

Three Reasons for Defining and Criminalizing Terrorism

Ben Saul*

1. Introduction

Much of the international legal debate on terrorism has focused on ideological disputes or the technical mechanics of definition, rather than 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 the existing sector-specific treaties addressing terrorist-type conduct.

In State practice, the bases of international criminalization appear to be that terrorism severely undermines: (1) individual human rights; (2) the State and the political process (but not exclusively democracy); and (3) international peace and security. Treating terrorism as a separate category of unlawful activity expresses a deliberate desire by the international community to morally condemn and stigmatize terrorism as an especially egregious crime, beyond its ordinary criminal characteristics. The overreach in existing sectoral treaties, which criminalize private and political violence equally, would be clarified by a more calibrated crime of terrorism that excludes non-political motives. Once consensus is reached on what it considered wrong about terrorism, it is then easier to move on to define the elements of terrorist offences with appropriate legal precision.

2. Nature of International Crimes

The prohibition of conduct as criminal ordinarily falls within the reserved domain of domestic jurisdiction, and there is value in preventing the proliferation of unnecessary or duplicate international offences. Conduct is criminalized in international law where it is of such gravity that it attracts international concern. In the *Hostages* case, the US Military Tribunal at Nuremberg stated that

An international crime is such 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...²

* BA(Hons) LLB(Hons) (Syd), Tutor and DPhil Candidate in Law, University of Oxford.

¹ J Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 Israel YB Human Rights 13, 23-25; MC Bassiouni, 'Methodological Options for International Legal Control of Terrorism', in MC Bassiouni (ed), *International Terrorism and Political Crimes* (Charles C Thomas, Springfield, 1975) 485, 487.

² *Re List and Others*, US Military Tribunal at Nuremberg, 19 Feb 1948 (1953) 15 Ann Dig 632, 636.

Conduct may be of international concern because it has transboundary effects or threatens ‘the peace, security and well-being of the world’,³ or because it violates natural or moral law and shocks the conscience of humanity.⁴ International criminal law thus seeks to protect the shared values considered important by the international community,⁵ despite the subjectivity inherent in identifying universal values. As with other international or transnational crimes, there is nothing innately or intrinsically criminal about terrorism, which is situated in its own historical and political context.

Although international crimes require an international element, this does not mean that prohibited conduct must physically or materially transcend national boundaries. Genocide, war crimes and crimes against humanity may be wholly committed within a single domestic jurisdiction. Although these crimes often involve State action or policy because of their scale or gravity, such involvement is not essential. Further, conduct need not threaten some aspect of peace and security to constitute an international crime, where such conduct is considered to infringe international moral values. Thus if terrorism injures values or interests deserving international protection, then domestic as well as international terrorism should be equally criminalized.

3. Terrorism as a Discrete Crime

Since the early 1960s, much of the physical conduct comprising terrorist acts has been criminalized in numerous sectoral anti-terrorism 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. Yet dealing with terrorist acts as sectoral offences fails to differentiate between privately motivated violence and violence committed for political reasons.⁶ Despite the adoption of sectoral treaties, the term ‘terrorism’ continues to exhibit descriptive and analytical force in international legal discussion, suggesting that it captures a concept beyond the mere specific physical (or sectoral) acts comprising terrorist acts. That concept is 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.⁷

In particular, the international community has expressed its disapproval of ‘terrorism’, *as such*, on a number of grounds since the early 1970s. These include that terrorism is a serious human rights violation; that terrorism undermines democratic governance, or at a minimum undermines the State and peaceful political processes; and that terrorism threatens international peace and security. Each of these grounds is considered in turn as a basis for supporting international criminalization of terrorism. Definition of terrorism could remedy persistent

³ 1998 Rome Statute of the International Criminal Court, preamble; MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff, Dordrecht, 1992), 46-47.

