Reasons for Defining and Criminalizing Terrorism

. . . the reduction of fear is precious—in itself and in the productive possibilities it allows. For fear is not only frightening; it is typically also degrading, humiliating and paralysing. There is nothing to be said for it. Fear degrades those who suffer it, and equally those who inflict it.*

A. INTRODUCTION

Much of the international legal debate on terrorism has focused on ideological disputes, or technical mechanics, of definition, rather than on the underlying policy question of why—or whether—terrorism should be internationally criminalized. Since most terrorist acts are already punishable as ordinary criminal offences in national legal systems,¹ it is vital to explore whether—and articulate why—certain acts should be treated or classified as terrorist offences rather than as ordinary national crimes such as murder, assault, or arson. Equally, it is important to explain why terrorist acts should be treated separately from existing international crimes in cases where conduct overlaps different categories (particularly crimes against humanity, war crimes, and the existing sectoral anti-terrorism treaty offences).

In State practice, viewed through the lenses of UN organs and regional organizations, the bases of criminalization are that terrorism severely undermines: (1) basic human rights; (2) the State and the political process (but not exclusively democracy); and (3) international peace and security. Definition would also help to distinguish political from private violence, eliminating the overreach of the many ‘sectoral’ anti-terrorism treaties and ensuring a more calibrated international response to different types of violence. A definition could also help to confine the scope of Security Council Resolutions since 11 September 2001, which have encouraged States to pursue unilateral, excessive, and unpredictable counter-terrorism measures. Treating terrorism

* M Krygier, Civil Passions: Selected Writings (Black Inc, Melbourne, 2005) 149.
as a distinct category of criminal harm symbolically expresses the international community’s desire to condemn and stigmatize ‘terrorism’, as such, beyond its ordinary criminal characteristics. Doing so normatively recognizes and protects vital international community values and interests. Once consensus is reached on what is considered wrongful about terrorism, it is then easier to progress (in the last part of this chapter) to define the elements of terrorist offences with sufficient legal precision.

The rationale for criminalization is anchored in an examination of the common features of international crimes and the objectives of international criminological policy. This chapter is mindful of avoiding the proliferation of international offences and addresses problems of multiple charges and convictions. The rationale for definition depends on the purpose of definition, and the emphasis here is on definition in international criminal law, rather than in other branches of law (such as international humanitarian law (IHL), human rights, the use of force, refugee law, or extradition law). 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 basic human rights.

B. NATURE OF INTERNATIONAL CRIMES

An international crime is conduct prohibited by the international community as criminal. This bland positivist account merely identifies a crime by its source (State consent in a treaty, or through custom formation), but does not explain why the international community chooses to stigmatize conduct as deserving of international (or transnational) criminal prohibition and punishment. The policy rationale for criminalization is often obscure, and the ‘rapid expansion’ of the criminal law’s ‘material scope has not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalization, like individual autonomy, welfare, harm and minimalism’.3

1. Grave conduct of international concern

One general explanation for criminalization was suggested in the Hostages case, in which the US Military Tribunal at Nuremberg stated that: ‘An inter-


3 Boister, n 2, 957.
national crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances. The prohibition of conduct as criminal is ordinarily a matter falling within the reserved domain of domestic jurisdiction, and there is value in preventing the proliferation of superfluous or duplicate international offences—and unnecessary liabilities on individuals—to ensure the systemic integrity and coherence of international criminal law.

However, as the Tribunal noted, conduct is internationally criminalized where it is of such gravity that it attracts international concern. Conduct may be of international concern because it has transboundary effects or threatens ‘the peace, security and well-being of the world’; causes or threatens public harm of great magnitude; or violates natural or moral law and ‘shocks the conscience’ of humanity. International criminal law thus seeks to protect the shared values considered important by the international community, rather than comprising socially expedient or technical rules. As a result, ‘a greater degree of moral turpitude attaches’ to an international crime, which is not merely the product of social prejudice, indignation, distaste, or disgust.

There is inevitable subjectivity in identifying universal values, or in appealing to natural law as the basis of criminalization, and ‘make-believe universalism’ undermines the law’s authority. Despite cultural differences between States and their communities, over time consensus has emerged on

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4 Hostages case (1953) 15 Ann Dig 632, 636.
5 1998 Rome Statute, preamble; MC Bassiouni, Crimes Against Humanity (Martinus Nijhoff, Dordrecht, 1992) 46-47. Criminalization of piracy is warranted since it occurs beyond territorial jurisdiction, on the high seas.
core international crimes, evolving in an ad hoc and piecemeal fashion rather than by a systematic policy of criminalization. International moral agreement is not innate, but varies over time, shaped by community concerns about public safety and social order. As with other crimes, there is nothing intrinsically criminal about terrorism (as opposed to the physical criminal acts that it often comprises), which is situated in its own historical and political context.

2. International element

In the Hostages case, the US Military Tribunal laid down the criterion that conduct must be of such a nature that its suppression in domestic law alone would not be sufficient. Sectoral anti-terrorism treaties typically apply only where there is an international element to conduct. For example, the 1997 Terrorist Bombings Convention and the 1999 Terrorist Financing Convention do not apply where an offence is committed in a single State, the alleged offender is in the territory of that State, and no other State has a Convention basis to exercise jurisdiction. There is a similar provision in the Draft Comprehensive Convention, which also stipulates that the victims must not be nationals of the State where the offence is committed.

Although international crimes require an international element, this does not mean that prohibited conduct must always physically or materially transcend national boundaries, although domestic terrorism may threaten regional peace and security ‘owing to spill-over effects’ such as cross-border violence and refugee outflows. Genocide, war crimes and crimes against humanity may be wholly committed in a single jurisdiction. While these crimes often involve State action because of their scale or gravity, such involvement is not essential. Further, conduct need not threaten peace and security to constitute an international crime, where such conduct infringes international values.


16 1997 Terrorist Bombings Convention, Art 3; 1999 Terrorist Financing Convention, Art 3.

17 Draft Comprehensive Convention, Art 3.


Thus if terrorism injures values or interests deserving international protection—such as certain human rights—then domestic and international varieties should be equally criminalized. This is the approach followed regionally in the EU Framework Decision, which does not differentiate between the criminalization of domestic or international terrorism, as long as motive elements of altering or destroying a State, or intimidating a people, are satisfied. It is not the existence of a physical international element which attracts international jurisdiction; but the egregious nature of the interests affected. On the other hand, the international consensus favours only defining and criminalizing international terrorism, leaving crimes of domestic terrorism to the discretion of States. The construction of an international element to terrorist offences is considered at the end of this chapter.

3. The ‘international community’

In national legal systems, the criminal law underpins, serves, and protects the values and interests of the national community. While domestic analogies should be cautiously drawn, international criminal law similarly presupposes an international community, as constructed by its members, and even though it may lack clarity. Those who doubt the coherence of the international community, and thus decry the weakness of international criminal justice, overstate those problems. First, many modern, pluralist national communities also lack coherence, since power, authority, identity, and values are contested by diverse sub-national groups.

Second, individuals in national communities can still appreciate and adhere to international values, since national citizenship is not an exclusive marker of personal identity or allegiance. It is possible to assert the primacy of national law while concurrently realizing the value of the Nuremberg principles; indeed, the Rome Statute of the International Criminal Court (ICC)


accords such primacy to national courts. Third, when national communities uniformly demand vengeance, international trials may become most important to ensure fair prosecutions—particularly against ‘terrorists’. A more difficult problem lies in identifying the ‘international community’ which designs, and is served by, international criminal law. Kennedy claims the ‘international community’ is a ‘fantasy’ of objective agreement, when it is really the product of a small bureaucratic technical class. Clearly, a positivist account is insufficient—if States ‘make’ international law and comprise its community, it is unsurprising that States will seek to outlaw anti-State violence (including terrorism). There is a danger that the morality or national interests of dominant States may be disguised as a shared international morality of common interests; a hegemonic State may ‘arrogate to itself the exclusive power to lay down the definitive interpretation of the universal’. As Habermas warns: ‘the universalistic discourses of law and morality can be abused as a particularly insidious form of legitimation since particular interests can hide behind the glimmering façade of reasonable universality.’

In considering whether (and how) to criminalize terrorism, the views and interests of a wider range of participants in the international system must be taken into account, so that regulation of terrorism does not descend into a Statist technique of illiberal control. As Lauterpacht writes, ‘if there is law to be found in every community, law . . . must not be wholly identified with the law of States’. The international community comprises a ‘whole array of other actors whose actions influence the development of international legal rules’. For Habermas, while ‘there is not yet a global public sphere’, there are now ‘actors who confront states from within the network of an international civil society’. Diversity in a decentralized community does not preclude the existence of the community; international criminal law does not presuppose a monolithic community, just as national law does not depend on a homogenous society. As Abi-Saab writes: ‘Rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree

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34 Lauterpacht, n 7, 10; see also Allott, n 23, 50.
36 Habermas, n 27, 177.
of community existing within the group in relation to a given subject, at a
given moment. Terrorism, for instance, is a global danger that has ‘united
the world into an involuntary community of shared risks’.

A question remains as to whether terrorism is too ‘political’ for agreement to
be reached on definition. It would be a mistake for any law against terrorism
to attempt to ‘remain neutral in respect to competing values, and claims’,
as Bassiouni suggests. International criminal justice is not a ‘technical-
instrumental-oriented enterprise’, but is densely implicated in international
politics. Just as other international crimes partly rest on an ‘intuitive-
moralistic’ foundation, so too can it not be expected that terrorism is
able by definition of objective calculation or rational deduction.

The absence of any immutable content of ‘terrorism’ is no reason to refrain
from forging a political consensus on definition; less still is it a basis for
believing that terrorism is inherently indefinable. In the past, liberal and
illiberal States have supported the criminalization of other conduct,
demonstrating that consensus is possible even where it interferes in sovereign
criminal jurisdiction. Further, that terrorism was historically directed against
few States, such as the US, the UK, France, and Israel, is not fatal to the
broader appeal of a prohibition. Indeed, ‘a system of thought may be true,
and hence non-relativistic, even though it has developed within a tradition
that is historically and culturally specific’. Certain values may be ‘universal-
izable’, if not yet universal.

There must, however, be an awareness that criminalizing politics (or
judicializing the public sphere by punishing political enemies) ‘strengthens
the hand of those who are in a position to determine what acts count as

38 Habermas, n 27, 186.
41 Tallgren, n 12, 564.
42 cf G Sliwowski, ‘Legal Aspects of Terrorism’ in D Carlton and C Schaerf (eds),
43 Mégrét, n 40, 1268.
HRDLJ 81. Or as Koskenniemi puts it: ‘From the fact that law has no shape of its own, but
always comes to us in the shape of particular traditions or preferences, it does not follow that we
cannot choose between better or worse preferences, traditions we have more or less reason to
hope to generalise’: M Koskenniemi, ‘International Law in Europe: Between Tradition and
“crimes” and who are able to send in the police’. What is then important are principles of transparency and broad participation in the politics of law-making, to determine ‘the common interest of society’ and to avoid a ‘democratic deficit’ in law-making. Only through an inclusive process is definition of terrorism likely to be widely regarded as legitimate, and not ‘wielded to fit the interest or the whim of any one member of the community’.

C. INTERNATIONAL CRIMINOLOGICAL POLICY

1. Criminological purposes of criminalization

In domestic criminal law, criminalization is often said to advance certain criminological or policy purposes: punishment or retribution; incapacitation; rehabilitation; and general and specific deterrence. Ashworth identifies the three main purposes of criminal law as declaratory, preventive, and censuring. International criminal law seeks to secure similar objectives, although its criminology is underdeveloped, and its sentencing policy confused. In Simic (Sentencing), the ‘main general sentencing factors’ in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) were found to be ‘deterrence and retribution’, and the Rome Statute’s preamble affirms that punishment and prevention of crimes are key purposes of the International Criminal Court.

