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Defining terrorism to protect human rights

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Few words are plagued by so much indeterminacy, subjectivity and political disagreement as 'terrorism'. The ordinary linguistic meaning of 'terrorism' is instantly evocative and highly emotive, referring to acts causing extreme fear, or intense fright or dread. By itself, a literal meaning is not particularly helpful in defining terrorism as a legal term, since many forms of violence, from mugging to warfare, can cause terror.

The deceptively simple, literal meaning of terrorism is overlaid with centuries of political and historical connotations, from the 'Red Terror' of the French Revolution to the Stalinist Terror in Russia and the 'terror bombing' of European cities in the Second World War. Terrorism also came to refer to non-State actors, such as 19th century anarchists and the ethnic separatists who assassinated Archduke Franz Ferdinand in 1914 (precipitating the First World War).

After the Second World War, 'terrorism' became mired in the ideological cleavages and proxy violence of the Cold War. Whereas developed States focused on non-State terrorism, developing and socialist States emphasised 'State terrorism' by colonial powers, while

law since the 1920s have all ended in failure, and the various counter-terrorism treaties have deliberately avoided defining terrorism. Internationally, terrorism remains a descriptive political concept, although States have increasingly defined terrorism in national law.

A combination of pragmatic and principled arguments persuasively supports the case for defining terrorism in international law. The resilience of the term testifies not only to its political utility, but also to its popular symbolic resonance. It encapsulates a phenomenon of political violence widely condemned in many societies as anti-social, amoral, inhumane, and deviant. If criminal law aims to protect social values, express popular indignation at unjustifiable violence, and stigmatize immoral conduct, 'terrorism' captures and embodies many such judgements.

There is plainly a moral difference in prosecuting a person for 'terrorism' rather than murder or hijacking. A distinctive feature of terrorism is the use of *political* violence. Defining terrorism would help to differentiate politically motivated violence from private violence,

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regarding national liberation violence as justifiable. Much post-war 'terrorism' was linked to anti-colonial struggles and dissipated or ended completely once independence was attained.

The magnitude, internationalisation, and indiscrimination of modern terrorism sets it apart from the targeted assassinations of the 19th century. By the late 20th century, new forms of fundamentalist religious terrorism emerged decoupled from particular territorial claims, specific demands like the release of prisoners, or restraint in tactics. At the same time, after 11 September 2001, there was a tendency to conflate disparate terrorist threats into a homogenous global pandemic, erasing the concrete conditions underlying different situations of violence.

Despite the shifting and contested meanings of 'terrorism' over time, the peculiar semantic power of the term is its capacity to denigrate and dehumanise those at whom it is directed – including legitimate political opponents. The term is ideologically and politically loaded; pejorative; implies moral, social and value judgment; and often abused. Disagreement about terrorism is not merely rhetorical, but reflects doctrinal, ideological and jurisprudential arguments about who is entitled to exercise violence, against whom, and for what purposes.

Why should terrorism be legally defined?

The many attempts to define terrorism in international

just as the Convention on Transnational Organised Crime (2000) distinguishes violence for financial profit. International law would thus respond in a more morally calibrated way to violence committed for different reasons.

In many resolutions of the UN General Assembly and Security Council, the international community has also objected that terrorism: (1) seriously undermines human rights; (2) jeopardizes the State and peaceful, deliberative politics (replacing speech with violence); and (3) threatens international peace and security. While there are conceptual problems with each of these arguments, on the whole they provide coherent and principled reasons for defining terrorism, to protect vital community values and interests.

The most pragmatic reason for defining terrorism arises from the Security Council's response to the terrorist attacks of 11 September 2001. Previously, lack of definition was legally inconsequential, since no rights or duties hinged on the term 'terrorism'. Since 11 September 2001, that has changed. The Security Council has *required* States to implement measures against *terrorist acts* and *terrorists*, according those terms operative legal significance without defining them.

As a result, governments have been authorised to unilaterally and subjectively define terrorism, leading to extremely divergent and vague definitions – many of

which criminalise legitimate opponents. The situation has been exacerbated by a lack of procedural fairness in the work of the UN Counter-Terrorism Committee, which is responsible for listing terrorist groups and freezing their assets. It was only in May 2005, after three years of excessive counter-terrorism responses, that the UN Commission on Human Rights mandated an International Expert to examine the impact of counter-terrorism on human rights.

Whether one is sceptical of definitions (Roberts, 2002) or regrets that the term was ever inflicted upon us (Baxter, 1974) is irrelevant; the term now has legal consequences and cannot be ignored as merely of academic interest, or wished away. Defining terrorism would help to confine the term and prevent its abuse, providing a yardstick against which to contest spurious claims by governments that certain people are terrorists.