⁴ *Ibid*; *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 (District Ct Jerusalem), ¶12; H Lauterpacht (ed), *Oppenheim’s International Law: Vol I Peace* (8th ed, Longmans, Green & Co, London, 1955), 753.

⁵ MC Bassiouni, ‘A Policy Oriented Inquiry into the Different Forms and Manifestations of “International Terrorism”’, in MC Bassiouni (ed), *Legal Responses to International Terrorism: US Procedural Aspects* (Martinus Nijhoff, Dordrecht, 1988) xv, xl.

⁶ G Levitt, ‘Is “Terrorism” Worth Defining?’ (1986) 13 Ohio Northern University L Rev 97, 115.

⁷ See, eg, R Baxter, ‘A Skeptical Look at the Concept of Terrorism’ (1974) 7 Akron L Rev 380.

concerns about its vagueness, while preserving the symbolic force attached to the term by the international community.

A. 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.⁸ Numerous resolutions of General Assembly since the 1970s,⁹ and of the UN Commission on Human Rights since the 1990s,¹⁰ have asserted that terrorism threatens or destroys fundamental human rights and freedoms. The 2002 EU Framework Decision on Combating Terrorism, which adopted a generic definition of terrorist crimes to facilitate a common European arrest warrant, similarly presents terrorism as among the most serious threats to human rights.¹¹ A number of other regional anti-terrorism instruments also support the idea that terrorism gravely violates human rights,¹² while the preamble to the Draft UN Comprehensive Convention against terrorism, under negotiation since 2000, similarly

⁸ A Cassese, *International Criminal Law* (OUP, Oxford, 2003), 23.

⁹ UNGA resols 3034(XXVII) (1972), ¶1; 32/147 (1977), ¶1; 34/145 (1979), ¶3; 38/130 (1983), ¶1; 40/61 (1985), pmb1, ¶¶2-3; 42/159 (1987), pmb1, ¶¶2-3; 44/29 (1989), pmb1, ¶2; 46/51 (1991), pmb1, ¶2; 48/122 (1993), pmb1, ¶1; 49/60 (1994), pmb1; 49/185 (1994), pmb1, ¶1; 50/186 (1995), pmb1, ¶2; 51/210 (1996), annexed Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, pmb1; 52/133 (1997), pmb1, ¶¶2-3; 54/164 (2000), pmb1, ¶¶2-3; see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, ¶17.

¹⁰ UNComHR resols 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 1999/30; 2000/30; 2001/37; 2002/35; 2003/37; UNSubComHR resols 1994/18; 1996/20; 1997/39; 1998/29; 1999/26; 2001/18; 2002/24.

¹¹ European Commission, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 Sep 2001, COM(2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 2-3, 7.

¹² 1998 Arab Convention on the Suppression of Terrorism, pmb1; 1999 OIC Convention on Combating International Terrorism, pmb1; 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, pmb1; 1999 OAU Convention on the Prevention and Combating of Terrorism, pmb1; OAS General Assembly, AG/RES 1840 (XXXII-O/02), pmb1; OAS Declaration of Lima to Prevent, Combat, and Eliminate Terrorism, adopted at the Inter-American Specialized Conference on Terrorism, 26 Apr 1996, pmb1 and ¶1; Declaration of Quito, IX Meeting of the Rio Group, adopted Sep 1995; OAU Central Organ Ministerial Communiqué on Terrorism, adopted 11 Nov 2001, Central Organ/MEC/MIN/Ex-Ord (V) Comm, ¶3; OAS General Assembly, AG/RES 1840 (XXXII-O/02), pmb1; Council of Europe (Ctee of Ministers), Guidelines of the Committee of Ministers on human rights and the fight against terrorism, 11 Jul 2002, pmb1 [a]; European Parliament res A5-0050/2000, 16 Mar 2000, ¶¶41-42; OIC (Extraordinary Session of Foreign Ministers), Declaration On International Terrorism, Kuala Lumpur, 1-3 Apr 2002, ¶7; see also International Commission of Jurists, resolution adopted at triennial mtg, Geneva, 18 Sep 2001; NAM, XIV Ministerial Conf, Final Document, Durban, 17-19 Aug 2004, ¶100; NAM, XIII Conference of Heads of State or Government, Final Document, Kuala Lumpur, 25 Feb 2003, ¶107.

suggests that terrorism endangers human rights.¹³ A UN Special Rapporteur on terrorism has observed that ‘there is probably not a single human right exempt from the impact of terrorism’.¹⁴

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.