While imprisonment promotes punishment and deterrence, criminalization also furthers these goals by expressing community repugnance at conduct and invoking ‘social censure and shame’. The purposes served by

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48 Allott, n 23, 32.
49 Boister, n 2, 957–958.
52 Ashworth, n 11, 36.
criminalization may, however, vary in different contexts, and pluralistic ideas of justice should not be sacrificed to ‘western ethical aggression’.  

For example, prosecutions in post-conflict societies may contribute to national reconciliation and rehabilitation, while in other contexts restorative or alternative models of justice may be more appropriate.  

Unlike in domestic law, international criminal law has no unified or systematic law enforcement and judicial machinery. Even the establishment of the ICC does not entirely remedy this deficiency, since its criminal jurisdiction is established by treaty, not universal customary law, and is limited to enforcement among State Parties (excepting Security Council referrals). Thus national courts necessarily play a leading role in enforcing international criminal law, facilitated by judicial cooperation and assistance.

Proscription may still be effective despite the absence of a universal enforcement system. While international criminal law primarily has a repressive function, its normative role should not be understated. The mere existence of a criminal prohibition has normative value—signifying condemnation and stigmatization of conduct—irrespective of prosecutions. The identification of a crime, multilateral support for it, and its dissemination are non-prosecutorial modes of giving weight to a prohibition, producing ‘general pressure’ to conform. As Lemkin wrote of genocide, ‘if the law was in place it would have an effect—sooner or later’. Inevitably, ineffective enforcement undermines the normative weight and deterrent value of a prohibition. Yet even scarce prosecutions may support a prohibition, if they are appropriately targeted and publicized, and conducted by the principled exercise of prosecutorial discretion.

Criminalizing terrorism has a number of criminological implications. Bassiouni argues that incapacitation, through imprisonment, is one of the most credible theories of punishment for terrorists, since it neutralizes the threat of reoffending. Yet incapacitation is already served by prosecuting terrorism as ordinary crime, so this rationale does not specifically justify criminalizing terrorism, unless terrorist offences trigger enhanced penalties and thus prolong incapacitation. International criminal law historically prohibited conduct without agreeing on penalties, ‘due to widely differing

59 Cassese, n 6, 20. 60 ibid. 61 Ashworth, n 11, 36. 62 Hart, n 9, 220.
views’ on the gravity of crimes and the harshness of punishment. Yet as Ashworth writes, ‘one of the main functions of criminal law is to express the degree of wrongdoing, not simply the fact of wrongdoing’. An international treaty could, however, specify special penalties for terrorism, as in the 2002 EU Framework Decision.

Retribution or punishment is the most significant factor supporting the distinct criminalization of terrorism, since conviction socially stigmatizes and condemns the offender and provides some sense of justice for victims. In contrast, it is doubtful whether some terrorists are likely to be deterred by either imprisonment or condemnation by legal systems whose legitimacy they reject. The publicity gained by detention may even be beneficial to an ideologically-motivated offender’s cause, or have a martyr effect. Suicide bombers are particularly unlikely to be concerned about apprehension and prosecution. It is also for these reasons that rehabilitation is often inapplicable to an offender ‘opposed . . . to the social system into which he is to be resocialized’.

Nevertheless, criminalization is a useful symbolic mechanism for condemning and stigmatizing unacceptable behaviour. It may be too much to expect that the criminal law alone will effectively suppress terrorism, and such expectation may be an exercise in deception, irrationality, or quasi-religious hope. Criminalization is only one small part of the overall international response to terrorism. Further, Baudrillard fittingly warns that ‘though we can range a great machinery of repression and deterrence against physical insecurity and terrorism, nothing will protect us from this mental insecurity’.

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66 Cassese, n 6, 157.  
67 Ashworth, n 11, 37.  
71 Bassiouni, ‘A Policy-Oriented Inquiry’, n 8, xli, xxxiii; see also Rubin, ibid, 193.  
72 Bassiouni, ibid, xli–xlii; see also Rubin, ibid, 193.  
74 Tallgren, n 12.  
75 D Freestone, ‘Legal Responses to Terrorism: Towards European Cooperation?’ in J Lodge (ed), Terrorism: A Challenge to the State (Martin Robertson, Oxford, 1981) 195, 200; see UNODC, ‘Classification of Counter-Terrorism Measures’ (2002), classifying responses in these categories: I. Politics and Governance; II. Economic and Social; III. Psychological-communication-educational; IV. Military; V. Judicial and Legal; VI. Police and Prison System; VII. Intelligence and Secret Service; VIII. Other.  
Yet turning even an irrational hope against terrorism is not mere impotence: ‘norm setting eventually changes reality, however arduous the process’. Criminalization is valuable if it helps the international community to recognize and condemn violence for what it is—even if it is known that such violence is likely to continue. While punishment of terrorists may not meet ‘basic requirements of deterrence, retribution, incapacitation and resocialization’, ‘no alternative solutions . . . have yet been found’—other than defensive, pre-emptive, or centrifugal wars. When asked if a piece of paper would stop Hitler or Stalin, Lemkin exclaimed: ‘Only man has law . . . You must build the law!’

2. Vengeance and the problem of evil

Criminalization should not, however, serve as an instrument of populist vengeance. The exemplary function of international criminal justice risks degrading or victimizing an accused on the altar of popular values, while the law’s retributive function may primitively inflict suffering without any broader correctional purpose. Invidious moralization tends to accompany reference to terrorism, casting it as a titanic, Manichean, existential struggle of polarities: humanity and inhumanity; civilization and barbarism; freedom and fear; modernity and pre-modernity; liberal democracy and apocalyptic, eschatological, phantasmagorical nihilism; the rational and the pathological; law and outlaw; friend and enemy; the West and Others; Christianity and Islam; light and dark; good and evil.

Clearly, the term terrorism is imbricated in a dense ideological discourse. Habermas warns that ‘moralization brands opponents as enemies, and the resulting criminalization . . . gives inhumanity a completely free hand’. A State will often seek ‘to usurp a universal concept in its struggle against its enemy, in the same way that one can misuse peace, justice, progress, and

79 Quoted in Power, n 63, 55.
80 Zolo, n 53, 731–733.
83 Habermas, n 27, 189.
civilization’. Regarding terrorism as a human rights violation encourages just wars against terrorism ‘in the name of a globalised humanity’, and fosters the instrumentalization of human rights. For Schmitt, subsuming political relations within moral categories of good and evil turns the enemy into ‘an inhuman monster that must not only be repulsed but must be totally annihilated’—positing terrorism as a new enemy of humanity (*hostis humani generis*). In the words of the UN legal counsel, terrorism ‘threatens all States, every society and each individual’.

Thus in 1986, it was possible for Friedlander hysterically to urge Old Testament justice upon terrorists—public execution to humiliate and degrade them—to ‘Treat them as the monsters that they really are’; to ‘metaphorically spit in their bestial faces’; and to ‘terrorize the terrorist barbarians’. Others have called for the abandonment of reactive criminal law responses in favour of offensive military action, or for terrorists to be treated as pirates or ‘outlaws’. In the UK, the Archbishop of Canterbury cited Jesus in calling for terrorists who harm children to have millstones placed around their necks and be cast into the sea. If terrorism is presented as an absolute threat, then counter-terrorism measures must also be unlimited. Labelling opponents as terrorists de-legitimizes, discredits, dehumanizes, and demonizes them, casting them as fanatics who cannot be reasoned with.

Yet it is precisely because terrorism remains undefined that it lends itself to abuse in the service of unbounded moral abstraction, ideological causes, and imperial projects. The moralizing attaching to terrorism is not, however, a reason to avoid the term, so much as a reason to define it. While the term

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85 P Fitzpatrick, ‘Enduring Right’ in Strawson (ed), n 32, 37, 41; see also Douzinas, n 32, 25.
87 Schmitt, n 84, 36.
94 Krisch, n 31, 24.
95 UN Policy Working Group, n 19, para 14.
implies judgment and condemnation, by defining terrorism it is possible to finally appreciate precisely what is being judged and condemned. Definition fixes a legal standard against which to test and constrain political claims that opponents are terrorists, limiting ideological and political abuse of the term. Definition can harness and tame a term that has powerful symbolic resonance for, and embodies vital social judgments by, the international community of States and peoples.

It is not sufficient simply to object that the term is too potent to ever be legally deployed, since it will continue to be aggressively used in the political and public spheres as long as it remains undefined. As such, definition may help to limit the worst excesses. Definition could provide a constructive interpretation which satisfactorily expresses the community’s emotional and normative attachment to the term, but simultaneously protects those accused of terrorism from being reviled as unlimited ‘personifications of evil’. By sketching the contours of terrorism as an international public wrong, definition could help to foil punitive and absolutist demands that terrorists, as evil people, must surrender their human dignity.

Clearly, a legal definition cannot possibly control all uses or misuses of the term terrorism, or seek to exercise a monopoly on the meaning of public language. The term ‘genocide’ was invented by a lawyer for the purposes of constructing the 1948 Genocide Convention, but that term is now both abused and under-used at variance with its legal meaning. In part, that is because ‘genocide’ was defined too narrowly (due to drafting compromises) and thus excludes some vulnerable groups from protection. The term does not, therefore, accord with popular understandings of the concept as group-based extermination, regardless of the group’s identity.

At the same time, misapplying the term genocide to situations where genocidal intent is lacking erodes its descriptive utility and symbolic resonance, and its moral power to stigmatize offenders, and devalues the experience of victims of genuine genocides. While defining terrorism is equally unlikely to restrain all misuses of the term, definition nonetheless provides strategic leverage and critical focus in public debates about whether particular acts qualify as terrorism. It may thus help to blunt some of the more excessive misuses of the term. As the genocide example suggests, to do this most effectively is it important that a definition should correlate as far as possible with public expectations about, and understandings of, the term.

98 Douzinas, n 32, 27.
Criminalization of terrorism should also not punish trivial infringements. Recent prosecutions and convictions for international terrorism offences illustrate this problem. In the US, investigative referrals for these offences increased five-fold from 142 persons in the two years before 11 September 2001, to 748 persons in the two years from 11 September 2001 to 30 September 2003.\(^\text{102}\) Convictions increased seven-fold in the same period, from 24 to 184. Yet of the 184 persons convicted, 171 received minor sentences (80 received no prison sentence, and 91 less than one year in prison). Despite the large increase in convictions, fewer persons received prison sentences of five or more years (three people in 2001–03, versus six in 1999–2001).\(^\text{103}\) These sentencing trends suggest that international terrorism offences are capturing minor conduct, even though such offences should address the most serious conduct, attracting the highest penalties.\(^\text{104}\)

The exercise of discretion by US federal prosecutors is also revealing. Sixty per cent of (domestic and international) terrorism referrals were declined by prosecutors (1,048 cases), while 30 per cent of additional ‘anti-terrorism’ referrals were declined (506 cases).\(^\text{105}\) Of all referrals declined, nearly 35 per cent were declined for lack of evidence of criminal intent or the existence of an offence, or lack of federal interest. A further 15 per cent were declined for ‘weak or insufficient admissible evidence’. While the statistics reflect the difficulties of gathering evidence against terrorism, they also suggest overzealous law enforcement, based on flimsy evidence, unverified suspicion, and racial profiling. Excessive enforcement is a response to political and public demands for action against terrorists, by-passing evidentiary controls and investigative protocols. Increased enforcement does not necessarily correlate with any increase in terrorist activity.\(^\text{106}\)

In the UK, in the four years from 11 September 2001 to 30 September 2005, 895 were arrested under the Terrorism Act 2000 (UK) but only 26 per cent of these were charged with an offence under any UK legislation.\(^\text{107}\)

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\(^\text{103}\) However, the majority of cases referred were still pending after 30 Sept 2003 and more complex criminal matters, potentially leading to higher sentences, take longer to prosecute.

