CONCLUSION

The Promise of Restraint

Undoubtedly, terrorism commands disproportionate attention relative to the harm it causes¹ and other kinds of violence—particularly by States, and even by common criminals—cause greater harm.² Since the 1960s, global casualties of international terrorism have averaged a few thousand deaths per decade, in contrast to the many tens of millions killed in wars, internal conflicts, and by repressive States.³ Clearly, ‘the quantum of harm’ caused by terrorism is not what shapes perceptions of [the] threat⁴ and terrorism may well indulge western anxieties in the absence of real emergencies.⁵ The spectacular nature of terrorist acts, the vulnerability of civilian targets, the frequent victimization of the United States and Israel, and mass media publicity have shaped a powerful discourse of public panic and transnational anxiety surrounding terrorism. In some western media, there is little questioning of the official labelling of ‘terrorists’, analysis of the causes of terrorism, attention to State violence precipitating terrorism, or responsiveness to non-State explanations for violence.⁶ Exaggeration of the terrorist threat is significant because those who fear terrorism the most also tend to support more aggressively militant responses to it.⁷

While it is simplistic to claim that the attacks of 11 September 2001 were a ‘predictable and inevitable . . . act of retaliation against constant and systematic manifestations of state terrorism’ by the US,⁸ in some cases, root causes underlie and explain—but do not necessarily justify or excuse—resort to

³ L Pojman, ‘The Moral Response to Terrorism and Cosmopolitanism’ in Sterba (ed), n 2, 135. US Department of Justice (FBI), Terrorism in the US 1999 (DOJ, Washington, DC, 2000) 15 (there were an estimated 14,000 international terrorist attacks between 1968 and 1999, resulting in 10,000 deaths).
⁸ H Pinter, Speech on receipt of an Honorary Doctorate at Turin, 27 Nov 2002.
terrorism. Legal controls perform only cosmetic functions, or merely treat symptoms, unless structural grievances are also addressed.\(^9\) In particular, inclusive political processes discourage violence\(^{10}\)—even if it is not possible to bargain meaningfully with some people.\(^{11}\) The preoccupation with terrorism also overshadows less spectacular international harms, including those which may generate terrorist impulses. As Koskenniemi writes:

It is hard to justify the attention given and the resources allocated to the ‘fight against terrorism’ in the aftermath of the attacks . . . in September 2001 in which nearly 3,000 people lost their lives, while simultaneously six million children under five years old die annually of malnutrition by causes that could be prevented . . . What becomes a ‘crisis’ in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process . . .\(^{12}\)

The response to terrorism has, furthermore, distorted the allocation of the limited funds available for humanitarian assistance. In 2002, half of all global humanitarian aid went to Afghanistan\(^{13}\)—the frontline in the ‘war on terror’—and aid distribution was similarly distorted following the invasion of Iraq in 2003. Terrorism has thus come to dominate both security discourse and the field of humanitarian action.

The refashioning of terrorism as an international security threat has profoundly shaped the choice of legal responses, while conversely the choice of legal responses has influenced the characterization of terrorism as a security threat. Much has been written of the view that after 11 September 2001, it is no longer enough to serve terrorists with legal papers,\(^{14}\) or that a ‘third way’ between crime and war is required.\(^{15}\) The reliance on legal ‘black holes’ or ‘loopholes’ has been eloquently described elsewhere,\(^{16}\) as a variety of


\(^11\) Wilkinson, n 2, 180.


exceptional responses to terrorism proliferated: extrajudicial execution or assassination of suspects (often by foreign governments, outside conflict zones, and based on untested, secret evidence); torture and ill-treatment; extraordinary or irregular rendition; and regimes of preventive, executive, or incommunicado detention. Extra-legal approaches to countering terrorism are marked by their denial or restriction of procedural protections, access to remedies, and judicial supervision. Even where formal human rights protections apply, fear of terrorism has fostered a climate in which States may resort too readily to states of exception and derogation, while courts face pressure to allow ‘margins of appreciation’ or degrees of deference that are arguably too wide.