There is no explicit international human right to ‘freedom from fear’—which a crime of terrorism could seek to protect—although such protection may be implied from other provisions. First, the UDHR preamble states that ‘freedom from fear’ is part of the ‘the highest aspiration of the common people’, while the ICCPR and 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 UNDP as an aspect of human development.¹⁵ 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.¹⁶ Its inclusion in the UDHR reflects an internationalization of American aspirations, partly at the urging of Eleanor Roosevelt. These preambular provisions support the criminalization of serious violations of the nascent right to live free from fear, which is captured fairly precisely by prohibiting terrorism.

Second, implementing the right to liberty and security of person (ICCPR, art 9(1); UDHR, art 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 elaborate 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 ECHR, deal almost entirely with aspects of the deprivation of liberty.¹⁷

Yet an ordinary textual interpretation would give the term ‘security’ a meaning distinct from ‘liberty’.¹⁸ The UDHR drafting records show that some States thought the right to ‘security’ of person encompassed a right to live free from fear,¹⁹ although the dominant interpretation was

¹³ UNGA, Reports of the Ad Hoc Committee established by UNGA res 51/210 (17 Dec. 1996), 6th Session (2002), UN Doc Supp 37 (A/57/37), annex I: Bureau Discussion Paper.

¹⁴ UNSubComHR (53rd Sess), Terrorism and Human Rights: Progress Report by Special Rapporteur K Koufa, 27 Jun 2001, UN Doc E/CN.4/Sub.2/2001/31, 28.

¹⁵ UNDP, *Human Development Report 1994* (OUP, New York, 1994), 23.

¹⁶ US President FD Roosevelt, State of the Union Address, 77th US Congress, 6 Jan 1941, (1941) 87 Congressional Record, pt I; J Brierly, *The Outlook for International Law* (Clarendon, Oxford, 1944), 75.

¹⁷ UNHRC (16th Session), General Comment No 8: ICCPR, Article 9, 30 Jun 1982; *Bonzano v France*, Judgment, 18 Dec 1986, Ser A, (1987) 9 EHRR 297.

¹⁸ C Ovey and R White, *Jacobs & White: European Convention on the Human Rights* (3rd ed, OUP, Oxford, 2002), 103.

¹⁹ UNGAOR 3rd Session, 3rd Cttee Summary Records of Meetings, 21 Sep—8 Dec 1948, 175 (Costa Rica), 172, 193-194 (Haiti).

that it referred to ‘physical integrity’.²⁰ If the right to security means a right to physical integrity, it is arguable that terrorism undermines such a right. So much is recognized by the OIC Convention, which states that terrorism is a ‘gross violation of human rights, in particular the right to... security’.²¹ The right to security is, however, more limited in meaning than the expansive concept of ‘human security’ which gained some currency in the 1990s.²²

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 a violator.²³ While human rights law and international criminal law sometimes 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’.²⁴ Human rights law is not punitive, but remedies rights violations.²⁵ Human rights treaties do not require prosecution of rights violators as a necessary remedy,²⁶ although ‘the obligation to ensure rights is held to encompass such a duty, at least with respect to the most serious violations’.²⁷

There is no doubt that human rights are, however, ‘one source of principles for criminalization’,²⁸ 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.²⁹ 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’.³⁰

Some writers have questioned whether terrorism can violate human rights as a matter of law, where terrorist acts are not attributable to a State.³¹ The basis of this argument is that under human rights treaties, only State parties, rather than non-State actors or individuals,³² 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 General Assembly’s 1994 Declaration on terrorism, who argued that terrorism is a crime but not a rights violation, because only acts

²⁰ Ibid, 190 (US, France), 157 (Netherlands), 189 (Haiti), 191 (China), 192 (Guatemala), 194 (Philippines).

