Chapter 4
Civilising the Exception: Universally Defining Terrorism

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4.1 Introduction

The struggle to give legal form and content to 'terrorism' has preoccupied states, international organisations, and lawyers for more than 80 years, since the League of Nations first considered terrorism as a transnational legal problem.[1] Originally confronted within the framework of domestic extradition law, the powerful terminology of 'terrorism' soon took on an international life of its own, with calls for its more deliberate regulation. The subsequent great difficulties in defining terrorism are typically portrayed as an unfortunate failure of the international community to confront a virulent species of transnational crime.

In one sense, that dominant critique is understandable because the failure to reach agreement has hindered the highest possible level of international cooperation against terrorism. Countries cannot fully cooperate against 'terrorism' without knowing the scope of the phenomenon against which they would be required to impose legal sanctions. Some of the disagreement between states has stemmed from negotiating positions which have sought to confer unprincipled impunity on certain preferred political actors. Attempts to carve out exceptions for one's own side of international politics have damaged inter-state confidence.

In a different sense, however, the failure to define terrorism can also been viewed as a kind of messy success. Some states have resisted efforts to define terrorism for more principled reasons – for instance, because defining terrorism in a certain way would jeopardize other international public policy interests such as political freedom, asylum, or human rights. That some states have held out against pres-

[1] See B. Saul, "The Legal Response of the League of Nations to Terrorism," *Journal of International Criminal Justice* 4 (2006): 78.

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sures to conform to particular definitional proposals is an achievement of sorts, for it has stalled the destructive slide towards overly-punitive responses to terrorism which has tempted many states. Having no definition of terrorism is better than having a definition which criminalises legitimate politics or dissolves freedoms. Meanwhile, practical cooperation against particular forms of terrorism has not only been possible but effective, through various means including transnational crime treaties.

Given the protracted and often acrimonious disagreements among states about defining terrorism, it surprised many to learn that the United Nations Special Tribunal for Lebanon identified a customary international crime of transnational terrorism in February 2011.[2] By recognising a definition of terrorism in customary law, the Special Tribunal neatly side-stepped almost a century of legal deadlocks in (ongoing) treaty negotiations and debates in bodies such as the UN General Assembly and Security Council. The first part of this chapter assesses whether there is now an accepted definition of terrorism in general international law. Concluding that there is no such consensus, the second part of the chapter examines the relative advantages and costs of defining terrorism in particular ways.

4.2 Is There a Definition of Terrorism in International Law?

The definition of terrorism identified by the UN Special Tribunal for Lebanon is a useful starting point for considering whether there is a general definition in international law. The Special Tribunal identified a customary law crime of terrorism consisting of three elements:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[3]

The requirement of a transnational element[4] rules out purely domestic terrorism. While the Tribunal recognised only peace-time terrorism as a crime, it indicated that 'a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging'.[5]

State practice does not, however, support the conclusion reached by the Tribunal. A close analysis of relevant treaties, United Nations resolutions, national laws and

[2] UN Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 February 2011.

[3] *Ibidem* at para. 85.

[4] *Ibidem* at para. 90.

[5] *Ibidem* at para. 107; see generally paras. 107–9.

national judicial decisions[6] confirms the near-universal scholarly consensus that there does not yet exist a customary law crime of terrorism as defined by the Tribunal.

As regards treaties, a decisive point is that numerous efforts by the international community since the 1920s have not produced agreement on a general international crime of terrorism in a treaty.[7] While there are numerous 'sector'-specific treaties which address particular criminal means or methods used by terrorists,[8] none of those treaties – individually or collectively – contains a comprehensive definition of terrorism[9] or establishes a general international crime of transnational 'terrorism'. At most, specific offences in some treaties may have entered into customary law, such as aircraft hijacking or hostage taking.[10]

In the absence of a general crime of terrorism in treaty law, no parallel customary rule can arise out of those treaties. The sectoral approach was adopted precisely because states could not reach agreement on 'terrorism' as such. The decades of

[6] Including regional anti-terrorism treaties, General Assembly resolutions, UN Security Council resolution 1566 (2004), the UN Draft Comprehensive Anti-Terrorism Convention, the Terrorist Financing Convention 1999, 37 national laws, and nine national judicial decisions.

[7] See B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006), chapters 3–4; G. Guillaume, "Terrorism and International Law" *International and Comparative Law Quarterly* 53 (2004): 537; R. Higgins, "The General International Law of Terrorism," in *Terrorism and International Law,* ed. R. Higgins and M. Flory (London: Routledge, 1997) 13, 13–14.

[8] See, e.g., Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969, 704 UNTS 219); Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971, 860 UNTS 105); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977, 1035 UNTS 167); International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983, 1316 UNTS 205); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992, 1678 UNTS 221); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992, 1678 UNTS 304); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989, 974 UNTS 177); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998); 1997 International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997 by UN General Assembly Resolution 52/164 (1997), entered into force 23 May 2001, 2149 UNTS 256); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 by UN General Assembly resolution 54/109, entered into force 10 April 2002, 2178 UNTS 229); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005 by UN General Assembly Resolution 59/290 (2005), entered into force 7 July 2007).

[9] Report of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/98, 28 December 2005, para. 28.

