on the term ‘terrorism’. Since 11 September 2001, that has changed. The Security Council has required States to implement measures against terrorist acts and terrorists, according those terms operative legal significance without defining them.

Whether one is sceptical of definitions,36 or regrets that the term was ‘ever inflicted upon us’,37 is irrelevant; the term now has legal consequences and cannot be ignored, as merely of academic interest, or wished away. Defining terrorism would help to confine the term and prevent its abuse. The absence of definition enables States to unilaterally and subjectively determine what constitutes terrorist activity, and to take advantage of the public panic and anxiety engendered by the designation of conduct as terroristic to pursue arbitrary and excessive counter-terrorism responses.

Plainly, the problem of terrorism touches on a great many areas of international law, and the focus of this book is on defining terrorism in international criminal law, drawing on other branches of international law where relevant, and mindful that criminal law is only one facet of the overall response to terrorism. There is a vast and often repetitive legal literature on terrorism, much of it focusing on national extradition law, the use of force, domestic legal measures (including civil remedies), and national human rights and civil liberties concerns. US and Israeli practice naturally dominates, given those States’ frequent targeting by terrorists. While the practice of such specially affected States requires particular attention in

35 Freestone, n 31.
the assessment of customary norms on terrorism, caution is warranted since the legal literature may be distorted by the preponderance of US writers and interests.

There is often a lack of clarity in discussion of terrorism, not to mention an over-emphasis on spectacular events and the manufacturing of a pervasive atmosphere of crisis. In particular, the rapidly expanding literature exudes an infatuation with the novelty of terrorist weapons or methods, especially ‘weapons of mass destruction’, and everything from ‘cyberterrorism’ and ‘eco-terrorism’ to ‘narco-terrorism’ and ‘agro-terrorism’. It is also marked by intemperate and hyperbolic language, exemplified by terms such as ‘hyperterrorism’ and ‘megaterrorism’, an ahistorical emphasis on the ‘radical newness of the problem’, and the labelling of terrorists as ‘apocalyptic’, ‘eschatological’, and ‘nihilists’.

The literature is also (unavoidably) reactive to specific incidents. At this distance, whether the attacks of 11 September 2001 are a seismic normative shift or an aberration remains to be seen. Certainly a previously intermittent problem has moved to the centre of international relations, and there has been a ‘staggering acceleration’ in measures against terrorism, and particularly a blurring or hybridization of, or vacillation between, traditional criminal justice and war paradigms.

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38 North Sea Continental Shelf cases (1969) ICJ Reports 3, 43, para 74.
43 Mégret, n 13, 329.
47 Koufá, n 9, 7.
Yet crises are often bad paradigms, and there is danger in being mesmerized by the scale, symbolism, and emotional resonance of those attacks, and thereby acceding to unnecessary or imprudent modifications of international law. Many claims about the legal novelty of those events misstate the scope of, or underestimate the durability and flexibility of, the existing law, and it is important not to overstate the normative effects of those events.

**DEFINING TERRORISM IN INTERNATIONAL LAW**

In the absence of a specific international crime of terrorism, Chapter 1 explains the policy rationale for defining and criminalizing terrorism—why, rather than how, to define it. Much of the international disagreement about defining terrorism stems from a more fundamental confusion about the underlying reasons for definition. By identifying precisely what is so objectionable about terrorism, it then becomes easier to define it technically to encapsulate those policy judgments. Since many of the physical acts comprising terrorist conduct are already domestic crimes or sectoral treaty offences, or fall within existing international crimes, it is vital to articulate why terrorism per se deserves special treatment.

The core rationale for definition and criminalization is that terrorism seriously undermines fundamental human rights, jeopardizes the State and peaceful politics, and threatens international peace and security. Defining terrorism as a discrete crime normatively recognizes and protects vital international community values and interests, symbolically expresses community condemnation, and stigmatizes offenders. The overreach inherent in sectoral treaties would be clarified by a more calibrated response which differentiates political from private violence. Arguments for criminalization are grounded in an examination of the basic characteristics of international crimes, the purposes of criminological policy, and the need to prevent the proliferation of unnecessary offences. The case for internationally criminalizing both domestic and international terrorism is also made, before a basic definition of terrorism is deduced from the policy reasons underlying its definition.