\(^\text{104}\) Similar patterns were recorded for domestic terrorism offences. As Ashworth, n 11, 17, writes: ‘criminal law, being society’s strongest form of official censure and punishment, should be concerned only with the central values and significant harms’.

\(^\text{105}\) TRAC, n 102.

\(^\text{106}\) ibid.

Around 55 per cent of those arrested (496 people) were released without charge, while 7 per cent were referred to immigration authorities (63 people). Only 15 per cent of those arrested were charged under the Terrorism Act 2000 itself (138 people), with only twenty-three people convicted (a conviction rate of 17 per cent). These twenty-three convictions represent only 3 per cent of all people arrested under the Act. Under the earlier Prevention of Terrorism Act (UK), 97 per cent of those arrested between 1974 and 1988 were released without charge and only 1 per cent were convicted. As the in US, immigration proceedings are a common way of dealing with people detained under terrorism laws, but against whom there is insufficient evidence to prosecute. These trends illustrate the well-known problem of emergency powers being used to capture ordinary crimes, contaminating the legal system.

4. Avoiding duplication of coverage by existing laws

A potent pragmatic objection to criminalizing certain conduct as terrorism is the view that domestic laws—and international criminal law—already prohibit the same conduct, albeit under different nomenclature, and that the emphasis should be placed on enforcing the existing law rather than developing new norms. Proponents of criminalizing genocide in the 1940s were faced with the same objection: Australia argued that domestic crimes like murder already adequately punished the physical elements of genocidal conduct. Critics also argued that human rights law—particularly the right to life and freedom from torture—would achieve the same result of preventing genocide.

There is plainly value in preventing the unnecessary proliferation of offences which duplicate existing prohibitions. Individuals must be able to know prospectively, with a modicum of certainty, the scope of their legal obligations, particularly their criminal liabilities. Already, international criminal law imposes a complex array of liabilities, with the deceptively simple categories of war crimes and crimes against humanity comprising numerous

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109 S Murphy, ‘International Law, the United States, and the Non-military “War” against Terrorism’ (2003) 14 AJIL 347, 357.
112 Bassiouni, n 8, xviii.
113 See Saul (2000), n 100.
114 Power, n 63, 75.
distinct (and sometimes overlapping) offences. While no criminal code can be static in the face of changing circumstances, international criminal law embodies only the most serious crimes, which should not vary too greatly over time.

While the law must keep pace with public expectations and social change, gratifying public passion or vengeance is not a good reason for criminalization. As in domestic law: ‘Creating a new criminal offence may often be regarded as an instantly satisfying political response to public worries about a form of conduct that has been given publicity by the newspapers and television.’ This critique is pertinent to terrorism, which inflames public sentiment like few other issues. For example, anti-terrorism law in Northern Ireland in the early 1990s was arguably exploited for symbolic significance to placate the electorate, rather than being adopted to meet legitimate law enforcement needs.

While most physical manifestations of terrorism are covered by existing domestic and international crimes—particularly crimes against humanity—there is still a persuasive case for internationally criminalizing terrorism. Beyond the physical violence of terrorism lie its unique and distinguishing characteristics—such as the specific intent to terrorize, intimidate, or coerce; and the existence of a political motive. These elements, which are additional to the physical violence of terrorism, are not adequately reflected in existing criminal prohibitions—just as the genocidal destruction of a group is not adequately embodied in crimes such as murder or even extermination.

An intermediate mode of criminalization is to categorize terrorism as a crime against humanity, as proposed at the 1998 Rome Conference, and by Russia in 2001. This would avoid creating an entirely new category of international crime and integrate terrorism into the existing hierarchy (and jurisprudence) of crimes, rather than setting it apart as a crime sui generis. It

116 The 1998 Rome Statute lists 34 separate war crimes in international armed conflict and 16 in non-international armed conflict (Art 8(2)); and 11 crimes against humanity (Art 7).
117 Ashworth, n 11, 24.
would also set up the crime against humanity of terrorism as a peace-time counterpart to the war crime of terrorism in armed conflict.\textsuperscript{121} One drawback is that crimes against humanity only encompass widespread or systematic attacks on a civilian population. Although this ensures that only very serious conduct is internationally criminalized, it would drastically reduce the scope of terrorism by excluding conduct below that threshold. Another disadvantage is identified by Mégret, who argues that, ‘no two equally meaningful qualifications can ever be given to the same act so that, confronted with a choice, one should always opt for the most specific description available, in accordance with the principles of sound conceptual economy’.\textsuperscript{122} In contrast, subsuming the narrower category of terrorism under the overall label of crimes against humanity risks diluting the \textit{lex specialis} into the \textit{lex generalis}.\textsuperscript{123} In this light, it is preferable to establish terrorism as a separate category of international (or transnational) crime, not coupled to the restrictive conditions of war crimes (requiring an armed conflict) or crimes against humanity (requiring widespread or systematic acts). Discrete categorization would also preserve the distinct moral condemnation attached to terrorism by the international community.

\textbf{5. Multiplicity of charges and convictions}

A further concern about the proliferation of offences is the problem of prosecuting and convicting individuals for multiple overlapping offences, based on the same conduct.\textsuperscript{124} This problem is not unique to terrorism and international tribunals have developed recent jurisprudence on the issue.\textsuperscript{125} The ICTY found that cumulative convictions for different offences may punish the same criminal conduct where ‘each statutory provision involved has a materially distinct element not contained in the other’.\textsuperscript{126} If each offence does not require ‘proof of a fact not contained in the other’, then ‘a conviction should be entered only under the more specific provision . . . with the additional element’.\textsuperscript{127}

Thus in the \textit{Galic} case, the ICTY refused to permit convictions for the


\textsuperscript{123} ibid.

\textsuperscript{124} Cassese, n 6, 212–218.


\textsuperscript{127} \textit{Celebici (Appeal)} ibid, paras 412–413; \textit{Kupreškić} ICTY–95–16 (14 Jan 2000) paras 683–684; \textit{Galic} ibid, para 158.
crimes of terror and attack on civilians based on the same conduct, and instead entered a conviction only for the more specific crime of terror (with the additional element of the ‘primary purpose of spreading terror’). In contrast, cumulative convictions for the crimes of terror and murder and inhumane acts were permitted, since they were not based on the same acts. Pre-trial, the ICTY allows cumulative or alternative charges to be filed for the same conduct, since before the evidence is presented at trial, it may be difficult for prosecutors to know precisely which offences will be supported by the evidence.

D. TERRORISM AS A DISCRETE INTERNATIONAL CRIME

Since the early 1960s, much of the physical conduct comprising terrorist acts has been criminalized in international treaties, and some terrorist acts may also qualify as other international crimes (such as war crimes, crimes against humanity, genocide, or torture) if the elements of those crimes are present. Despite the adoption of the sectoral treaties, the term ‘terrorism’ continues to exhibit descriptive and analytical force in international legal discussion, suggesting that, for the international community, it captures a concept beyond the mere physical, sectoral acts comprising terrorism. That term signals not merely a descriptive need of the international community, but also encapsulates a normative demand. This is so despite the vagueness and ambiguity for which the term ‘terrorism’ is often derided.

In the first place, the international community has expressed its disapproval of ‘terrorism’, as such, on a number of grounds since the 1970s, including that terrorism: is a serious human rights violation; undermines the State and peaceful political processes; and threatens international peace and security. In particular, there is a lingering sense in international political discourse that the offences in sectoral treaties fail specifically to recognize and condemn the political motivations underlying the physical violence of terrorism. The nature of the Security Council’s enforcement measures since September 2001 have further made the search for a common definition pragmatically urgent. Each of these grounds is considered as a basis for supporting the international criminalization of terrorism. Definition of

\[128\] Galic ibid, para 162.
\[129\] ibid, paras 163–164. The ICTY has also found that genocide does not subsume persecution and extermination, and permitted cumulative convictions: see Kostić (Appeal) ICTY–98–33–T (19 Apr 2004).
\[130\] Delalić (Appeal) ICTY–96–21–A (20 Feb 2001) para 400 (cumulative charging); Kupreškić n 127, para 727 (alternative charging).
\[131\] See Ch 3.
terrorism could remedy persistent concerns about its vagueness, while preserving the symbolic force attached to the term by the international community.

1. Terrorism as a serious human rights violation

International criminal law often prohibits conduct which infringes values protected by human rights law, without proclaiming those values directly.\textsuperscript{133} Numerous resolutions of the UN General Assembly since the 1970s,\textsuperscript{134} and of the Commission on Human Rights since the 1990s,\textsuperscript{135} assert that terrorism threatens or destroys basic human rights and freedoms, particularly life, liberty, and security, but also civil and political, and economic, social, and cultural rights.\textsuperscript{136} Regional anti-terrorism instruments,\textsuperscript{136} and the preamble to the Draft Comprehensive Convention,\textsuperscript{137} support the idea that terrorism gravely violates human rights. A UN Special Rapporteur observes that ‘there is probably not a single human right exempt from the impact of terrorism’\textsuperscript{138}

The notion of terrorism as a particularly serious human rights violation does not, by itself, constitute a compelling 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.

\textsuperscript{133} Cassese, n 6, 23.


\textsuperscript{137} UNGAOR (57th Sess), Ad Hoc Committee Report (2002), Supp 37 (A/57/37), Annex I: bureau paper.

\textsuperscript{138} Koufa (2001), n 21, 28.
Although some resolutions have condemned terrorism for violating the right to live free from fear, there is no explicit human right to freedom from fear, which a crime of terror might seek to protect. Such protection may, however, be implied from other provisions. First, the Universal Declaration of Human Rights (UDHR) preamble states that ‘freedom from fear’ is part of ‘the highest aspiration of the common people’, while the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Political Rights (ICESCR) preambles 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, and the new African Court on Human and People’s Rights ‘will address the need to build a just, united and peaceful Continent free from fear, want and ignorance’.

The political ideal of ‘freedom from fear’ was first articulated as one of four freedoms in a speech by US President Franklin D Roosevelt in 1941, and referred to the need to reduce global armaments to eliminate aggression. In 1944, the British jurist Brierly also spoke of the prospects for ‘freedom from fear’ in a reasonably secure international order. Its inclusion in the UDHR reflects an internationalization of American aspirations, partly at the urging of Eleanor Roosevelt. These treaty provisions support the criminalization of serious violations of the nascent right to live free from fear, which is protected fairly precisely by prohibiting terrorism (as extreme fear).

Second, safeguarding the right to liberty and security of person (ICCPR, Article 9(1) and UDHR, Article 3) may support the criminalization of terrorism. Most of the jurisprudence interpreting and applying that right has focused almost exclusively on the deprivation of liberty, without elucidating any independent meaning of the right to ‘security’. The text of the relevant provisions elaborates only on the content of liberty. Both the UN Human Rights Committee’s General Comment explaining Article 9, and European jurisprudence interpreting the equivalent right in Article 5 of the European

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142 US President F Roosevelt, State of the Union Address, 77th US Congress, 6 Jan 1941, (1941) 87 Congressional Record, Part I. The ‘four essential human freedoms’ were freedom of speech, freedom of worship, freedom from want, and freedom from fear. The ideal was also popularized in a wartime painting by Norman Rockwell, Freedom from Fear (1943).