[10] *US v Yunis,* 924 F.2d 1086 (DC Cir 1991), 1092; (1991) 30 ILM 403; *Burnett* et al. *v Al Baraka Investment and Development Corporation* et al., Civil Action No 02–1616 (JR), US District Crt, Distr Columbia, 25 July 2003, 274 F Supp 2d 86.

deadlock – continuing in the negotiations for a UN Draft Comprehensive Terrorism Convention since 2000 – demonstrate a lack of global consensus on defining terrorism. Even the 1999 Terrorist Financing Convention – sometimes pointed to as a generic definition of terrorism – only defines and criminalises terrorist *financing*, not terrorism per se, and there is no wider practice suggesting that states have extrapolated wider general crimes of terrorism from its definition.

The treaties of regional organisations also do not support the existence of an agreed definition of terrorism. An accurate reading of those conventions establishes exactly the opposite: enormous variation in regional conceptions of terrorism.[11] Some regional treaties focus on specific terrorist methods, without defining terrorism[12]; others contain (often wide or conflicting) generic definitions,[13] or define terrorism only to criminalize ancillary conduct[14]; and yet others do not create offences at all, but serve other purposes (such as extradition or law enforcement cooperation).[15] Some of the treaties do not enjoy wide participation by members of the regional organisation,[16] and even where states are parties, the treaty may not have influenced national practice much at all.[17]

The General Assembly resolutions have repeatedly condemned terrorism as '[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.[18] The value of such resolutions as evidence of a customary law agreement on the definition of terrorism must be cautiously appraised. The key normative resolution which sets out a definition, the 1994 Declaration on Measures against International Terrorism, itself emphasizes the need to progressively develop and codify the law on terrorism[19] – far from reflecting existing rules. In supporting it, many States argued that there was still a

[11] See B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006), chapter 4.

[12] 1971 *OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance*; 2002 *Inter-American Convention against Terrorism*.

[13] 1998 *Arab Convention for the Suppression of Terrorism*; *Organisation of the Islamic Conference (OIC) Convention on Combating International Terrorism*; 1999 *OAU Convention on the Prevention and Combating of Terrorism*; 2002 *EU Framework Decision on Combating Terrorism.*

[14] 2005 *Council of Europe Convention on the Prevention of Terrorism*; 2004 *SAARC Additional Protocol to the 1987 Convention*; 2004 *African Union Protocol to the 1999 Convention*.

[15] 2002 *Inter-American Convention against Terrorism*; 1977 *Council of Europe Convention on the Suppression of Terrorism*; 1987 *SAARC Regional Convention on Suppression of Terrorism*; 1999 *Commonwealth of Independent States (CIS) Treaty on Cooperation in Combating Terrorism*.

[16] As with the Organisation of the Islamic States.

[17] As with the Organisation of African Unity.

[18] The 1994 Declaration states that: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'.

[19] UNGA Resolution 49/60 (9 December 1994): Declaration on Measures to Eliminate International Terrorism, para. 12.

need to define terrorism and/or to adopt a comprehensive treaty criminalizing it,[20] and to distinguish self-determination struggles[21] – including the 118 States of the Non-Aligned Movement and 56 OIC states.[22] At most the Declaration reflects a political agreement on the wrongfulness of terrorism which falls short of evidencing a customary definition of terrorism, particularly against a background of continuing, inconclusive UN treaty negotiations on a definition since 2000.

Moreover, the Declaration's definition of terrorism (requiring a political purpose) is, in any case, different to that in the UN Draft Comprehensive Convention (which does not require a political motive). It is different again from the definition in Security Council resolution 1566 (which is limited to underlying sectoral offences, and does not catch all forms of terrorism). It is also different from the definitions in the 1999 Terrorist Financing Convention, where the emphasis is on intimidating a population or coercing a government, for whatever purpose. As shown below, it is also different from those many different definitions in national laws and, as shown above, in regional treaties. All of this suggests that the legal definition of terrorism, and such criminal liability as may attach to it, remains deeply contested.

National laws also do not evidence a customary law definition of terrorism.[23] Not all countries have even defined or criminalised terrorism generally in their legal systems, and still prosecute terrorism as ordinary crime or deal with it according to pre-existing legal categories (such as general security or emergency laws). Some countries thus resist the idea that the factual phenomenon of terrorism should be legally conceptualised as 'terrorism'.

While there are now a great many national laws giving legal life to 'terrorism', the picture is highly fragmented and variable. First, some national laws address domestic terrorism, others concern international terrorism, and some states deal with both. The many national laws which address domestic terrorism are irrelevant in evidencing a customary international crime of *transnational* terrorism (which the UN Special Tribunal claims exists).

Secondly, countries sometimes deploy different definitions of terrorism for different legal purposes (whether in criminal law, civil or administrative law), further fracturing any consensus on a core definition across most legal systems.

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[20] UNGAOR (49th Session) (6th Committee), 14th meeting, 20 October 1994, para. 5 (Sudan), 13 (India), 27 (Algeria), 71 (Nepal); 15th meeting, 21 October 1994, para. 4 (Sri Lanka), 9 (Iran), 18–19 (Libya).

[21] *Ibidem*, 14th meeting, 20 October 1994, para. 6 (Sudan), 20 (Syria), 24 (Pakistan); 15th meeting, 21 October 1994, para. 9 (Iran), 18–19 (Libya).