²¹ OIC Convention, pmbi.

²² D Newman, ‘A Human Security Council? Applying a “Human Security” Agenda to Security Council Reform’ (2000) 31 *Ottawa L Rev* 213, 222.

²³ S Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed, OUP, Oxford, 2001), 13.

²⁴ Ibid, 12-13.

²⁵ *Velasquez Rodriguez* case, IACHR, Ser C, No 4, (1988) 9 *Human Rights L J* 212, ¶134.

²⁶ Ratner and Abrams, 152; D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2000), 323.

²⁷ Shelton, *ibid*, 323.

²⁸ A Ashworth, *Principles of Criminal Law* (3rd ed, OUP, Oxford, 1999), 41.

²⁹ 1966 ICCPR, Art 7; 1984 Torture Convention, arts 4-5.

³⁰ Ashworth, *op cit*, 41.

³¹ T Meron, ‘When Do Acts of Terrorism Violate Human Rights?’ (1989) 19 *IYBHR* 271, 275.

³² H Steiner, ‘International Protection of Human Rights’ in M Evans (ed), *International Law* (OUP, Oxford 2003) 757, 776.

attributable to a State violate human rights.³³ (The EU has since reversed its position in the 2002 EU Framework Decision.)

Clearly, terrorist acts that are attributable to States under the law of State responsibility will violate States' human rights obligations.³⁴ 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.³⁵ 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'.³⁶ 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.³⁷ These duties are related to the duty to ensure effective remedies for rights violations.³⁸

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.³⁹ For this reason, in relation to human rights '[m]uch of the significance of the State/non-State (public-private) distinction with respect to the reach of international law... collapses'.⁴⁰ 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.⁴¹ Thus 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...

³³ UNGAOR 49th session, 84th mtg, Measures to eliminate international terrorism: Report of the 6th Cttee (A/49/743), 9 Dec 1994, 19-20 (Germany for the EU and Austria; Sweden for the Nordic States; Canada); see also UN Sec-Gen Report, Human Rights and Terrorism, UN Doc A/50/685, 26 Oct 1995, 5 (Sweden).

³⁴ Meron, 274.

³⁵ UNHRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, ¶8.

³⁶ UNHRC, General Comment No 31, ¶8; *Case of X and Y v The Netherlands* (1985) Ser A, vol 91, ¶23.

³⁷ *Velasquez-Rodriguez*, ¶¶172-173; UNHRC, General Comment No 31, ¶8; T Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) 72, 77-78; G Sperduti, 'Responsibility of States for Activities of Private Law Persons', in R Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) 373, 375; Shelton, *op cit*, 47; D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1990) 13 *Fordham Intl L J* 1; A Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1996), 105-106, 119; J Paust, 'The Link between Human Rights and Terrorism and its Implications for the Law of State Responsibility' (1987) 11 *Hastings Intl and Comp L Rev* 41; L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *IYBHR* 233, 240-241.

³⁸ ICCPR, art 2(3).

³⁹ Steiner, *op cit*, 776.

⁴⁰ *Ibid*.

⁴¹ *Velasquez-Rodriguez*, ¶¶172-173.

to promote respect for these rights and freedoms... to secure their universal recognition and observance', reiterated in UN resolutions.⁴² Article 29(1) of the UDHR further recognises that 'everyone has duties to the community' and the *travaux préparatoires* support the view that individuals must respect human rights.⁴³ 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.⁴⁴

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....⁴⁵

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.⁴⁶ 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 by individuals or groups.⁴⁷ As Clapham observes, individuals are subject to duties in other areas of international law, including IHL and international criminal law.⁴⁸

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. There is also the practical difficulty of non-State groups assuming obligations (such as to 'ensure' or 'protect' rights) that they lack the minimum organizational capacity to fulfil.⁴⁹ 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 diligently fulfil its duties of prevention and protection.