Convention on Human Rights (ECHR), deal almost entirely with aspects of the deprivation of liberty.144

Yet an ordinary textual interpretation would give the term ‘security’ a meaning distinct from ‘liberty’.145 The UDHR drafting records are instructive. Some States were concerned about the vagueness and lack of definition of the right to ‘security’ of person in Article 3.146 While a request for a definitive interpretation of ‘security’ was rejected,147 the US explained that ‘security’ was chosen as the most comprehensive and concise term to express ‘physical integrity’,148 and that was the prevailing interpretation.149 Some States added, without opposition, that security also referred to ‘moral integrity’.150

Other States objected that ‘security’ did not fully encompass the idea of physical integrity,151 preferring a reference to ‘integrity’ instead of security,152 but a proposal to insert ‘physical integrity’ into the draft provision was narrowly rejected.153 Ultimately, the reference to liberty and security in Article 3 was adopted by 47 votes to 0, with 4 abstentions.154 Some States voted for Article 3 on the express understanding that ‘security’ referred to physical integrity,155 or physical, moral, and legal integrity.156 Costa Rica had earlier argued that ‘security’ implied a conferring of legal status on US President Roosevelt’s ideal of ‘freedom from fear’, and Haiti abstained from voting because its suggestion for an express reference to ‘freedom from fear’ was rejected.157

If the right to security means a right to physical, and possibly moral, integrity, it is arguable that terrorism attacks the right to security of person in both its physical and psychological dimensions. So much is recognized by the Organization of the Islamic Conference (OIC) Convention, which states that terrorism is a ‘gross violation of human rights, in particular the right

144 UNHRC (16th Sess), General Comment No 8: ICCPR, Art 9, 30 June 1982; Bonzano v France, 18 Dec 1986, Series A, (1987) 9 EHRR 297. In Europe, security has been referred to in disappearance of prisoner cases such as Timurtas v Turkey (App 23531/94), 13 June 2000, (2001) 33 EHRR 121.
146 UNGAOR (3rd Sess), 3rd Committee Summary Records of Meetings, 21 Sept–8 Dec 1948, 143 (Panama), 189 (Guatemala), 190 (Cuba, Uruguay), 192 (Cuba).
147 ibid, 190 (Philippines).
148 ibid, 190 (US).
149 ibid, 190 (US, France), 157 (Netherlands), 189 (Haiti), 191 (China), 192 (Guatemala), 194 (Philippines).
150 ibid, 189 (Haiti), 192 (Chile), 193 (Venezuela). Yugoslavia gave as an example of a violation of security of person, the lynching of black Americans in the US: n 146, 158 (Yugoslavia).
151 ibid, 164 (Cuba), 193 (Ecuador).
152 ibid, 145 (Cuba), 174 (Belgium).
153 ibid, 188 (19 votes to 17, with 12 abstentions).
154 ibid, 191. The reference to the right to life was separately adopted by 49 to 0, with 2 abstentions. Art 3 as a whole was adopted by 36 to 0, with 12 abstentions: 193.
155 ibid, 193 (Guatemala), 194 (Philippines).
156 ibid, 192 (Chile), 193 (Venezuela).
157 ibid, 175 (Costa Rica), 172, 193–194 (Haiti).
to . . . security’. 158 In one writer’s view, human rights discourse ‘recognises the danger that subversive violence poses to liberal democratic society, but recasts this as a threat to human security rather than a menace to a particular territory or sovereign space’. 159 ‘The right to security is, however, more limited in meaning than the expansive concept of ‘human security’ which gained some currency in the 1990s. 160

Few human rights violations are characterized as international crimes, and usually the remedy for a rights violation is enforcement of the right rather than criminal punishment of the violator. 161 While human rights law and international criminal law may overlap, ‘states do not yet regard many violations of international humanitarian and human rights law, including some truly cruel and heinous conduct, as criminal in nature’. 162 As the Inter-American Court of Human Rights (IACHR) found in the Velasquez Rodriguez case, human rights law is not punitive, but remedial. 163 Human rights treaties do not require prosecution of violators as a necessary remedy, 164 although ‘the obligation to ensure rights is held to encompass such a duty, at least with respect to the most serious violations’. 165 In addition, the law of State responsibility has long demanded the apprehension, prosecution, and punishment of those who injure foreign nationals. 166

There is no doubt that human rights are, however, ‘one source of principles for criminalization’, 167 since the effects of conduct on human rights are part of the assessment of the seriousness and moral wrongness of that conduct. Freedom from torture is one of the few human rights which is also internationally criminalized. 168 Yet other rights violations may be worthy of criminalization if they involve serious harm to ‘physical integrity, material support and amenity, freedom from humiliation or degrading treatment, and privacy and autonomy’. 169

Some writers have questioned whether terrorism can violate human rights as a matter of law, where terrorist acts are not attributable to a

158 1999 OIC Convention, preamble.
162 ibid, 12–13.
164 Ratner and Abrams, n 161, 152; D Shelton, Remedies in International Human Rights Law (OUP, Oxford, 2000) 323.
165 Shelton, ibid, 323.
166 See, eg, James Case (US v Mexico) (1925) 4 RIAA 82; M Whiteman, Damages in International Law (USGPO, Washington, DC, 1937) 639.
167 Ashworth, n 11, 41.
169 Ashworth, n 11, 41.
The basis of this argument is that under human rights treaties, only State Parties, rather than non-State actors or individuals, legally undertake ‘to respect and to ensure’ human rights. This position was taken by the EU, the Nordic States, and Canada, in supporting the adoption of the 1994 Declaration on terrorism, who argued that terrorism is a crime but not a rights violation, since only acts attributable to a State can violate human rights. (The EU has since reversed its position in justifying the 2002 EU Framework Decision.)

Clearly, terrorist acts that are attributable to States under the law of State responsibility may violate States’ human rights obligations. In contrast, private persons are not parties to human rights treaties, which do not have ‘direct horizontal effects’ in international law and are not a substitute for domestic criminal law. Nonetheless, in implementing the duty to ‘ensure’ rights, States must protect individuals from private violations of rights ‘in so far as they are amenable to application between private persons or entities’. 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. ‘These duties are related to the duty to ensure effective remedies for rights violations.’

172 UNGAOR 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).
173 Meron, n 170, 274.
175 ibid.
177 1966 ICCPR, Art 2(3).
Thus non-State actors, including terrorists, are indirectly regulated by human rights law, by virtue of the duties on States to ‘protect’ and ‘ensure’ rights. For this reason, in relation to human rights: ‘Much of the significance of the State/non-State (public-private) distinction with respect to the reach of international law . . . collapses.’ Even so, where a private act is not attributable to the State, the State cannot be held responsible for the act itself, but only for its own failures to exercise due diligence in preventing the resulting rights violations or responding appropriately to them. In the absence of State involvement in a terrorist act, the State can only be held responsible for its own failures or omissions, not for the private terrorist act itself.

While private persons are not directly legally responsible for rights violations, neither are they left entirely unregulated. The UDHR preamble states that ‘every individual . . . shall strive . . . to promote respect for these rights and freedoms . . . to secure their universal recognition and observance’, and this injunction has been reiterated in UN Resolutions against terrorism. Article 29(1) of the UDHR further recognizes that ‘everyone has duties to the community’ and the travaux préparatoires support the view that individuals must respect human rights. Similarly, the ICCPR and ICESCR preambles state that ‘the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized’ in those covenants.

These preambular injunctions, UDHR provisions, and Resolutions are, however, not binding. More persuasively, common Article 5(1) of the ICCPR and ICESCR states that nothing in those treaties ‘may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for’.

During the adoption of the 1994 Declaration, Algeria responded to the EU and Nordic States by arguing that this provision imposes legal obligations on individuals and groups to respect human rights. While the provision is not framed as a positive obligation on individuals or groups to observe human rights, by necessary implication it requires as much if individuals are to avoid destroying or unjustifiably limiting rights, as stipulated. The UN Special Rapporteur regards these provisions as forbidding the abuse of human rights

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182 Clapham, n 176, 97–98.
183 1966 ICCPR and 1966 ICESCR, preambles; see also 1948 UDHR, preamble.
184 See also 1948 UDHR, Art 30.
185 6th Committee Report, n 172, 21.
by individuals or groups. As Clapham observes, individuals are subject to duties in other areas of international law, including IHL and international criminal law.

Nonetheless, private actors have rarely been held directly accountable in human rights law for terrorist acts where no State is involved, and non-State actors are not bound by international supervisory mechanisms. Exceptionally, in Central and South America, the Inter-American Commission on Human Rights condemned ‘acts of political terrorism and urban or rural guerilla terrorism’, by irregular armed groups in the 1960s and 1970s, for causing ‘serious violations of the rights to life, personal security and physical freedom, freedom of thought, opinion and expression, and the rights to protection’.

Yet following controversy in the Organization of American States (OAS) in the 1980s on the definition of terrorism and its relationship to human rights, the Inter-American Commission retreated from its earlier position. In 1991, it emphasized that it was the function of the State to prevent and punish private violence, not the role of international rights bodies. There were concerns that directly addressing private violence would confer recognition on armed groups; deprive human rights of its specificity and nexus to international protection; stretch resources; irritate governments; put workers at risk; and relieve States of responsibility. There is also the practical difficulty of non-State groups assuming obligations (to ‘ensure’ or ‘protect’ rights) that they may lack the minimum organizational capacity to fulfil. Most of these criticisms relate to institutional, supervisory, and remedial questions, rather than to the principle of whether private actors do, or do not, violate rights.

Nevertheless, the weight of international practice suggests that it remains difficult to legally characterize terrorist acts by non-State actors as violations of human rights, in situations where a State has not failed to fulfil diligently its duties of prevention and protection. In such cases, the rights of victims will only be violated in a descriptive—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 terrorist themselves or the

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188 Schorlemer, n 171, 270.
192 cf Clapham, n 176, 93–94: ‘International law recognizes that individuals or private bodies are capable of committing violations of human rights’.
193 Steiner, n 171, 776.
relevant State. While it is ‘dangerous to exclude private violators of rights from the theory and practice of human rights’, 194 even descriptive violations of rights are a sufficient ground on which to criminalize terrorism by non-State actors.