[22] Non-Aligned Movement ('NAM'), XIV Ministerial Conference, Final Document, Durban, 17–19 August 2004, paras. 98–99, 101–102, 104; NAM, XIII Conf of Heads of State or Government, Final Document, Kuala Lumpur, 25 February 2003, paras. 105–06, 108, 115; NAM, XIII Ministerial Conf, Final Document, Cartagena, 8–9 April 2000, paras. 90–91; OIC resolutions 6/31-LEG (2004), para. 5; 7/31-LEG (2004), preamble, paras. 1–2; 6/10-LEG(IS) (2003), para. 5; 7/10-LEG (IS) (2003), paras. 1–2; OIC, Islamic Summit Conference (10th Session), Final Communiqué, Malaysia, 16–17 October 2003, para. 50; OIC (Extraordinary Session Foreign Ministers), Declaration on International Terrorism, Kuala Lumpur, 1–3 April 2002, paras. 8, 11, 16 and Plan of Action, paras. 2–3.

[23] Cf. STL Appeals Chamber Decision, op cit, paras. 91–98.

More particularly, only national criminal law definitions of terrorism can usefully evidence any customary international law criminal definition of terrorism.

Thirdly, where national laws do define terrorism (for whatever purpose), they reveal fundamental disagreements between states as to what legally constitutes terrorism.[24] Examination of state reports to the UN's Counter-Terrorism Committee clearly evidences such wide variations in approach.[25]

Fourthly, even where national laws converge on the definition of terrorism, they may be inappropriate models for an international definition. Various national definitions have been criticised for violating international human rights law, such as by being too vague to satisfy the principle of legality and freedom from retroactive criminal punishment.[26] Such unlawful acts are not accompanied by *opinio juris* to the effect that rights-violating definitions are permissible or required under international law: they remain simply unlawful.

While certain national judicial decisions have also been invoked to support the existence of a customary definition of terrorism,[27] analysis of national decisions does not sustain such a claim. At worst, some national decisions expressly doubt the customary law status of terrorism[28]; do not concern terrorism at all[29]; mention terrorism incidentally but not dispositively[30]; or refrain from ruling on the issue.[31] At most, some national decisions accept that certain forms of terrorism may have attracted international consensus[32] (for instance, hijacking or hostage taking), but that falls short of support for the existence of a comprehensive, universal definition of terrorism per se.

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[24] Cf. *ibidem* at para. 97 (citing 37 national laws which it claims converge on a consensus definition).

[25] See analysis in B. Saul, *Defining Terrorism in International Law* (Oxford, 2006), 263–269.

[26] Under article 15 of the *International Covenant on Civil and Political Rights* 1966. For human rights critiques of national laws, see, eg, UN Human Rights Committee, Concluding Observations: United States of America (15 September 2006) UN Doc. CCPR/C/USA/CO/3, para. 11; Algeria (18 August 1998) UN Doc. CCPR/C/79/Add.95, para. 11; Egypt (9 August 1993) UN Doc CCPR/C/79/Add.23, para. 8; Democratic Peoples' Republic of Korea (27 August 2001) UN Doc. CCPR/CO/72/PRK, para. 14; Portugal (Macao) (4 November 1999) UN Doc. CCPR/C/79/Add.115, para. 12; Peru (25 July 1996) UN Doc. CCPR /C/79/Add.67, para. 12; and Report of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/98, 28 December 2005, paras. 27–28, 45–47, 56, 62.

[27] STL Appeals Chamber Decision, op cit, para. 86.

[28] *US v Yousef* et al., 327 F.3d 56 (US Crt App, 2nd Cir), 4 April 2003 at 34, 44, 46, 53–60, affirming *Tel-Oren v Libyan Arab Republic* 726 F.2d 774 (DC Cir 1984) at 795 (Edwards J) and 806–07 (Bork J) (USA); *Ghaddafi* case, Bulletin des arret de la Cour de Cassation, Chambre criminelle, mar 2001, No. 64, 218–219; *Madan Singh v State of Bihar* [2004] INSC 225 (2 April 2004).

[29] *Chile v Clavel,* quoted in STL Appeals Chamber Decision, op cit.

[30] *Cavallo*, quoted in STL Appeals Chamber Decision, op cit, para. 86; *US v Yunis,* 924 F.2d 1086 (DC Cir 1991); *EHL* case, Cass. 15 février 2006, RG P.05.1594.F, Pas. 2006, No. 96; RDP2006, 795, cited in *Rapport annuele la Cour de cassation de Belgique 2009*.

[31] *Zrig v Canada (Minister of Citizenship and Immigration)* (CA) [2003] 3 FC 761, para. 180.

[32] *Zrig*, *ibidem*; *US v Yunis,* 924 F.2d 1086 (DC Cir 1991).