⁴² Preambles to UNGA res 48/22 (1993); UNComHR resols 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 2000/30; 2001/37; UNSubComHR resols 1997/39; 1998/29; 1999/26; 2001/18; 2002/24.

⁴³ Clapham, 97-98.

⁴⁴ ICCPR and ICESCR, pmbles; UDHR, pmbbl.

⁴⁵ See also UDHR, art 30.

⁴⁶ UNGAOR 49th session, 84th mtg, Measures to eliminate international terrorism: Report of the 6th Cttee (A/49/743), 9 Dec 1994, 21.

⁴⁷ UNSubComHR (51st Sess), Terrorism and Human Rights: Preliminary Report by Special Rapporteur K Koufa, 7 Jun 1999, UN Doc E/CN.4/Sub.2/1999/27, ¶¶22-23.

⁴⁸ Clapham, 95-96; see also B Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' (2001) 32 Columbia Human Rights L Rev 565.

⁴⁹ See L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (CUP, Cambridge, 2002).

In such cases, the human rights of victims will only be violated in a descriptive,⁵⁰ 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 relevant State. While it is ‘dangerous to exclude private violators of rights from the theory and practice of human rights’,⁵¹ even descriptive violations of rights are a sufficient ground on which to criminalize terrorism by non-State actors.

B. Terrorism as a Threat to Democratic Governance or Peaceful Politics

In the 1990s, the General Assembly and the UN Commission on Human Rights frequently described terrorism as aimed at the destruction of democracy,⁵² or the destabilizing of ‘legitimately constituted Governments’ and ‘pluralistic civil society’.⁵³ Some resolutions state that terrorism ‘poses a severe challenge to democracy, civil society and the rule of law’.⁵⁴ The 2002 EU Framework Decision, the 2002 Inter-American Convention against Terrorism, and the UN Draft Comprehensive Convention are similarly based on the premise that terrorism jeopardizes democracy.⁵⁵ Most regional treaties are, however, silent on the effects of terrorism on democracy—including those of the African Union, Organisation of American States, Organization of the Islamic Conference, South Asian Association for Regional Cooperation, Commonwealth of Independent States and the Council of Europe—suggesting that most regional organizations do not regard terrorism as an offence specifically against democracy.⁵⁶

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. A 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

⁵⁰ Steiner, *op cit*, 776.

⁵¹ Clapham, *op cit*, 124.

⁵² UNGA resols 48/122 (1993), ¶1; 49/60 (1994), ¶2; 49/185 (1994), ¶1; 50/186 (1995), ¶2; 52/133 (1997), ¶3; 54/164 (2000), ¶¶2-3; UNComHR resols 1995/43, ¶1; 1996/47, ¶¶1-2; 1997/42, ¶¶1-2; 1998/47, ¶3; 1999/27, ¶1; 2000/30, ¶1; 2001/37, ¶1; 2002/35, ¶1; 2003/37, ¶1; UNSubComHR resols 1994/18, ¶1; 1996/20, ¶1; 1997/39, ¶1; 2001/18, pmb1; 2002/24, pmb1; 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, ¶17.

⁵³ UNGA resols 48/122 (1993), ¶1; 49/185 (1994), ¶1; 50/186 (1995), ¶2; 52/133 (1997), ¶3; 54/164 (2000), ¶¶2-3; UNComHR resols 1995/43, ¶1; 1996/47, ¶2; 1997/42, ¶2; 1998/47, ¶2; 1999/27, ¶1; 2000/30, ¶1; 2001/37, ¶1; 2002/35, ¶1; 2003/37, ¶1; UNSubComHR resols 1994/18, ¶1; 1996/20, ¶1.