2. Terrorism as a threat to democratic governance?

In the 1990s, the General Assembly and the UN Commission on Human Rights frequently described terrorism as aimed at the destruction of democracy, 195 or the destabilizing of ‘legitimately constituted Governments’ and ‘pluralistic civil society’.196 Some resolutions state that terrorism ‘poses a severe challenge to democracy, civil society and the rule of law’. 197 The 2002 EU Framework Decision, the 2002 Inter-American Convention, and the Draft Comprehensive Convention are similarly based on the premise that terrorism jeopardizes democracy. 198 Most regional treaties are, however, silent on the effects of terrorism on democracy—including those of the OAU, OAS, OIC, SAARC, CIS, and Council of Europe—suggesting that they do not regard terrorism as an offence specifically against democracy. 199

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 plausible basis 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.200 Terrorists violate the ground rules of democracy by coercing electors and candidates; wielding disproportionate and unfair power through violence;

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194 Clapham, n 176, 124.
198 2002 EU Framework Decision, recitals 1–2; Draft Comprehensive Convention, preamble; 2002 Inter-American Convention.
199 Although the Council of Europe stated that terrorism ‘threatens democracy’: Guidelines, n 136, preamble, para a.
200 1948 UDHR, Art 29(2); 1966 ICESCR, Arts 4, 8(1)(a); 1966 ICCPR, Arts 14(1), 21, 22(2); see UN Com Status of Women Resolution 36/7 (1992) preamble; Koufa (1999), n 186, paras 26–31.
and subverting the rule of law.\textsuperscript{201} 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.\textsuperscript{202}

As Arendt argues, humans are political beings endowed with speech, but ‘speech is helpless when confronted with violence’.\textsuperscript{203} For Ignatieff, terrorism ‘kills politics, the one process we have devised that masters violence in the name of justice’.\textsuperscript{204} Boutros Boutros-Ghali stated that terrorism reveals the unwillingness of terrorists ‘to subject their views to the test of a fair political process’.\textsuperscript{205} 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 concretize and protect the ‘emerging right to democratic governance’ which is progressively coalescing around the provisions of human rights treaties:\textsuperscript{206} ‘since 1989 the international system has begun to take the notion of democratic rights seriously’.\textsuperscript{207}

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’,\textsuperscript{208} not to mention much denied.\textsuperscript{209} 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.\textsuperscript{210} Further, the customary criteria reflected in the 1933 Montevideo

\begin{thebibliography}{99}
\bibitem{202} Koufa (1999), n 186, para 32.
\bibitem{205} Quoted in Koufa (1999), n 186, para 31.
\bibitem{208} S Chesterman, \textit{Just War or Just Peace?} (OUP, Oxford, 2002) 89.
\bibitem{209} In 2003, Freedom House regarded only 88 States as democratic, 55 States as part-democratic, and 49 States as ‘not free’: www.freedomhouse.org.
\bibitem{210} For analysis of different conceptions of democracy, see S Marks, \textit{The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology} (OUP, Oxford, 2000) chs 3–5.
\end{thebibliography}
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 recognized 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. 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.

Second, if terrorism is indeed characterized 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 ‘destabilizing 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’. Though seeming 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 which voted for them.

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 antidemocratic crime. Even in a community of democracies such as the EU, the

214 See Ch 4 below.
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.\(^{216}\)

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.

3. 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’.\(^{217}\) In contrast, since the early 1960s, the numerous ‘sectoral’ anti-terrorism treaties have avoided any general definition of terrorism.\(^{218}\) 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 terrorism per se’, since it fails to differentiate between privately motivated violence and violence committed for political reasons: ‘Not all hijackings, sabotages, attacks on diplomats, or even hostage-takings are “terrorist”; such acts may be done for personal or pecuniary reasons or simply out of insanity. The international instruments that address these acts are thus “overbroad”’.\(^{219}\) Overreach undermines ‘the moral and political force of these instruments as a

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\(^{217}\) UNGA Resolution 49/60 (1994), annexed Declaration, para 3.

\(^{218}\) See Ch 3 below.

counter-terrorism measure\textsuperscript{220} and dilutes the special character of terrorism as a crime against non-violent politics. As 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’.\textsuperscript{221} Prosecuting an individual for politically motivated ‘terrorism’, rather than for common crimes like murder or sectoral offences like hijacking, may help to satisfy public indignation at terrorist acts, better express community condemnation, and placate popular demands for justice.

Is there a moral difference between political and private violence, or between a conviction for ‘terrorism’ rather than murder or hijacking? Historically, many States sought to downplay and deny any such distinction, fearing that formally marking out offenders as ‘political’ would legitimize them or transform them into causes célèbres, lightning rods for dissent, or martyrs for a cause. Requiring proof of a political motive would expose fringe political claims to the judicial process, inevitably requiring the law to take serious notice of them and bringing them greater public attention. It was thought preferable to focus on the physical harm resulting from terrorist acts and, accordingly, to treat offenders as ordinary criminals.

The strength of these objections is doubtful. The political demands of terrorists will usually become prominent regardless of their ventilation in a courtroom, whether through the media or, since the mid-1990s, 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 a definition of terrorism is not overbroad and is flexible enough to exclude violent resistance that has legitimate public policy justifications\textsuperscript{222}.

Those objections are also prudential rather than theoretical ones. Whether it is wise to differentiate political offenders in the legal system is a separate question to whether such offenders are morally distinguishable. In recent years, the international community has shown itself increasingly willing to differentiate different kinds of violence according to their motivation. The very idea of just war theory (surviving in the law of self-defence, and resurfacings in debates about humanitarian intervention) privileges certain kinds of violence based on motivation. More pointedly, the 2000 UN Convention against Transnational Organized Crime defines transnational organized crime as serious crime that is motivated by ‘financial or other

\textsuperscript{220} Levitt, ibid.  
\textsuperscript{221} Habermas, n 33, 34.  
\textsuperscript{222} See Ch 2 below.
material benefit. During its drafting, a number of States argued that the definition should not cover terrorist organizations, although other States hoped that it could be used against terrorist groups when they act for profit. The resolution adopting the Convention urged the drafters of the UN Comprehensive Terrorism Convention to take the Convention into account when framing its provisions. Defining terrorism by reference to its underlying political motives would help to distinguish terrorism conceptually from profit-oriented transnational organized crime.

This distinction does not necessarily imply that terrorism is morally worse than organized crime (a mafia hit may cause as much fear as a terrorist act), but it does suggest that it is morally different. Such a distinction was drawn in the EU’s 2002 Framework Decision on Combating Terrorism. According to its drafters, because terrorism aims to intimidate countries, their institutions, or people and to seriously alter or destroy their political, economic, or social structures, ‘the motivation of the offender is different . . . and, consequently, other legal rights are also affected’. Terrorist acts are ‘ordinary offences which become terrorist because of the motivations of the offender’. A motive element distinguishes terrorism from ordinary crime which terrifies (such as armed robbery, serial rape, or mass murder).

A traditional difficulty is that in most domestic legal systems (and in international criminal law), motive is normally irrelevant to criminal

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226 cf Moore, n 224, who suggests that organized crime is a ‘distinct’ but also a ‘lesser’ crime than terrorism and thus should be kept separate.


229 ibid, 6.
Proof of motive is not typically required as an element of an offence, although it may be relevant in other ways (such as in evidence of fact, or in the exercise of judicial discretion in sentencing, especially in mitigation or aggravation). It is normally an offender’s intention to commit a prohibited act that is essential to criminal responsibility, rather than motives such as greed, jealousy, hatred, or revenge.

Even so, 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. There may be a powerful symbolic or moral value in condemning the motivation behind an act, quite separately from condemning the intentional physical act itself.

The key practical disadvantage of requiring motive as a mental element of a criminal offence is that it may be difficult to prove and ‘creates an additional obstacle to effective prosecution’. Yet, the ICTY has found that intent too ‘a mental factor which is difficult, even impossible, to determine’ and consequently ‘intent can be inferred from a certain number of presumptions of fact’. Motive too might be inferred by reference to the context and circumstances.

Where motives are mixed (as in a hybrid criminal/terrorist organization), it is arguably sufficient that the political motive constitute a substantial motive (rather than the sole or dominant one). The real difficulties arise where motives are undeclared, or where declared motives do not accord with actual motives. An example of the first category is when two speedboats attacked

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231 Kittichaisaree, ibid, 92.


235 Akayesu (Judgment) ICTR–96–4–T (2 Sept 1998) para 523: including ‘the general context of the perpetration of other culpable acts systematically directed against that same group . . . the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups’.

the Bahamas-registered cruise ship, *Seabourn Spirit*, off the Somali coast in late 2005, where the motives were unclear and authorities were unable to determine if the attack constituted piracy (for profit) or terrorism (for political reasons).\(^{237}\) In the absence of proof of political motives, such acts could, by default, be prosecuted as maritime offences under sectoral treaties. In such cases, nothing is lost by requiring a political motive to establish terrorism, since the community has not been harmed by the element of *political* coercion that justifies distinguishing terrorism from other violence.

An example of the second category is where a criminal group feigns political motives to mask private ones (such as the pursuit of illegal profit), in the hope of legitimizing their operations or lending them respectability.\(^{238}\) A related situation is where a terrorist group transforms over time into a profit-driven group.\(^{239}\) This problem is foremost an evidentiary one which requires investigators to distinguish genuine motives from disingenuous ones. Yet, it also raises a conceptual problem. If a group publicly justifies its violence in political terms, then the community will inevitably perceive and experience such violence as political, not private (at least until the real motives are revealed). In such cases, it may be justifiable to prosecute such violence as terrorism, on the basis that a purported or publicly manifested political motive may still constitute a substantial one; the genuineness or objectivity of the motive need not be decisive.

Pragmatically, a definition which does not require a political motive avoids the difficulty of interpreting the term ‘political’. In national extradition law, there are wide divergences in the meaning of ‘political’ offences,\(^ {240}\) and such jurisprudence may influence the interpretation of ‘political’ motives in terrorist offences. While no exhaustive definition of ‘political’ offences may be possible,\(^ {241}\) extradition law often excludes violence from the ‘political’ offence except where it is indiscriminate or atrocious,\(^ {242}\) or where it is too

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\(^{239}\) Or as Ignatieff says: ‘What happens when political violence ceases to be motivated by political ideals and comes to be motivated by the emotional forces, . . . [such as] resentment and envy, greed and blood lust, violence for its own sake?’ Ignatieff (2005), n 204, 114.


\(^{241}\) *Schraks v Israel* [1964] AC 556, 589 (Lord Radcliffe); *R v Secretary of State for the Home Department, ex p Fininvest Spa* [1997] 1 WLR 743, 760 (Simon Brown LJ).

remote from, or disproportionate to, a political end.\textsuperscript{243} (Courts have applied similar factors in interpreting the meaning of serious non-political crimes in international refugee law.)\textsuperscript{244} Historically, acts not directed to the overthrow of a government,\textsuperscript{245} or not committed in the course of a political disturbance,\textsuperscript{246} were also found to be non-political, even where they had political aims in a broader policy sense. While this position has since been liberalized in some jurisdictions,\textsuperscript{247} some States now regard acts as non-political where they attack democratic regimes.\textsuperscript{248} In addition, terrorist acts in peacetime which would violate IHL in armed conflict have been considered non-political by some courts.\textsuperscript{249}

These cases illustrate that the existence of a political motive does not decisively determine the political character of an act for extradition purposes.\textsuperscript{250} If conduct is not ‘political’ in these circumstances, it might be difficult to secure a conviction for terrorist offences, since the use of indiscriminate violence deprives the conduct of its political character. Thus in McGlinchey v Wren, terrorist violence was considered ‘the antithesis’ of the political.\textsuperscript{251} In a different context, the US Supreme Court found that cross burning by the Ku Klux Klan aims to instil fear, not to express political views,\textsuperscript{252} even though fear was instilled for a political (racist) purpose.

The meaning of ‘political’ in extradition law is, however, by no means decisive of its meaning in the distinct context of criminal prosecutions. If a political motive comprises an element of an international terrorism offence, courts could carefully distinguish the meaning of ‘political offences’ in national extradition law from political motives or purposes in international


\textsuperscript{244} T v Home Secretary [1996] 2 All ER 865; McMullen v INS (1986) 788 F 2d 591; Minister for Immigration v Singh [2002] HCA 7; Re Gil and Minister of Employment and Immigration (1994) 119 DLR (4th) 497; Zrig v Canada (Minister of Citizenship and Immigration) (CA) [2003] 3 FC 761.

\textsuperscript{245} Quinn v Wren [1985] ILRM 410; Russell v Fanning [1988] ILRM 333.


\textsuperscript{247} R v Governor of Brixton Prison, ex p Koleczynski [1955] 1 QB 540; Schraks, n 241; Re Kavic 19 ILR 371 (Swiss Federal Tribunal, 1952); Cheng v Governor of Pentonville Prison [1973] AC 93; Singh, n 244, para 45 (Gaudron J).