In those few cases which mention customary law, the methodology of analysing custom formation is minimal to say the least and 'rest[s] upon a very inadequate use of the sources'.[33] The position on customary law is ambiguous in a few cases. One matter was a civil case and did not involve criminal liability,[34] while others concerned national law contexts such as extradition[35] or exclusion from refugee status.[36] One decision identifies 'the essence' of terrorism for the limited purpose of interpreting a domestic immigration law statute, but acknowledges that 'there is no single definition that is accepted internationally' and that '[o]ne searches in vain for an authoritative definition'.[37]

While one Italian decision appears to squarely identify a customary crime of terrorism,[38] it then defines such crime quite differently from the notion suggested by the UN Special Tribunal – specifically, by requiring a political, religious or ideological motivation. This is not a trivial or marginal difference of opinion. On the view of the Italian court, terrorism is simply *not* terrorism unless it is defined to include such a motive. Indeed one of the central disagreements in defining terrorism in national and international law is whether a publicly-oriented motive should be an element of the definition.[39]

Such divergence amongst national laws has not been cured by the UN Security Council's edict in Resolution 1373 (2001) requiring states to criminalise terrorism.[40] That resolution failed to define terrorism, and in practice the Security Council's Counter-Terrorism Committee tolerated a wide variety of national approaches to defining terrorism. The Council's subsequent 'working definition' of terrorism in Resolution 1566 (2004) does not require States to conform their anti-terrorism laws to it. Nonetheless, that resolution is understood by States as establishing 'soft' guide-posts in the implementation of earlier Resolution 1373. Over time, sufficient State practice in conformity with the resolution – that is, an *actual* common national law approach to defining terrorism – may provide evidence of a customary law definition. There is, however, a long way to go.

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[33] Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press 2003), 22 (speaking of the value of national decisions generally).

[34] *Almog v Arab Bank*, 471 F. Supp. 2d 257 (EDNY 2007)

[35] *EHL* case, op cit.

[36] *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 364.

[37] *Suresh v Canada (Minister for Immigration and Citizenship)* [2002] 1 SCR 3 at 53, para. 94.

[38] *Bouyahia Maher Ben Abdelaziz* et al., Judgment of 11 October 2006, Corte di Cassazione.

[39] See, eg, B. Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?," in *Law and Liberty in the War on Terror,* ed. A. Lynch, E. MacDonald and G. Williams,(Sydney: Federation Press 2007), 28.

[40] Defined as: 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.

Any emerging global consensus around the definition in Resolution 1566 would reflect a fairly narrow and rights-respecting concept of terrorism, and would not be a bad result. The cumulative elements set out in that resolution define conduct as terrorism only: (a) when it is committed to harm people, (b) with the purpose to provoke a state of terror, or to intimidate a population, or to compel a government or an international organization, and (c) and where such conduct *also* constitutes an offence under the existing sectoral anti-terrorism treaties.

In other words, Resolution 1566 does not criminalize any conduct which is not already criminal under existing transnational crime treaties; rather, it reclassifies as 'terrorism' certain existing criminal wrongs where they are designed to terrorize, intimidate or compel. There is no further 'special intent' or motive requirement of a political, religious or ideological purpose behind the conduct. The relatively narrow scope of that definition complements efforts by the UN human rights bodies and mechanisms[41] to identify and wind-back excessive national anti-terrorism laws which adversely affect human rights.

4.3 Defining Terrorism to Civilize Legal Exceptionalism

If terrorism is not presently defined under general international law, the twin questions arise whether it is worth the effort, and what kind of definition is worth the effort. As briefly noted earlier, numerous 'sectoral' treaties on transnational criminal cooperation, adopted since the 1960s, targeted the common methods of violence used by terrorists (such as hijacking, hostage taking, endangering maritime facilities and so on), but did not create or define a new international crime of terrorism.[42] Such treaties typically required States parties to criminalise certain conduct, to establish

[41] Including the UN Human Rights Committee, various Special Rapporteurs, the Human Rights Council, and the UN High Commissioner for Human Rights. See, e.g., UN Human Rights Committee, General Comment 29, States of Emergency (article 4), 31 August 2001; UN Commission on Human Rights, Resolutions 2003/37 (2003) and 2005/80 (2005); UN Human Rights Council, Resolutions 7/7 (2008), 10/9 (2009), 10/11 (2009), 10/15 (2009), 10/22 (2009). Reports of the Special Rapporteur on Terrorism and Human Rights (Kalliopi K. Koufa): Working Paper, 26 June 1997; Preliminary Report, 7 June 1999, Progress report, 27 June 2001, Second Progress Report, 17 July 2002, Additional progress report, 8 August 2003, Final Report, 25 June 2004, Updated framework draft of principles and guidelines concerning human rights and terrorism: Second expanded working paper, 3 August 2006. Report of the independent expert (Robert K. Goldman) on the protection of human rights and fundamental freedoms while countering terrorism, 7 February 2005. Reports of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Report to the Commission on Human Rights, 28 December 2005; Reports to the General Assembly, 16 August 2006, 15 August 2007, 6 August 2008; Reports to the Human Rights Council, 29 January 2007, 21 November 2007, 4 February 2009. Office of the UN High Commissioner for Human Rights, Report to the UN Human Rights Council on the protection of human rights and fundamental freedoms while countering terrorism, 2 September 2009.

[42] See B. Saul, *Defining Terrorism in International Law* (Oxford, 2006), chapter 3.

extraterritorial jurisdiction over it, and to cooperate by prosecuting or extraditing suspected offenders.