While the international community has repeatedly condemned terrorism as criminal and unjustifiable, that does not preclude the existence of exceptions to terrorism, or the idea that some terrorism may be excusable, and there is little evidence of absolute liability for it. Accordingly, Chapter 2 examines the range of justifications, excuses, and defences available to answer a terrorist charge, as well as purported exceptions (such as self-determination struggles). The first part outlines debates about the relevance of the causes of terrorism in evaluating responsibility for it. It then distinguishes permissible

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49 M Nussbaum, ‘Compassion and Terror’ in Sterba (ed), n 18, 229, 248.
self-determination violence from terrorism, and argues for the extension of international humanitarian law (IHL) as an appropriate normative framework for all self-determination struggles, as well as for certain internal rebellions.

The second part examines how the individual criminal defences of self-defence and duress/necessity may excuse some terrorist acts, and argues further that non-State group actors should be entitled to plead circumstances precluding wrongfulness, drawn analogously from the law of State responsibility, in defence of terrorism. While a narrow class of terrorist acts may be excused by individual or group defences, some acts considered justifiable may still fall outside the scope of defences. To maintain the law’s legitimacy, the final part argues that limited acts of ‘terrorism’, in collective defence of human rights, could be regarded as ‘illegal but justifiable’. In addition, political amnesties or pardons may be necessary in carefully limited circumstances in order to secure higher values of peace or national reconciliation.

In the absence of an accepted international definition of terrorism, Chapter 3 examines the international community’s response to terrorism in treaty law. Since the 1960s, numerous anti-terrorism (or sectoral) treaties have objectively regulated specific activities often described politically as terrorist, without creating a distinct generic crime of terrorism, or differentiating political from private violence. Regional treaty law followed a similar pattern until recently, when a number of treaties established wide generic terrorist offences, some indistinguishable from other forms of political violence. The second part of this chapter sketches numerous unsuccessful efforts since the 1920s to generically define and criminalize terrorism in treaty form. The many attempts at definition suggest that the international community has repeatedly attached importance to it, and illustrate the basic elements on which the definition debate has focused, including in the debate since 2000 about a UN Draft Comprehensive Convention.

Close analysis of customary international law in Chapter 4 confirms that there is no generic international crime, or distinct legal concept, of terrorism. Early attempts in the General Assembly to define terrorism were unsuccessful and a much-reiterated working definition of 1994 signals nascent political consensus, rather than firm legal agreement. There also remains disagreement over proposals for a national liberation exception to any legal prohibition of terrorism, although the adoption of the 1977 Geneva Protocols and the end of the Cold War dissipated some of the more paralysing and ideological features of the debate about the liberation exception.

In the Security Council, ‘terrorism’ was not mentioned in resolutions until 1985, after which time the Council increasingly designated a range of particular acts and incidents as ‘terrorist’, and condemned them as threats to international peace and security. After 11 September 2001, more generalized references to terrorism in Council resolutions have triggered serious legal
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consequences, without any definition of terrorism in Council practice. A working definition of terrorism in a resolution of late 2004\textsuperscript{50} does not cure this deficiency, given its non-binding status, and the latitude accorded to States in implementing resolutions.

Most international judicial decisions dealing with terrorist subject matter are silent on its legal status and instead treat the issue by recourse to existing legal norms. A number of national decisions concur, although some decisions have accepted international definitions for limited, non-criminal purposes. While some national laws define terrorism, most definitions serve administrative rather than criminal law purposes, and those containing generic terrorism offences are too diverse to support a customary international definition.

Finally, Chapter 5 explores the long history of attempts in IHL to regulate terrorism in armed conflict, especially in the context of air warfare, from the end of the First World War, through the inter-war period and the Second World War. A number of little-known prohibitions on terrorism, acts spreading terror, and acts of terrorism, are found in the 1949 Geneva Conventions and 1977 Protocols, and aim to enhance the protection of non-combatants in armed conflict. While those treaties do not define terrorism, its meaning in the different provisions can be derived from the drafting history, ordinary principles of textual interpretation, and a small number of judicial decisions. The meaning of terrorism in IHL is distinct from its meaning outside armed conflict, and embodies an interpretation of terrorism at its most literal—instilling extreme fear (in protected persons). There is, however, no wider concept of terrorism as politically motivated violence designed to coerce or intimidate governments or international organizations, despite attempts by the US to conflate peace-time definitions of terrorism with IHL. This chapter also examines justifications for these discrete prohibitions on terrorism, and special evidentiary difficulties arising from them.

\textsuperscript{50} UNSC Resolution 1566 (2004) para 3.