\textsuperscript{251} Re Castioni (1891) 1 QB 149; Re Meunier (1864) 2 QB 415; Re Ezeta 62 F 972, 978 (ND Cal 1894).

\textsuperscript{252} ‘Cross Burning an Issue of Hate, Not Free Speech’, Sydney Morning Herald, 9 Apr 2003 (the Court upheld a 1952 Virginian law banning cross burning in order to intimidate).
criminal law, just as the term ‘political’ has distinctive meanings in the law on refugees, non-discrimination, and crimes of persecution. Thus an act of terrorism may be an extraditable non-political offence in extradition law, because it is indiscriminate or disproportionate, but still comprise the crime of terrorism because of its political motivation.

Anarchic or nihilist violence, which lacks political aims and seeks only to destroy life or property, poses a special problem for any motive-based definition of terrorism. In extradition cases, courts have commonly held that anarchic violence is not ‘political’, since politics is considered to be the process of governing rather than the destruction of government itself. Similarly, if nihilism is a belief in nothing, it follows that a nihilist motive cannot be a political one. Such analysis is arguably unsound, since it hinges on a narrow conception of politics as merely the business of governing. In a modern sense, the ‘political’ does not only refer to the formal institutions and processes of government, but to any movements or causes which seek to influence the public or political sphere. As the House of Lords said in the Schtraks case: ‘The use of force, or it may be other means . . . to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution.’ The term ‘political’ could, for example, cover violence by anti-abortion activists, ‘eco-terrorists’, animal liberationists, or between ethnic groups—even if the victims are non-State targets. It is important to protect private persons perceived to be acting politically (and targeted as such), even though they are outside government.

Ignatieff claims that Al-Qaeda are eschatological and ‘apocalyptic nihilists’ who provide no justifications for their actions and thus lack any demands which can be politically accommodated. That crude assertion is at odds with the clear claims made by Osama bin Laden in his ‘Letter to America’ of 2002. Some of his complaints are unremarkable and shared by liberals or conservatives in the west. His demands are very specific: remove

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253 1951 Refugee Convention, Art 1A(2); ICCPR and ICESCR, common Art 2(1); 1998 Rome Statute, Art 7(1)(h) (crime against humanity of persecution).

254 Re Mennier (1894) 2 QB 415 (since it is not directed against a particular government); see also Prevato v Governor Metropolitan Remand Centre (1986) 64 ALR 37.

255 Schtraks, n 241, 583.

256 Ignatieff (2005), n 204, 99, see also 112–144.


258 Liberals share Bin Laden’s concerns that America: refuses to sign the Kyoto Protocol; dropped an atomic bomb on Japan; exploits women; maintains weapons of mass destruction; interferes in foreign governments; disrespects international law; seeks war crimes immunity for US soldiers; supported sanctions in Iraq which killed many children; and pursues an unjust oil policy. Conservatives share Bin Laden’s concerns about gambling, drugs, sexual immorality, homosexuality, and Clinton’s ‘immoral acts’ in the Oval Office.
foreign military bases; stop supporting Israel and corrupt Muslim leaders; forbid usury; permit *shariah* law, and convert to Islam. Some of these claims may be unreasonable or excessive, but they are still *political* claims.

An alternative approach is to define terrorism not only by its political motivation, but more explicitly by 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 *ideological* cause, while this is supplemented by ‘philosophical’ motives in a draft South African law. In many cases, it is likely that religious or ideological motives would already be covered by giving a broad meaning to ‘political’, but the more comprehensive approach has the dual advantages of relative prospective certainty and of capturing violence which cannot be characterized 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 Sulawesi, Indonesia, in 2005, designed to strike fear into that religious community.

Given the breadth of the term ‘political’ and of these additional categories of motive, it is arguably unnecessary to prohibit separately violence motivated by a more ambiguous category of ‘social’ objectives (as in the US FBI’s definition). 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 discrimination), ideological causes (such as eugenics or organized ethnic chauvinism or supremacy), or religious differences. It is preferable to add ‘ethnic’ motives as an element defining violence which precipitates terror.

4. **Terrorism as a threat to international peace and security**

A further compelling rationale for criminalizing terrorism is the threat it may present to international peace and security. Resolutions of the General

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260 Walker, ibid, 26.


262 Walker, n 259, 21–22 (UK law-makers thought that this expression was too broad and might cover mere blackmail or extortion).
Assembly since the 1970s, and of the Commission on Human Rights since the 1990s, 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, particularly given access to modern technology, weapons, transport, communications, and links to organized crime.

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'. From the early 1990s, the Security Council increasingly acknowledged in general or specific terms that acts of international terrorism may, or do, constitute threats to international peace and security. 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 security—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'.

Yet such consequences cannot be assumed for all terrorist acts. Before

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

265 2002 Inter-American Convention, preamble; 1971 OAS Convention, preamble; 1987 SAARC Convention, preamble; Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan 2004; NAM Final Doc (2004), n 136, para 100; NAM Final Doc (2003), n 136, paras 107, 110; ASEAN, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, preamble; OSCE, Bucharest Plan of Action for Combating Terrorism, 4 Dec 2001, MC(9).DEC/1, Annex, para 1; Decision on Combating Terrorism (MC(9).DEC/1).

266 EU Com Proposal, n 216, 3, 8.


268 Preambles to UNSC 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) para 1.


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.271

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 localized or contained. In the absence of advance definition of terrorism before late 2004, the Council’s expansive approach condemned acts of prospectively unknown—and unknowable—scope. Even with definition in 2004, it is not clear that sectoral offences committed to provoke terror, intimidate a population, or compel a government or organization, will always be sufficiently grave to affect international peace or security.

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,272 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.273 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.274

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

271 See Ch 4 below.
justified if it helps to avert more serious harm to international peace or security, such as the escalation of regional violence.

5. Controlling Security Council measures

(a) Lack of definition of terrorism in Council practice

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. Yet, terrorism was not defined in resolutions after 11 September, nor were lists of terrorists established. The lack of definition was deliberate, since consensus on key Resolution 1373 depended on avoiding definition.

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.

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’. The CTC did

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275 See Ch 4 below.
277 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, para 8.
not want to interfere in the competence of other UN bodies by defining it, or by adjudicating on specific acts. 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. It pragmatically asserted that terrorism can be combated without agreement on its criminality in all situations. While Resolution 1373 was drafted partly on the basis that sectoral treaties provided a framework definition, the CTC openly allowed States to define terrorism unilaterally. Commonwealth model laws to implement Resolution 1373 have defined terrorism by reference to sectoral offences but also generically.

While flexibility in implementation is warranted due to variations in domestic legal systems, this effectively means that each State unilaterally defines terrorism, 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, 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 qualify as terrorist.

The failure to define terrorism provoked mixed reactions from Council members. Colombia believed definition was unnecessary, since terrorism was defined in Assembly Resolution 49/60. Whereas Mauritius did not want to ‘quibble’ about definition, other States have placed more value on it. Syria stated that non-definition encouraged violations of human rights and IHL, and ‘selective accusations of terrorism’. Arab and Islamic States insist

that terrorism be distinguished from self-determination struggles; that ‘State terrorism’ be covered; and that root causes be addressed.294

As Amnesty notes, ‘the terms “terrorists” and “terrorist acts” in resolution 1373 are open to widely differing interpretations’ and may facilitate rights violations.295 National anti-terrorism laws are widely divergent, with some very broad or vague definitions in play.296 Some States have deployed the international legitimacy conferred by Council authorization to define terrorism to repress or de-legitimize political opponents, and to conflate them with Al-Qaeda.

Thus China bluntly characterizes 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.297 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.298 Israel has identified Palestinians with Al-Qaeda, with Ariel Sharon calling Arafat ‘our Bin Laden’.299 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.300 Similarly, in Uzbekistan fifteen men were convicted of vague terrorism offences for

294 UNSC, 4453rd mtg, PR SC/7276, 18 Jan 2002 (including Syria; Qatar for the OIC; cf Israel); 4734th mtg, PR SC/7178, 4 Apr 2003 (Pakistan); Syria; 4512th and 4513th mtgs, PR SC/7361, 15 Apr 2002 (Malaysia); 4792nd mtg, PR SC/7823, 23 July 2003 (Pakistan); 4845th mtg, PR SC/7900, 16 Oct 2003 (Pakistan; Libya; Yemen).
296 See Ch 4 below.
organizing public demonstrations, at which the government indiscriminately fired upon the crowd.301

The Council has initiated a fight not against terrorism, but ‘different terrorisms’.302 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’.303 In contrast, operatively deploying the term without defining it creates uncertainty and allows States to make ‘unilateral determinations geared towards their own interests’.304 Few States have objected to Council measures because they largely align (rather than interfere) with their sovereign interests.305

(b) Scope of Council authority to respond to ‘terrorism’

The absence of a definition also raises difficult questions about the scope of the Council’s authority under Article 39 of the Charter to designate a generalized, indeterminate phenomenon (rather than a specific act or incident, as in past practice)306 as a threat to security.307 The Resolution addresses terrorism generally, unconnected to 11 September 2001 or Al-Qaeda, and the response is not bound by temporal or geographical limits.308 The justification for addressing terrorism generally is based on assumptions about the harmfulness of transnational terrorism.309 As Singapore stated, ‘the 11 September events had brought new responsibilities to the Council’s work. Traditional definitions of threats to international peace and security no longer held’.310

On one hand, what constitutes a ‘threat to the peace’ is a continuously evolving and largely political question.311 When Article 39 of the Charter was drafted at San Francisco in 1945, threats to the peace, or breaches of the peace, were primarily understood as referring to the use of organized military

302 Laqueur, n 223, 79.
305 Krisch, n 31, 15.
307 Krisch, n 31.
308 ibid, 6; Szasz, n 306, 901; Stromseth, n 276, 43.
309 Abi-Saab, n 306, 310.
311 Talmon, n 276, 40–43.
force between States (or de facto States, as in the Korean war). This meant that enforcement action under Article 41 or 42 could only be triggered by inter-State military conflict, and lesser disputes were left to be dealt with by other UN organs. Article 39 was not intended to cover violence by private armed groups; internal violence and civil wars (which fell within the scope of domestic jurisdiction under Article 2(7) of the Charter); or even illegal foreign occupation of territory. The concept of aggression in Article 39 was purposely left undefined so as not to restrict the Council’s discretion. However, it too referred to the direct or indirect application of armed force (including sending armed groups) by one State against another, and thus largely overlapped with the concept of a breach of the peace. Early Council practice accepted this narrow view of Article 39. In considering the problem of Franco’s Spain, the Council rejected a Polish argument that ‘imminent’ dangers, such as domestic fascism, constituted a threat to the peace, and insisted that only ‘existing’ threats were within its mandate.

During the Cold War, the Council seldom took enforcement action in response to threats to peace and security, not for lack of threats, but because it was frequently deadlocked or paralysed by the geopolitical rivalry of the superpowers. Throughout this period, threats to peace and security were interpreted by the international community as principally referring to inter-State conflicts. While the Council criticized apartheid in South Africa—an internal affair—for disturbing peace and security (UNSC Resolution 311 (1972)), the Resolution must be interpreted in the broader context of South Africa’s military incursions into neighbouring countries. Despite its original meaning, Article 39 of the Charter confers a wide, broad, elastic or even ‘complete’ or ‘full’ discretion on the Council to determine the existence of a threat to peace or security. The ‘open-textured’ terms of Article 39 were left deliberately undefined—including

313 ibid, 609.
314 ibid, 608. Aggression was defined in a non-binding resolution of the UN General Assembly in its 1974 Definition of Aggression. The Rome Statute of the ICC provides for future jurisdiction over the crime of aggression once it is defined at a future review conference.
315 According to the law of State responsibility.
316 Simma, n 312, 610.
321 Kelsen, n 317, 727.
323 Stromseth, n 276, 42.
‘aggression’—and were intended to be subjectively determined by the Council. Political and factual judgments are inherent in determinations, though political matters are not necessarily non-legal. Political reality is the foremost constraint on Council action.