This pragmatic approach enabled the repression of terrorism while side-stepping the irreconcilable problem of defining it, at a time when States were unable to agree on the legitimacy of violence committed by self-determination movements or by State forces. The result has been a functional transnational cooperation against terrorism, even if there remain regulatory gaps because of the reactive, ad hoc nature of treaty making (for example, terrorist attacks by small arms, as in Mumbai in 2008, are not prohibited by treaty law).

Despite the wide range of terrorist conduct criminalised by the sectoral treaties and the law of armed conduct, the international community has continued to feel compelled to pursue a more general international anti-terrorism treaty framework. Since 2000, efforts have been underway to negotiate a Comprehensive Anti-Terrorism Convention under the auspices of the United Nations. Draft article 2(1) proposes an offence if a person 'unlawfully and intentionally' causes: '[d]eath or serious bodily injury to any person'; '[s]erious damage to public or private property'; or '[d]amage to property, places, facilities, or systems… resulting or likely to result in major economic loss'.[43] The purpose of any such conduct, 'by its nature or context', must be 'to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act'.[44] Possible exceptions to the Draft Convention remain contentious, particularly as regards violence by non-State groups and State military forces.

The ongoing effort to define a general international crime of terrorism suggests that the international community places some importance on that effort. At a normative level, defining terrorism as a distinct category of legal harm also symbolically expresses the international community's desire to condemn and stigmatize 'terrorism', as such, beyond its ordinary physical or criminal characteristics. Doing so normatively recognizes and protects certain international community values, and sets legal limits on the acceptable means and methods of political action. At a practical level, the patchy regulation of terrorism in many domestic legal systems can give rise to impunity, as a result of jurisdictional lacunae, differences in the definition of offences, gaps the coverage of the sectoral treaties, and limits on the extradition of political offenders. International agreement on defining terrorism and cooperative measures to deal with it is capable of narrowing those gaps. It would also bring greater precision and certainty in the definition of terrorist offences pursuant to UN Security Council measures, and thus strengthen the rule of law in responding to terrorism.

In the practice of the international community over many decades, concentrated through the United Nations organs and regional organizations, broad consensus has emerged that transnational terrorism is internationally wrongful because it: (1) seriously threatens or destroys basic human rights and freedom; (2) jeopardizes the

[43] UNGA (56th Sess) (6th Cttee), Measures to Eliminate International Terrorism: Working Group Report, 29 Oct 2001, UN Doc A/C.6/56/L.9, annex I, 16 (informal Coordinator texts).

[44] Ancillary offences are found in Draft Comprehensive Convention, *ibidem*, art. 2(2), (3) and (4)(a)–(c).

state and the stability of political life; and (3) threatens international peace and security.[45] While those explanations are not entirely coherent or without criticism,[46] the collective identification of what is wrongful about terrorism aids in explaining both why it is insufficient to leave its regulation to domestic law alone, and how terrorism can be best defined to reflect the underlying international interests and protected values at stake.

This in turn raises important questions about who is entitled to use violence and for what purposes. Depending on the scope of the definition of terrorism and the acceptability of any exceptions to it, the criminalisation of terrorism risks empowering the State – including autocratic ones – at the expense of other (potentially legitimate) political claims to the use of violence. Terrorism may often jeopardize the human rights of civilians; but if terrorism is defined more widely as any violence against the State, then the criminalisation of terrorism itself strips away the human freedom to resist oppressive or authoritarian regimes. Criminalising terrorism may serve to safeguard the stability of the State and its political order; but those political orders which systematically violate human rights may warrant destabilisation and subversion. Protecting democracy from terrorism is one thing, but protecting all States is different matter – hence the understandable political difficulty of reaching international agreement on an acceptable universal definition of terrorism.

One important means of legally distinguishing terrorism is by reference to the motivation of offenders. A compelling reason for including a motive element in an international or domestic definition of terrorist offences is that it helps to differentiate terrorism from other kinds of serious violence which may also generate fear (such as common assault, armed robbery, rape, or murder), while also according with commonplace public understanding of what constitutes terrorism. The core premise is that *political* violence, or violence done for some other public-oriented reason (such as religion, ideology, or race/ethnicity) is *conceptually* and *morally* different than violence perpetrated for private ends (such as profit, greed, jealousy, animosity, hatred, revenge, personal or family disputes and so on).

As such, international law should recognise this distinction in defining terrorism, so as to more accurately express what is considered by the international and national communities to be distinctively wrongful about terrorism. This distinction does not necessarily imply that terrorism is always morally *worse* than organised crime (a mafia hit may cause as much fear as a terrorist act), but it does suggest that it is morally *different*, not least because it aims to disrupt and coerce peaceful political processes through violence.

Until recently, the international community's legal response to terrorism did not focus on motive. From the early 1960s, the 'sectoral' anti-terrorism treaties avoided any general definition of terrorism, including reference to motive. 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

[45] See B. Saul, *Defining Terrorism in International Law* (Oxford, 2006), chapter 1.

[46] *Ibidem*.

ends. Proof of the motive(s) behind the act (as distinct from the *intention* to commit the act) is not required as an element of the offences.[47]

At best, some of the treaties define their offences by inclusion of special intent requirements, but which fall short of requiring a political or other motive as such. For instance, the *1999 Terrorist Financing Convention* prohibits the financing of certain acts where their purpose 'is to intimidate a population or to compel a government… to do or abstain from doing any act'.[48] While this definition partly signals a focus on repressing public-oriented violence – by targeting acts directed at the community or a government– it still does not accurately capture what is most wrongful about terrorism.[49] For it is still possible to intimidate a population or compel a government for a host of private, non-political reasons, including simple extortion.