Set against the vain hope of pounding terrorists into oblivion through war, the criminal law offers the promise of restraint: individual rather than collective responsibility; a presumption of innocence; no detention without charge; proof of guilt beyond reasonable doubt; due process; the right to prepare and present an adequate defence; independent adjudication; and rational and proportionate punishment. Criminal law responses to terrorism are not a panacea; for one thing, new anti-terrorism laws may have a ‘marginal deterrent value’, although terrorist acts often occur because of law enforcement or intelligence failures rather than gaps in the law. While the threat of terrorism may justify some modifications to regular criminal process, there is also a risk that rational principles of criminal law may be strained by reactive and emotive responses wrought by political pressures on governments. Indeed, many States have modified regular criminal procedure or established expansive offences in terrorist cases, increasing the risk of wrongful convictions. Whether defining terrorism is a good idea must depend on the uses to which it will be put, particular if it is designed to trigger radical measures outside the criminal law.

Despite these limitations, defining and criminalizing terrorism in international law would provide States with a functional, alternative response to terrorism. Expanding the armoury of regular legal responses may discourage the premature resort to extra-legal and military options. In the absence of any ‘law of terrorism’ in public international law, it is not sufficient to leave definition of terrorism to individual governments, as the Security Council

18 ibid, 150. 19 ibid, 136. 20 ibid, 132.
21 ibid, 140. eg some States have made it easier to admit certain types of less reliable evidence; protected security sensitive evidence from disclosure to defendants or the court; modified the standard or burden of proof; removed the right to silence; overridden lawyer-client confidentiality; limited judicial supervision; and established broad preparatory or group-based terrorist offences.
has done.\textsuperscript{23} Definition would not merely produce gains at the ‘crude political level’,\textsuperscript{24} but could normatively express and articulate the wrongfulness of terrorism through the creation of a new international crime,\textsuperscript{25} and restrain excessive national counter-terrorism responses. The term ‘terrorism’ holds powerful sway over public consciousness and, since the 1920s, has been often grappled with by jurists at the international level, suggesting that it captures and describes a phenomenon of some social and political importance.

\textbf{DEFINING TERRORISM IN INTERNATIONAL LAW}

In the light of the intense and persistent disagreement about defining terrorism over many years, it is crucial to first appreciate precisely what is so objectionable about terrorism. As shown in Chapter 1, the views and practice of States, evidenced through UN organs, indicate that the international community regards terrorism as a grave affront to fundamental human rights and freedoms, State authority and the political process, and international security. Terrorism is also perceived as distinguishable from private violence due to its political or public motivations, while a definition could structure and restrain the unilateral implementation of Security Council measures. These considerations, along with other incidental or subsidiary arguments, provide a coherent—but not unproblematic—basis on which to internationally define and criminalize terrorism.

Unless a pacifist position is accepted, any international definition of terrorism must ensure that legitimate forms of violent resistance to political oppression are not internationally criminalized. Chapter 2 argued that controversy about defining terrorism could be defused or depoliticized if similarly-situated self-determination movements were equally treated by the law, through the extension of Protocol I and recognition of combatant immunity. This does not mean that such movements could commit terrorist acts with impunity. Rather, IHL would apply to conduct committed in armed conflict, including liability for war crimes and for breaches of the specialized prohibitions on ‘terrorism’ in armed conflict (including where civilians are deliberately attacked). Far from legitimizing terrorists, the application of

\textsuperscript{23} cf C Lim, ‘The Question of a Generic Definition of Terrorism under General International Law’ in Ramraj et al (eds), n 17, 37, 62-63 (arguing that national definition can progressively develop custom and produce greater precision in definition and wider participation by States).


\textsuperscript{25} See also UN High-Level Panel on Threats, Challenges and Change, \textit{A more secure world: Our shared responsibility}, 2 Dec 2004, UN Doc A/59/565, para 159: ‘Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image’.
humanitarian law provides an incentive for them to comply with the law (since compliance is rewarded with treatment as prisoners of war). A similar approach could be adopted in internal conflicts involving political rebellions.

As for ‘State terrorism’, such conduct by governments is largely covered by other rules of international law, including human rights law, criminal law, humanitarian law (including specific offences of terrorism in the 1949 Geneva Convention and 1977 Protocols), and the law of State responsibility. In contrast, non-State actors have historically been subject to far less regulation, thus stimulating efforts to address some of their activities by defining them as terrorism. Even so, there is still a case for making State officials accountable for government violence which amounts to terrorism, since the above-mentioned laws applying to States do not always impose individual criminal liability for unlawful State violence (and instead only give rise to other remedies such as a duty to make reparation). This is so particularly where State violence is committed outside armed conflict (so war crimes law does not apply), and beneath the threshold of crimes against humanity (requiring conduct to be large scale or systematic). Only imposing liability for terrorism on non-State actors suffers from a lack of moral symmetry, undermining the legitimacy of any definition of terrorism. Thus extrajudicial assassinations of political opponents by State officials might gainfully be qualified as terrorism (such as the US assassination of enemies in Yemen, outside the theatre of hostilities), as might suicide bombings by non-State actors in peacetime.