⁵⁴ Preambles to UNComHR resols 1998/47; 1999/27; 2000/30; 2001/31; 2002/35; 2003/37; UNSubComHR resols 1999/26; 2001/18; 2002/24.

⁵⁵ EU Explanatory Memorandum, 7; 2002 Inter-American Convention and OAS General Assembly, AG/RES 1840 (XXXII-O/02), preamble; UN Draft Comprehensive Convention, preamble.

⁵⁶ Although the Council of Europe has recently stated that terrorism ‘threatens democracy’: Council of Europe, Guidelines of the Committee of Ministers on human rights and the fight against terrorism’, 11 Jul 2002, pmb1 [a].

voting, freedom of speech, opinion, expression and association.⁵⁷ Terrorists violate the ground rules of democracy, by coercing electors and candidates, wielding disproportionate and unfair power through violence, and subverting the rule of law.⁵⁸ 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.⁵⁹

As Arendt argues, humans are political beings endowed with speech, but ‘speech is helpless when confronted with violence’.⁶⁰ For Ignatieff, terrorism ‘kills politics, the one process we have devised that masters violence in the name of justice’.⁶¹ Boutros Boutros-Ghali stated that terrorism reveals the unwillingness of terrorists ‘to subject their views to the test of a fair political process’.⁶² 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 relevant provisions of human rights treaties.⁶³

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’.⁶⁴ 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 short of establishing a right to a comprehensive democratic system, unless a particularly ‘thin’, procedural or formal conception of democracy is accepted.⁶⁵ Further, the customary criteria reflected in the 1933 Montevideo 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 right under international law. 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

⁵⁷ UDHR, art 29(2); ICESCR, arts 4, 8(1)(a); ICCPR, arts 14(1), 21, 22(2); see Koufa 1999, ¶¶26-31.

⁵⁸ T Honderich, *Three Essays on Political Violence* (Basil Blackwell, Oxford, 1976), 103.

⁵⁹ Koufa (1999), op cit, ¶32.

⁶⁰ H Arendt, *On Revolution* (Penguin, London, 1990), 19.

⁶¹ M Ignatieff, ‘Human Rights, the Laws of War, and Terrorism’ (2002) 69 *Social Research* 1137 at 1157.

⁶² Quoted in Koufa (1999), op cit, ¶31.

⁶³ T Franck, ‘The Emerging Right of Democratic Governance’ (1992) 86 *AJIL* 46; G Fox ‘The Right to Political Participation in International Law’ (1992) 17 *Yale J Intl Law* 539; G Fox and B Roth (eds), *Democratic Governance in International Law* (CUP, Cambridge, 2000).

⁶⁴ S Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP, Oxford, 2002) 89.

⁶⁵ For analysis of different conceptions of democracy, see S Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP, Oxford, 2000), chapters 3-5.

as a precondition of European Community membership.⁶⁶ Even still, there is significant variation between EU member States in their different 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.⁶⁷

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 the language of some UN resolutions, quoted above, refers to terrorism as ‘destabilizing *legitimately* constituted Governments’ [emphasis added], implying that terrorism is *not* objectionable against illegitimate governments—particularly if read in conjunction with the historical qualification in many resolutions that self-determination movements should be excluded from the notion of terrorism.

However, relevant UN resolutions discount this possibility. Over time the international community has agreed that ‘all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed’ are both criminal and unjustifiable. Thus even just causes, pursued against violent or tyrannical regimes, may not employ terrorist means. As the Commission on Human Rights has resolved, ‘terrorism... can never be justified as a means to promote and protect human rights’.⁶⁸ Most regional anti-terrorism instruments support the idea of terrorism as a crime against the State and the political process, rather than as a crime against democracy.⁶⁹

Consequently, based on world opinion, it is difficult to argue that terrorism should be criminalized as a crime against democratic politics, since it must also be regarded as criminal and unjustifiable against even tyrannical regimes. As a result, the minimum shared conception of terrorism in the international community encompasses violent conduct directed against politics and the State (including its security and institutions), but regardless of its democratic character. However, there is less support for the more specific concept of terrorism as a threat to democracy, reflecting the diversity of political systems in the international community.