Few believe that the Charter should be interpreted in a static, doctrinaire, or formalistic way, mummifying original meanings from 1945. The Charter should be interpreted flexibly, as a living instrument, to promote the values of the international community, rather than in a strict constructionist or conservative textual manner. The scope of Article 39 necessarily changes according to prevailing political conditions. The 1969 Vienna Convention on the Law of Treaties accepts that the subsequent practice or agreement of parties to a treaty may establish an agreed interpretation, even if it is at variance with its original meaning.

In this regard, the practice of the Security Council since the 1990s, and the acquiescence of States to its measures, supports an expanded interpretation of Article 39, and a reciprocal narrowing of the reserved domain of domestic jurisdiction under Article 2(7) of the Charter. The end of the Cold War encouraged a loosening of traditional views on the meaning of peace and security under the UN Charter, including in the practice of regional institutions. As early as 1992, the Security Council acknowledged that threats to peace and security may spring from ‘sources of instability in the economic, social, humanitarian and ecological field’. In a range of situations in the 1990s, the Council responded actively to wider threats, beyond inter-State conflict, such as violent internal armed conflicts, humanitarian crises, disruption of democracy, mass internal displacements of people, refugee outflows,

324 Akande, n 319, 339.
325 Reisman, n 320, 93.
and serious violations of international criminal law.\textsuperscript{333} Many of these cases were controversial,\textsuperscript{334} and ‘there is an obvious element of artificiality and discomfort’ in characterizing internal situations as threats to international peace and security.\textsuperscript{335}

In addition, a number of non-binding, standard-setting, or thematic Council resolutions in the 1990s addressed generalized threats to security, on matters such as the protection of civilians and children in armed conflict; women and security; HIV/AIDS and peacekeeping; the protection of UN and humanitarian workers; proliferation of small arms and mercenaries in Africa; and weapons of mass destruction (WMDs).\textsuperscript{336} In addition to the main counter-terrorism resolutions since 2001, resolutions have also addressed the impact on children of links between conflict and terrorism and between terrorism, non-State actors and WMDs.\textsuperscript{337} The Council has been increasingly influenced by a ‘human security’ agenda, reflected in proposals for UN reform,\textsuperscript{338} despite doubts about whether such issues genuinely involve security questions.\textsuperscript{339}

On the other hand, action against an abstract and non-specific phenomenon,\textsuperscript{340} or against distant, speculative, or potential threats,\textsuperscript{341} may be of questionable validity—quite apart from the distinct question whether a judicial body is competent to review Council action.\textsuperscript{342} Despite the discretionary breadth of Article 39, interpretative flexibility, and subsequent


\textsuperscript{335} G Evans, ‘The Responsibility to Protect: Evolution and Implementation’, Keynote Address to the London School of Economics/King’s College London Conference on Ethical Dimensions of European Foreign Policy, London, 1 July 2005.


\textsuperscript{337} UNSC Resolutions 1379 (2001) para 6 and 1540 (2004) preamble respectively.


\textsuperscript{340} Abi-Saab, n 306, 310; de Brichambaut, n 306, 275; Nolte, n 306, 321–324; Bowett, n 306, 92.

\textsuperscript{341} \textit{Namibia Advisory Opinion} (1971) ICJ Reports 6, 340, para 34 (Gros J); Kelsen, n 317, 727–728.

\textsuperscript{342} Akande, n 319, 325.
agreements among parties, the meaning of Article 39 is not legally unlimited. The legal rights and duties of individuals and States hinge on the meaning given to particular words under Chapter VII, and the legal consequence of interpretation may be a decision to authorize military violence or impose sanctions. For this reason, some degree of predictability in interpretation is essential on grounds of fairness, so that participants in the international system are not confronted by rapid changes in the rules at the behest of the fifteen members of the Council. The language of Article 39 and precision in its interpretation are vital means of ensuring predictability.

Language implies constraint and inherent or ultimate limits: ‘Words are supposed to carry meanings.’ The 1969 Vienna Convention requires that a treaty be interpreted in good faith, according to the ordinary meaning of its terms in context and in the light of its object and purpose. While the Charter should be viewed ‘not as a static formula, but as a constitutive instrument capable of organic growth’, it cannot be interpreted beyond its own textual limits. That can only be achieved by amending the Charter in accordance with Articles 108 and 109. There is a danger in interpreting texts too strictly or dogmatically, but the greater danger lies in straining a text beyond the outermost limits of its natural elasticity, since then the international rule of law dissipates into nothingness. As Lowe writes: ‘If one can no longer read texts . . . and take them at their face value on the basis of their ordinary meaning, diplomacy and the Rule of Law become quite literally impossible.’

The language of Article 39 may be indeterminate, but it is not infinite. The Council can only possess a discretion within the textual bounds of the authority conferred on it. While it may not be possible to define prospectively all conduct threatening security—abstract lists should be viewed with suspicion—it may be possible to identify what is not a threat within the ordinary, contextual, purposive meaning of Article 39. In the Namibia Advisory Opinion (1971), Judge Fitzmaurice warned of the ‘all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote to genuinely constitute one’. Judge Gros similarly stated that a

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343 Nolte, n 306, 317.
matter that ‘may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government’. Judge Fitzmaurice agreed that a threat must be more than ‘a mere figment or pretext’ and must not be ‘artificially created as a pretext for the realization of ulterior purposes’. Other jurists also recognize these legal limits. Abi-Saab argues that the Council ‘cannot act under Chapter VII in the abstract . . . measures have thus always to be pegged to a particular crisis or situation’. The Council may not interpret the Charter ‘in an abstract or context-neutral way’ and its action must remain ‘situation specific’. Moreover, Bowett argues that:

The Council decisions are binding only in so far as they are in accordance with the Charter. They may spell out, or particularize, the obligations of members that arise from the Charter. But they may not create totally new obligations that have no basis in the Charter, for the Council is an executive organ, not a legislature. In short, the Council does not have a blank cheque.

There must be some outer limit on even the most flexible and dynamic interpretation of Charter provisions conferring power on the Security Council. Otherwise, the boundaries of legal authority dissolve, undermining not only the certainty of legal relations but ultimately the legitimacy of Council authority itself. If the Council is not seen to be acting within the law, then the UN system retains little moral or legal authority to impel others to remain within the law.

Clearly, while terrorism may threaten peace and security, in the absence of a definition limited to grave violent acts, it is hard to accept that every terrorist act constitutes a threat. It is one thing for the Council to identify particular incidents as terrorist—as with aggression—but quite another matter for it to allow States to arbitrarily do so, in the absence of any ‘criteria of reference’. Prudentially, the Council already suffers from legitimacy problems because of its politicized selectivity in addressing some traditional violent conflicts but not others, with action distorted by the veto power of the permanent five. The Council is already overburdened with confronting

349 ibid, 340, para 34 (Judge Gros).
350 ibid, 293, para 112; 294, para 116 (Judge Fitzmaurice).
351 Abi-Saab, n 306, 310; see also Nolte, n 306, 324: ‘Security Council action is linked, by definition, to concrete circumstances and the presumption is that it does not purport to influence the existing law beyond the scope of these circumstances.’
354 Bowett, n 306, 92.
355 G Fitzmaurice, ‘The Definition of Aggression’ (1952) 1 ICLQ 137, 143–144.
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traditional threats to security and risks being swamped by wider security threats such as terrorism, diluting its already limited capacity to prevent conflict and further eroding its legitimacy.

E. ELEMENTS OF A DEFINITION OF TERRORISM

1. Approaches to a definition of terrorism

As early as 1983, 109 different official and academic definitions of terrorism were identified in one much cited study.358 Despite the divergence of opinion, there is no technical impossibility in defining terrorism;359 disagreement is fundamentally political. Often, definitions differ mainly in emphasis or semantics—such as by greater or lesser specification of violent means or protected targets—than in substance. Moreover, as the authors of that pioneering 1983 study concede: ‘Many definitions are enumerations of elements without clear indications which element(s) must be present for a phenomenon to be qualified as terrorism and which elements are merely regularly accompanying features of the phenomenon.’360 For example, whether terrorism is ‘random’ or ‘indiscriminate’ (as suggested by numerous General Assembly resolutions) rather than targeted may be useful in describing and differentiating different kinds of terrorist acts, but need not be decisive in the legal definition of the act. Similarly, whether terrorism relies on mass media publicity or clandestine methods may be operationally helpful in combating terrorism, but need not define its core legal elements. Indeed, many of the definitions in that study were intended for descriptive political or academic purposes and not for the narrower international legal purpose of criminalization. Once it is understood what is objectionable about terrorism, the technical elements of a legal definition can be extrapolated from these policy foundations. Before considering each element in turn, it must be noted that precision in definition is necessary if terrorist offences are not to infringe on freedom from retroactive criminal punishment.361 As the European Court of Human Rights stated in Kokkinakis v Greece:

359 Abi-Saab, n 306, 311; Flory, n 21, 33; see generally R Mushkat, “Technical” Impediments on the Way to a Universal Definition of International Terrorism’ (1980) 20 Indian JIL 448.
361 ICCPR, Art 15(1): ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.’
. . . the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment . . . [requires that] an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, from the courts’ interpretation of it, what acts and omissions will make him liable.\footnote{Kokkinakis v Greece ECHR Series A No 260–A (25 May 1993) para 52 (concerning non-retroactivity in Art 7 of the European Convention on Human Rights).}

The UN Human Rights Committee found, for example, that in Belgium’s 2003 definition of terrorism, references to the degree of severity of offences and the perpetrator’s intended purpose do ‘not entirely satisfy the principle of offences and penalties being established in law’.\footnote{Under Art 15 of the ICCPR: UN HR Committee, Concluding Observations: Belgium, 12 Aug 2004, UN Doc CCPR/CO/81/BEL, para 24.} In 2005, the Committee was also concerned about the wide definition of terrorism in Canadian law and recommended that Canada ‘adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds’.\footnote{UN HR Committee, Concluding Observations: Canada, 2 Nov 2005, UN Doc CCPR/C/CAN/CO/5, para 24.}

Moreover, in 2003, the Peruvian Constitutional Court declared too broad a definition of terrorism which referred to spreading anxiety, alarm or fear in the population to change the power structure (by installing a totalitarian government).\footnote{Decision of 3 Jan 2003, in UN SC CTC Report: Peru, UN Doc S/2003/896 (17 Sep 2003) 2.} This followed an earlier finding by the Inter-American Court of Human Rights that Peru’s terrorism offences were too vague and violated the principle of *nullum crimen nulla poena sine lege praevia* in Article 9 of the American Convention:

. . . crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.\footnote{In Castillo Petruzzi et al v Peru [1999] IACHR 6 (30 May 1999) para 121.}

In contrast to the objective enumeration of offences in sectoral anti-terrorism treaties, a generic definition can capture and condemn the motive elements
which distinguish terrorism from ordinary crime. Generic definition avoids the rigidity of enumerative definitions,\textsuperscript{367} which may not cover changing terrorist methods. Generic definitions are, however, wider and more ambiguous than enumerative ones,\textsuperscript{368} although all definitions generalize\textsuperscript{369} and the problem can be lessened by combining generic and enumerative features in a single definition. Combined definitions are narrower than enumerative ones, since listed offences only amount to terrorism if they satisfy a motive element.