As a result of their failure to include motive elements, many of the existing anti-terrorism treaties reach considerably beyond common understandings of terrorism, since violence for public and private motives alike is equally criminalized. Thus hostage taking or hijacking for profit or to obtain custody of a child in a family dispute is treated no differently than identical acts committed in pursuit of a political cause. The lack of differentiation arguably fails to capture what it distinctively wrongful about terrorism, which is not inherent in a physical act of violence alone.[50] As Levitt writes:

> 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'…[51]

Overreach undermines 'the moral and political force of these instruments as a counter-terrorism measure'[52] and dilutes the special character of terrorism as a crime against non-violent politics and social life. As Habermas suggests, terrorism 'differs from a private incident in that it deserves public interest and requires a different kind of analysis than murder out of jealousy'.[53] Prosecuting an individual for politically motivated 'terrorism', rather than for common crimes like murder or sectoral offences like hijacking, may help satisfy public indignation at terrorist acts, better express community condemnation, and placate popular (but reasonable) demands for justice.

In international practice, there is increasing support for the view that terrorism is *political* or other publicly motivated violence, which is distinguishable, and should be distinguished, from private violence. In its influential and widely supported 1994

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[47] J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius 1990), 49.

[48] 1999 Terrorist Financing Convention, art 2(1)(b).

[49] Human Rights and Equal Opportunity Commission (Australia), Supplementary Submission to the Security Legislation Review Committee (2006), 8.

[50] Lambert, *Terrorism and Hostages in International Law*…, at 50.

[51] G. Levitt, "Is 'Terrorism' Worth Defining?," *Ohio Northern University Law Review* 13 (1986): 97 at 115.

[52] *Ibidem*.

[53] J. Habermas, "Fundamentalism and Terror: A Dialogue with Jürgen Habermas," in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, ed. G. Borradori (Chicago: University of Chicago Press 2003), 25 at 34.

Declaration mentioned earlier, the UN General Assembly distinguished terrorism from other violence because of its motivation 'for political purposes'.[54] In the European Union's 2002 Framework Decision on Combating Terrorism,[55] terrorism is considered a distinctive form of violence precisely because 'the motivation of the offender is different'.[56]

The definitions of terrorism in Britain, Canada, Australia, New Zealand and South Africa similarly reflect a political judgment by those democratic communities that the motives of terrorists set them apart from other criminals. According to the Australian Parliamentary Joint Committee on Intelligence and Security in 2006, 'terrorism is qualitatively different from other types of serious crime' and is perceived as so distinct by the public.[57] For Australia's Human Rights and Equal Opportunity Commission, the aim of terrorists to undermine the political system and institutions 'makes the differentiation between "terrorist" and "non-terrorist" offences meaningful'.[58] As the Canadian government suggests, removing the motive element would thus make terrorism offences indistinguishable from the general law.[59] In a review of British terrorism laws in 1996, Lord Lloyd of Berwick observed that labelling what would otherwise be ordinary crime as terrorism reflects that terrorism attacks society and democratic institutions.[60]

At the same time, the international community has equally recognised the distinctiveness of non-political crime. For instance, the oldest international crime, piracy, is defined as violence on the high seas for 'private ends', indicating that core notion of piracy as common robbery which takes place beyond the reach of national criminal law enforcement. More recently, the *2000 UN Convention against Transnational Organized Crime* defines transnational organised crime as serious crime that is motivated by 'financial or other material benefit',[61] with indications during the drafting that proposals for an international treaty definition of terrorism should take into account what is already covered by this Convention.[62]

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[54] UN General Assembly resolution 49/60 (1994), annexed Declaration, para 3.

[55] The European Union also distinguishes organized crime for profit: see EU Council, Joint Action 98/733/JHA of 21 December 1998; 1995 Europol Convention, art 2; EU Council Decision 2002/187/JHA of 28 February 2002.

[56] European Commission, Proposal for a Council Framework Decision on Combating Terrorism, 19 September 2001, COM(2001) 521 Final, 2001/0217 (CNS), 6, 7.

[57] Parliamentary Joint Committee on Intelligence and Security (Australia), Review of Security and Counter Terrorism Legislation, December 2006, 57. Australia's independent Security Legislation Review Committee agreed in the same year that the motive element 'appropriately emphasises a publicly understood quality of terrorism': Security Legislation Review Committee (Sheller Report), Report tabled in the Australian House of Representatives, 15 June 2006, 57.

[58] Human Rights and Equal Opportunity Commission (Australia), op cit, 8.

[59] Cited in *R v Khawaja*, Case No 04-G30282, Ontario Superior Court of Justice (Canada), 24 October 2006, para 66.

[60] Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol. 1, CMD3420, xi.

[61] 2000 UN Convention against Transnational Organized Crime (adopted by UN General Assembly resolution 55/25 (2000) on 15 November 2000, entered into force 29 September 2003), arts 2 and 5.