At the same time, it makes sense to exclude the activities of State armed forces and non-State forces recognized under humanitarian law (as long as Protocol I is extended to liberation forces as argued earlier). Otherwise, criminalizing terrorism might interfere in the carefully constructed parameters of permissible violence in armed conflict, potentially unravelling compliance with the law of war and endangering civilians. (The alternative is to impose concurrent liability, just as crimes against humanity and genocide apply alongside war crimes law in armed conflicts).

Outside the context of armed conflicts, Chapter 3 found that, between 1963 and 2005, the international community strenuously avoided generic definition of terrorism in international treaties, instead preferring an objective, sectoral approach to regulating terrorist type acts. By the 1990s, that approach began to change as generic elements of definition found a place in the 1999 Terrorist Financing Convention, and the Draft UN Comprehensive Convention, but also in a number of treaties adopted by regional organizations. The diversity of regional definitions, however, militates against the emergence of a customary international crime. The many unsuccessful international attempts to define terrorism since the 1920s indicate that the international community has often regarded generic definition as
normatively important. While some of these efforts took similar approaches to definition, others were more divergent, and most attempts were thwarted by political and ideological obstacles thrown up by decolonization and the Cold War.

As Chapter 4 shows, there is also insufficient evidence of State practice and *opinio juris* supporting a customary international definition or crime of terrorism. The General Assembly has condemned terrorism in increasingly strident tones since the late 1970s, and reached political agreement on a working definition by 1994. Yet many States conditioned support for these positions on an understanding that legal definition of terrorism, and agreement on exceptions to terrorism, were still necessary. For its part, from 1985 onwards, the Security Council incrementally identified particular acts or incidents as terrorist threats to peace and security, without providing advance definition of terrorism. Council measures from late 2001 responded to terrorism in a more generalized way, still without defining the scope of the problem. The serious legal consequences of Resolution 1373—including individual criminal liability for an ambiguous range of terrorist conduct—highlights the need for definition. A non-binding working definition of late 2004 is insufficient, and there are legitimacy costs in evading the usual treaty-making processes for transnational crimes.

Further, international and national judicial decisions seldom invoke terrorism as an operative international legal concept, usually treating terrorist-type conduct by recourse to more entrenched legal norms. Some national decisions, however, have deployed international definitions of terrorism for non-criminal purposes, such as in immigration proceedings or exclusion from refugee status. In national criminal legislation, almost half of States now define terrorism generically (either in simple or composite definitions), although half of States still treat terrorism as ordinary crime. The variation in national definitions precludes the identification of any international customary definition, although generic definition is increasingly common.

Finally, Chapter 5 explored the evolution and progressive codification of distinctive prohibitions on terrorism in armed conflict under IHL. Early prohibitions on aerial bombardment to terrorize civilians were generalized and universalized in the 1949 Geneva Convention and 1977 Protocols and have been affirmed in subsequent State practice and applied most recently as a basis for individual criminal liability in ad hoc international criminal tribunals. While there are difficulties in quantifying ‘terror’ in war and in differentiating it from the ether of fear which surrounds and permeates conflict, the international community has consciously condemned the deliberate terrorization of civilians as a tactic. The meaning of terrorism in IHL is distinct from the meaning of terrorism outside armed conflicts.

Ultimately, attempts to abandon any legal use of the term ‘terrorism’, as
pointless ‘moralised name-calling’, are unrealistic in view of its popular resonance and powerful, enduring appeal. It is preferable to acknowledge that the term, once defined, can help to distinguish between different types of illegitimate violence and to express international condemnation of acts of political violence which transgress the outermost ethical boundaries of legitimate violent resistance. Intellectually, definition would also supply clarity in studying terrorism, since the methodological difficulties of researching ‘terrorism’ stem partly from the conceptual confusion about its content.

Indeed, it is not possible coherently or systematically to describe, analyse, understand or ultimately counter the threat posed by terrorism unless there is basic agreement on what constitutes it.

In the absence of definition, a lingering ‘conceptual chaos or zone of passing turbulence in public or political language’ privileges those in the hegemonic position to define and interpret ‘terrorism’—and to erratically brand it upon their enemies.

27 ibid.
29 See, eg, Wardlaw, n 26, 3.