2. Elements of a definition

It is possible to sketch the contours of a definition of terrorism based on the policy reasons for definition and criminalization discussed in this chapter. Technical concerns about particular elements of definition are discussed in Chapters 3 to 5, which examine the range of definitions in criminal law treaties, State practice, and humanitarian law. The purpose of this section is to chart the boundaries of a definition which reflects existing agreement on the wrongfulness of terrorism. To reflect fully 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 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 endanger people physically, 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 terrorist acts in themselves.\textsuperscript{370}

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

\textsuperscript{367} Fitzmaurice, n 355, 143–144; Brownlie, n 356, 355.
\textsuperscript{368} ibid; A Schmid, ‘Terrorism: The Definitional Problem’ (2004) 36 Case Western Reserve JIL 375, 400: ‘The higher the level of abstraction, the less specific the properties and attributes a definition contains’.
\textsuperscript{369} Brownlie, n 356, 356; see also Schmid, n 368, 400: ‘abstraction always involves a process of reduction’; C Coady, ‘Defining Terrorism’ in I Primoratz (ed), \textit{Terrorism: The Philosophical Issues} (Palgrave Macmillan, Hampshire, 2004) 3 (‘mathematical exactitude’ cannot be expected and there will always be ‘fuzzy edges’ and ‘contentious interpretations’).
\textsuperscript{370} 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.
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 will be more predictable if it attempts to particularize 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.

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 organization to do or to abstain from doing any act’. 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’. It may be questioned why such conduct is not described more precisely as crimes of ‘intimidation’ (as in some national laws) or ‘compulsion’. This problem is arguably cured by the EU’s solution of requiring an aim to seriously intimidate a population or unduly compel a government or international

371 1999 Terrorist Financing Convention, Art 2(1)(b); see also UNSC Resolution 1566 (2004); UN High-Level Panel, n 338; UN Secretary-General’s Report, In larger freedom: towards development, security and human rights for all, UNGA (59th Sess), 21 Mar 2005, UN Doc A/59/2005; UN Draft Comprehensive Convention, Art 2(1) (see Ch 3 below).

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

373 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.
organization. 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 including the EU’s element of undue compulsion.

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, but wherever there is a 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 multinational preparation or effects, the involvement of State authorities, or injury to other vital international community values or interests. As discussed earlier, this need not preclude a definition from covering domestic terrorism, where such conduct is thought to injure international values. As discussed in Chapter 4, domestic terrorism is increasingly attracting 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. The most recent

374 2002 EU Framework Decision, Art 1(1).
375 Terrorism Suppression Act 2002 (NZ), s 5(2)(a)–(b).
376 UNGA Resolutions 49/60 (1994), annexed Declaration on Measures to Eliminate International Terrorism.
377 See n 259.
378 In relation to transport, the 1963 Tokyo Convention applies only while an aircraft is in flight or on the surface of the high seas or any other area outside the territory of any State: Art 1(3). The 1970 Hague Convention only applies if the place of take-off or actual landing is situated outside the territory of the State of registration of the aircraft, and it does not apply to offences committed on board an aircraft where the places of take-off or landing are entirely within one State (unless the offender is in another State): Art 3(4)–(5). The 1971 Montreal Convention applies in similar circumstances, but also where the offence is committed in the territory of a State other than the aircraft’s State of registration (unless the offender is in another State): Art 4(2)–(4). The Rome Convention 1988 only applies to ships navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a State, or
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 all 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. Article 3 of the UN Draft Comprehensive Convention follows the same formula.

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. This may include instances where an act takes place 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.

the lateral limits of its territorial sea with adjacent States (or when the alleged offender is within the territory of a State): Art 4(1)–(2). In other treaties, the 1973 Protected Persons Convention only covers offences against protected persons located in foreign States or in other places of protection under international law: Art 1(a)–(b). The 1979 Hostages Convention does not apply where an offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State: Art 13. The Vienna Convention 1980 applies primarily to nuclear material in ‘international nuclear transport’, although much of the Convention also applies to domestic uses, storage, and transport of such material: Art 2(1)–(2). The Montreal Convention 1991 regulates many purely internal uses of unmarked plastic explosives, although it also applies to the international movement ‘into or out of its territory’ of explosives: Arts II and III.

379 Common Art 3.
380 See Ch 3 below.
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’, \(^{381}\) or ‘to provoke a state of terror’, \(^{382}\) in particular persons, groups of persons, or the general public. Despite the circularity in defining ‘terrorism’ as involving a ‘state of terror’, an international tribunal has recently interpreted terror as meaning ‘extreme fear’ and has been assisted by expert psychiatric evidence in determining the causes and symptoms of extreme fear. \(^{383}\) The serious social stigma which attaches to labelling an offender a ‘terrorist’ should be reserved 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.

(e) Exceptions to a definition of terrorism

Agreement on exceptions to any definition of terrorism has proved more difficult than agreement on the definition itself. The next chapter closely examines the two key controversies which have plagued debate about definition: first, whether national liberation or self-determination movements should be excluded from liability for terrorism, and second, whether State violence causing terror should be covered.

In short, Chapter 2 argues that IHL is the appropriate legal framework for dealing with all self-determination conflicts, and for internal rebellions rising to the level of an armed conflict. Given the specialized prohibitions on terrorism in armed conflict under IHL (discussed in Chapter 5), it is therefore appropriate to exclude acts committed in connection with an international or internal armed conflict, whether by State or non-State forces. Excluding conduct in armed conflicts has the added advantage of removing the moral criterion of ‘innocence’ from definitions of terrorism, depoliticizing it by applying the framework of combatants and non-combatants under IHL. The language of various exclusionary provisions is considered both in the next chapter and in Chapter 3 on treaty law.

Where terrorism is committed in peacetime (or in situations not covered by IHL), in order to maintain moral symmetry\(^{384}\) and broaden its legitimacy, a definition should cover acts of both State officials and non-State actors.


\(^{382}\) UNSC Resolution 1566 (2004); 1994 UNGA Declaration on Measures to Eliminate International Terrorism.

\(^{383}\) See Ch 5 below for a discussion of the Galic case (2003) at the ICTY.

\(^{384}\) Bassiouni, ‘A Policy-Oriented Inquiry’, n 8, xxxix.
Thus extrajudicial assassinations of political opponents by State officials, or collusion in such killings, might gainfully be qualified as terrorism, as might suicide bombings by non-State actors outside armed conflict. As Primoratz argues, acts which exhibit the ‘the same morally relevant traits’ should be morally understood in a similar way.

Any international crime of terrorism must also accommodate reasonable justifications, excuses, and defences for a limited range of violent conduct. Individual defences in international criminal law, and group circumstances precluding responsibility, 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

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punishments), even religious States explicitly reject religious justifications for terrorist violence, including in criminal cases. 

In addition to the range of exceptions and defences considered in the next chapter, 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. 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); or when urban rioters cause extensive property damage, as at G8 anti-globalization protests, or in the Paris suburbs in late 2005. While such acts of 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.

(f) Summary of definition

Based on the international community’s identification of the underlying wrongfulness of international terrorism, terrorism 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;

388 cf Adelaide Company of Jehovah’s Witnesses Inc v Australia (1943) 67 CLR 116 (religion is not a justification for criminal violence).

389 1999 OIC Convention, preamble; 1998 Arab Convention, preamble; General Pervez Musharraf, Address to the Nation (Pakistan), 12 Jan 2002: <www.pak.gov.pk/public/President_address.htm>.


391 In Canada, acts against property or essential services are not regarded as terrorism where they are ‘a result of advocacy, protest, dissent or stoppage of work’ and they are not intended to result in death, serious bodily harm, or serious risk to the health or safety of the public: Canadian Criminal Code, s 83.01(1)(E). In Australia, an act of ‘advocacy, protest, dissent or industrial action’ does not constitute terrorism where it is not intended to cause death, serious physical harm to a person, or serious risk to public health or safety, or to endanger life: Australian Criminal Code, s 100.1(3). In New Zealand, engaging in ‘protest, advocacy, or dissent . . . strike, lockout, or other industrial action, is not, by itself, a sufficient basis’ for establishing a terrorist offence: Terrorism Suppression Act 2002 (NZ), s 5(5).

(3) for a political, ideological, religious, or ethnic purpose; and
(4) where intended to create extreme fear in a person, group, or the general public, and:
(a) seriously intimidate a population or part of a population, or
(b) unduly compel a government or an international organization 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 minimizing interference in the existing law governing violence in armed conflicts. It also neatly correlates with some of the most common characteristics found in the 1983 study of 109 definitions of terrorism.\(^{393}\) The cumulative elements of this proposed 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. The next chapter turns to the complex problem of the circumstances in which political violence may be justified or excused in a diverse international community. 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 is considered both in light of the definition outlined in this chapter, and also in relation to a range of other possible definitions of terrorism. The wider the definition of terrorism, the more likely a broader range of exceptions or defences should be available.

F. CONCLUSION

Historically, technical disputes about the intricacies of drafting an acceptable definition of terrorism have obscured more fundamental questions about the

\(^{393}\) Of those definitions, 84% referred to violence or force; 65% to a political dimension; and 51% to fear or terror: Schmid, n 358, 76–77. On the other hand, only 6% of those definitions referred to the ‘criminal’ features of terrorism, and merely 17% to any element of ‘intimidation’. Similarly, of 73 academic definitions surveyed in 2002, 71% referred to violence or force; 60% to a political dimension; and 22% to fear or terror: Weinberg et al, n 360, 781. In a later study by Schmid of definitions in 75 States and 13 international organizations, 85% of definitions referred to the illegal or criminal nature of the conduct; 78% to fear or terror; 53% to coercion; and 25% to a political dimension: Schmid, n 368, 405. In a study of 165 academic and non-governmental definitions, Schmid found that 68% of definitions referred to a political dimension; 59% to terror; and 38% to coercion: Schmid, n 368, 407. See also G Wardlaw, Political Terrorism: Theory, Tactics and Counter-Measures (CUP, Cambridge, 1982) 16.
policy rationale for defining and criminalizing it in the first place. Instead of focusing on competing definitions, by stepping back to examine what is so bad about terrorism, it is possible to gain a clearer picture of the kinds of conduct the international community objects to. In recent years, the EU and UN organs have fashioned common justifications for prohibiting and criminalizing terrorism, regarding it as a special crime against human rights, the State and peaceful politics, and international peace and security. Consensus on what is wrongful about terrorism allows progress to be made on legal definition, and clears the way for consideration, in the next chapter, of any justifications and excuses for terrorism.

There are also incidental benefits which flow from criminalizing terrorism, which provide subsidiary justifications for its definition. Definition encourages harmonization of national criminal laws, reducing ‘differences in legal treatment’ between States.\(^{394}\) 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.\(^{395}\) Definition might also help to confine the political offence exception to extradition for terrorist offences, should that be considered desirable by the international community.\(^{396}\) 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.\(^{397}\) To the extent that sectoral offences are enumerated within a generic definition, definition would widen the substantive implementation of sectoral treaties.\(^{398}\)

Although these rationales for criminalization are not independently persuasive, taken in conjunction they establish a principled basis on which to define and criminalize the terrorist threat. Criminalization is a powerful

\(^{394}\) EU Com, n 216, 3. Whether harmonization is desirable as an end in itself is beyond this discussion.

\(^{395}\) Murphy, ‘Defining International Terrorism’, n 1, 35.


\(^{398}\) EU Com Proposal, n 216, 5.
symbolic mechanism for delineating internationally unacceptable behaviour, even if deterrence of ideologically motivated offenders is unlikely. 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.