[62] UN General Assembly resolution 55/25 (2000), para. 7.

In sum, the expressive function of international law cannot be overstated; a conviction for *political* or *religious* violence sends a symbolic message that certain kinds of violence, *as such*, cannot be tolerated against states, which are duty bound to ensure the safety of their peoples and to legitimately suppress those who wish to influence politics, and interfere in the autonomy of others in peaceful societies, by resorting to violence. Here international law has a role in reinforcing the ethical values of democratic political communities, which are constructed on a shared commitment to peaceful deliberation and participatory dialogue – rather than using the unilateral force of arms against one's fellow citizens or the community at large.

4.4 The Elements of Definition

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

First, 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 physically endanger people, including acts against essential utilities and public infrastructure.[63]

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

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

[63] 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.

Secondly, 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'.[64] 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'.[65] This problem is arguably cured by the European Union's solution of requiring an aim to *seriously* intimidate a population or *unduly* compel a government or international organization.[66] Alternatively, New Zealand modifies this approach by replacing the 'intimidation' of a population with a graver intention 'to induce terror in a civilian population'.[67]

The language of 'terrorism' itself implies that the intention to inflict terror, as opposed to mere intimidation, ought to be required. There has been considerable support for including such an element in an international definition of terrorism, commonly formulated in proposals as either an intention 'to create a state of terror',[68] or 'to provoke a state of terror',[69] in particular persons, groups of persons, or the general public. The serious social stigma which attaches to labelling an offender a 'terrorist' should be reserved only for those people who cause the grave psychological harm which is signified by the term terrorism. That label should not be deployed too easily to describe violent offenders who generate other harms.

Still, 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

[64] 1999 Terrorist Financing Convention, art 2(1)(b); see also UNSC resolution 1566(2004); UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004); UN Secretary-General, *In larger freedom: towards development, security and human rights for all*, UNGA (59th Sess), 21 March 2005, UN Doc A/59/2005; UN Draft Comprehensive Convention, art 2(1).

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

[66] 2002 EU Framework Decision, art 1(1).

[67] Terrorism Suppression Act 2002 (NZ), s 5(2)(a)–(b).

[68] 1937 League of Nations Convention, art 1(2); 1991 ILC Draft Code of Offences against the Peace and Security of Mankind, art 24; 1998 Draft Rome Statute, art 5.

[69] UNSC res 1566 (2004); 1994 UNGA Declaration on Measures to Eliminate International Terrorism.

process, it must differentiate publicly-oriented violence from private violence. As mentioned earlier, a terrorist act is committed not only where there it has a political purpose,[70] 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.

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

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.[71] The most recent sectoral treaties have followed a common formula, building on that 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.[72] Article 3 of the UN Draft Comprehensive Convention follows the same formula and is a reasonable approach.

Accordingly, 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. Committed for a political, ideological, religious or ethnic purpose; and
3. Where intended to:

   (a) Create extreme fear in [or seriously intimidate] a person, group, or the general public; or
   (b) Unduly compel a government or an international organization to do or to abstain from doing any act.

[70] UNGA resolutions 49/60 (1994), annexed Declaration on Measures to Eliminate International Terrorism.

[71] 1963 Tokyo Convention, art 1(3); 1970 Hague Convention, art 3(4)–(5); 1971 Montreal Convention, art 4(2)–(4); 1988 Rome Convention, art 4(1)–(2); 1973 Protected Persons Convention, art 1(a)–(b); 1979 Hostages Convention, art 13; 1980 Vienna Convention, art 2(1)–(2); 1991 Montreal Convention, arts 2–3.

[72] Common art 3 to those conventions.

The cumulative elements of this definition ensure that the stigma of the terrorist label is reserved for only the most serious kinds of unjustifiable political violence. Its limited application also prevents the symbolic power of the term from being diluted or eroded.

4.5 Exceptions to Definition: Democratic Protests, Armed Conflicts

The question remains whether any exceptions to the general definition should be recognised by international law. Agreement on exceptions to any definition of terrorism has proved more difficult than agreement on the definition itself. In particular, two controversies have plagued the debate: whether national liberation or self-determination movements should be exempt, and whether State violence causing terror should be covered. The wider the definition of terrorism, the more likely a broader range of exceptions or defences should be available. If international law is to avoid criminalizing legitimate violent resistance to political oppression, agreement on the lawful boundaries of political violence is an essential first step before agreement on definition can be properly reached. The variety of possible exceptions and defences to, and justifications and excuses for, terrorism under international law has been considered fully elsewhere.[73]

In the first place, it is justified to include an exception 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 – as exists already in some national laws.[74] 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)[75]; or when urban rioters cause extensive property damage, as at G8 anti-globalization protests, or in the Paris suburbs in late 2005. While such destruction to property may exceed the limits of freedom of expression and amount to public order offences, they should fall short of being labelled as terrorism. This is particularly important in the construction of an international crime of terrorism, since States that are not democratic or generally rights-respecting are far less likely to exercise prosecutorial restraint in selecting appropriate criminal charges.

[73] See B. Saul, "Defending Terrorism: Justifications and Excuses for Terrorism in International Criminal Law," *Australian Yearbook of International Law* 25 (2006): 177.

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

[75] M. Brown, "'No war' sail painters sent for trial," *Sydney Morning Herald*, 16 July 2003.