Proposed definitions of terrorism

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

In 2005, the UN Secretary-General's report, *In larger freedom*, proposed yet another definition of terrorism, first suggested by the UN High-Level Panel on Threats, Challenges and Change in 2004. This definition repeats the elements of *intimidation* or *compulsion* in the Security Council's definition, which were drawn from the 1999 Terrorist Financing Convention. However, the Secretary-General's definition is not limited to offences in existing treaties, nor even to criminal acts. Conversely, it is narrower than the Security Council's definition because it covers only acts against civilians or non-combatants and excludes violence against property. It also contains no reference to acts intended to provoke a 'state of terror', unlike the definitions of the Council and the General Assembly.

Since 2000, governments in the UN Sixth (Legal) Committee have also been negotiating a treaty defining terrorist crimes. The draft treaty currently defines terrorism as intentionally causing death or serious injury, or serious damage to public or private property, 'to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act'. Again, there is no reference to causing a 'state of terror', or any requirement of a political

motive. It is also unclear whether the whole population (or just a part) must be intimidated.

How should terrorism be defined?

Firstly, it is inherent in the word 'terrorism' itself that some person or group felt terror (meaning extreme fear), or were intended to feel terror. Otherwise, the term becomes disassociated from its linguistic origin, and such acts are better described by more precise terms (such as crimes of 'intimidation' or 'compulsion').

Second, if terrorism violates human rights, a definition must seek to protect rights, such as by prohibiting serious criminal violence endangering life or causing serious injury, or violence against property that seriously affects rights. (The degree of specificity of prohibited acts is negotiable without too much difficulty.)

Third, if terrorism undermines the State and the political process, a definition should require proof of a political motive, or a similar public motive (religious, social, racial, or ideological). Motive elements distinguish terrorism from private violence and ordinary crimes which also terrify (such as armed robbery, rape, or mass murder).

Finally, if terrorism threatens peace or security, a definition must be limited to acts capable of that result—for instance, because of the cross-border preparation or multi-national effects of terrorism, the involvement of State authorities, or injury to other vital community values or interests (such as human rights or State stability).

What conduct should be excluded from terrorism?

Agreement on exceptions to any definition of terrorism has proved more difficult than agreement on definition itself. The two most fundamental controversies are whether self-determination movements, and 'State terrorism', should be covered – or exempt.

Concerning self-determination, some governments have accepted Geneva Protocol I (1977), which recognises liberation fighters as combatants entitled to lawfully participate in hostilities. In contrast, liberation movements in countries not party to Protocol I (such as Palestinian groups in Israel) have no such entitlement, and can be punished as criminals (including as 'terrorists') – even if they confine their actions to attacks on military targets. This means that similarly-situated liberation movements are treated very differently under international law.

Controversy about defining terrorism could be defused or depoliticised if all liberation movements were equally treated by the law, by extending Protocol I to all liberation forces in armed conflict. This would not allow such movements to commit terrorist acts with impunity, since they would be bound by humanitarian law and liable for war crimes (including for deliberately attacking civilians or breaching the specialised prohibitions on terrorism in armed conflict).

As for 'State terrorism', government violence is largely covered by other international rules, including crimi-

nal, humanitarian and human rights law, and the law of State responsibility. In contrast, non-State actors have historically been subject to less regulation, thus stimulating efforts to define non-State violence as terrorism.

Even so, there is still a case for making State officials accountable for official terrorism, particularly where it is committed outside armed conflict (so war crimes law does not apply), and beneath the threshold of crimes against humanity (which requires conduct to be large scale or systematic).

Only imposing liability for terrorism on non-State actors suffers from moral asymmetry, undermining the legitimacy of any treaty against terrorism. Thus extra-judicial assassinations of political opponents by State officials might gainfully be qualified as terrorism, just as might suicide bombings by non-State actors.

At the same time, it makes sense to exclude the activities of State armed forces and non-State forces in armed conflicts, so that criminalising terrorism does not interfere in the carefully constructed regulation of violence by humanitarian law, and potentially unravel compliance with that law and endanger civilians.

Towards definition in 2005

Terrorism currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of legality and the right to a fair trial. If the law is to admit the term, advance definition is essential on grounds of fairness.

As world leaders meet in September 2005 to respond to the UN Secretary-General's reform proposals, it remains to be seen whether current efforts to define terrorism will succeed, or be consigned to the pile of failed attempts over 80 years. The difference now is that a definition of terrorism is more urgent than ever before.

Legal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately it must do so without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression.

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