Secondly, violence committed in the context of an armed conflict (international or non-international) should be excluded from a general definition of terrorism, and instead dealt with under the specialised regime of international humanitarian law (IHL). In armed conflict, where 'terrorists' commit unlawful violence under IHL or international criminal law, they may be prosecuted for war crimes or crimes against humanity, either in national courts or (where available) in international tribunals. Most terrorist-type conduct committed in connection with an armed conflict is already criminalized as war crimes,[76] including as a special war crime of spreading terror amongst a civilian population.[77] Where terrorism is not connected the conflict, it could be prosecuted under general terrorism offences.

Lawful violent acts committed by State or non-State forces should be excluded from the scope of any general international crime of terrorism, to prevent such a crime interfering in the carefully constructed parameters of permissible violence in IHL. IHL is also the appropriate legal framework for dealing with self-determination conflicts, and for internal rebellions rising to an armed conflict. Those who target military objectives in accordance with the laws of war would thus not be liable to prosecution as international 'terrorists'.

By contrast, if non-State parties to an armed conflict find themselves branded and delegitimized internationally as criminal terrorist groups, the incentive to comply with IHL by those groups evaporates. For it then makes sense to such groups to fight as dirtily and for as long as possible to avoid defeat, since defeat and capture brings severe criminal penalties rather than amnesties, demobilization and social reintegration. The brutal last months of the internal armed conflict in Sri Lanka is a telling case, where international legitimation of the government's cause in rooting out Tamil Tiger (LTTE) 'terrorists' encouraged an escalation of government violence into systematic war crimes or crimes against humanity; while the LTTE used civilian hostages as human shields and executed civilians attempting to flee.[78]

In contrast, if non-State groups are not criminalized as terrorists, but treated as belligerents in an armed conflict, there is greater reason to comply with humanitarian principles, both to enhance the group's own legitimacy and to stake a claim to more dignified treatment as belligerents upon capture. Of course, there may be some extreme organisations which are not, and will never be, interested in playing by any rules; but the broad definitions of terrorism currently in play sweep up many more organisations than only the most extreme or asocial.

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[76] See H. Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law," *International Review of the Red Cross* 84 (2002): 547.

[77] *Prosecutor v Galic*, ICTY-98-29-T (5 December 2003), paras. 65–66; affirmed in *Prosecutor v Galic (Appeals Chamber Judgment)*, IT-98-29-A, 30 November 2006, paras. 87–90. See also B. Saul, "Crimes and Prohibitions of 'Terror' and 'Terrorism' in Armed Conflict: 1919–2005," *Journal of the International Law of Peace and Armed Conflict* 4 (2005): 264.

[78] See, eg, Report of the UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011; G. Weiss, *The Cage: The Fight for Sri Lanka and the Last Days of the Tamil Tigers* (Australia: Picador , 2011).

Where terrorism is committed in peace-time (or in situations not covered by IHL), in order to maintain moral symmetry[79] and broaden its legitimacy, a definition should cover acts of both State officials and non-State actors. Thus extrajudicial assassinations of political opponents by State officials,[80] or collusion in such killings,[81] 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 similarly morally understood.[82]

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, as well as ordinary criminal law defences, may also play a role in more sensitively responding to particular instances of terrorism in context.

4.6 Conclusion

The application of international law to terrorism rapidly developed in the 10 year period from 2001–2011, and certainly more rapidly than in the previous 70 odd years. Security Council law-making, sanctions regimes, national law reform and transnational legal borrowing, judicial decisions, and 'soft law' standard-setting by a range of bodies have all increasingly shaped international counter-terrorism practice.

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

[80] See, eg, S. Jeffery, "Abbas Accuses Israel of "Terrorist" Attack," *Guardian*, 10 June 2003; AFP, 'Mossad switches from analysis to action', *Sydney Morning Herald*, 4 April 2003; W. Pincus, "Yemen aided CIA strike on 6 Al Qaeda suspects," *International Herald Tribune*, 7 November 2002; J. Risen and D. Johnston, "Bush has Widened Authority of CIA to Kill Terrorists', *New York Times*, 15 December 2002; D. Priest, "Drone Missile Kills al-Qaeda Suspect," *Sydney Morning Herald*, 16 May 2005 (possibly in Pakistan and outside the conflict in Afghanistan). Where committed in armed conflict, the targeting of civilians not taking an active part in hostilities (or after they have taken part) would amount to a war crime: Cassese, A, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, prepared for the petitioners in the *Public Committee against Torture* et al. *v Israel* et al., available at www.stoptorture.org.il (21 Dec 2005); but see Kretzmer, D, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 171.

[81] N. Hopkins and R. Cowan, "Scandal of Ulster's Secret War," *Guardian*, 17 April 2003.

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

Despite these rapid developments, there remains basic conceptual confusion about defining the problem of terrorism which is subject to such deepening regulation. No doubt certain effective measures can be taken to counter-terrorism even whilst the concept remains ambiguous. But quite apart from considerations of effectiveness, there are other costs which should properly concern the international community. Ambiguity of legal concepts allows both states to unilaterally shape their counter-terrorism responses in ways which undermine human rights and other international social interests and values; and terrorists too can take advantage of the gaps.

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