C. Terrorism as a Threat to International Peace and Security

⁶⁶ EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 Dec. 1991, *British Yearbook of International Law* (1991) p.559.

⁶⁷ B Roth, ‘Evaluating Democratic Progress: A Normative Theoretical Perspective’ (1995) 9 *Ethics and International Affairs* 55; Marks, *op cit*.

⁶⁸ Preambles to UNComHR resols 1996/47; 1997/42; 1998/47; 1999/27; 2000/30; 2001/31; 2002/35.

⁶⁹ OAU Convention, *pmbi*; OAS General Assembly, AG/RES 1840 (XXXII-O/02), *pmbi*; Arab Convention, *pmbi*; OIC Convention, *pmbi*; OIC resols 6/31-LEG (2004), *pmbi*; 6/10-LEG(IS) (2003), *pmbi*; SAARC Convention, *pmbi*; NAM, XIV Ministerial Conf, Final Document, Durban, 17-19 Aug 2004, ¶¶100; NAM, XIII Conference of Heads of State or Government, Final Document, Kuala Lumpur, 25 Feb 2003, ¶¶107-109; NAM, XIII Ministerial Conference, Final Document, Cartagena, 8-9 Apr 2000, ¶¶88-89.

A compelling rationale for criminalizing terrorism is the threat it presents to international peace and security. Resolutions of the General Assembly since the 1970s,⁷⁰ and of the Commission on Human Rights since the 1990s,⁷¹ 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 UN Comprehensive Convention take a similar position, while various regional instruments also highlight the threat to international peace and security presented by terrorism.⁷²

Most explicitly, 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.⁷³ After the terrorist attacks of 11 September 2001, the Council shifted to regarding ‘any’ act of international terrorism as a threat to peace and security⁷⁴—regardless of its severity or international effects—and abandoning its previously calibrated approach to examining the impact of specific acts. In addition, the Council now involves itself in *domestic* terrorism—such as the Madrid bombing (wrongly attributed to ETA) in Spain,⁷⁵ and Chechen terrorism in Russia. To the extent that terrorist acts do threaten peace and security, criminalization is an appropriate means of suppressing it. Even where terrorism is directed against an authoritarian State, criminalization may be justified if it helps to avert more serious harm to international peace or security, such as the escalation of regional violence.

Historically, the Security Council refrained from defining terrorism, and between late 2001 and late 2004 permitted States to unilaterally define the scope of terrorist crimes in national

⁷⁰ UNGA resols 38/130 (1983), ¶1; 40/61 (1985), pmb1, ¶¶2-3; UNGA res 42/22 (1987), annexed Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, pmb1; 42/159 (1987), pmb1, ¶¶2-3; 44/29 (1989), pmb1, ¶¶1-2; 46/51 (1991), pmb1, ¶¶1-2; 48/122 (1993), ¶1; 49/60 (1994), pmb1, ¶¶1-3; 49/185 (1994), ¶1; 50/53 (1995), ¶7; 50/186 (1995), ¶2; 51/210 (1996), annexed Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, pmb1, ¶¶1-2; 52/133 (1997), ¶3; 54/164 (2000), ¶¶2-3.

⁷¹ UNComHR resols 1995/43, ¶1; 1996/47, ¶2; 1997/42, ¶2; 1998/47, ¶3; 1999/27, ¶1; 2000/30, ¶1; 2001/37, ¶1; 2002/35, ¶1; 2003/37, ¶1; UNSubComHR resols 1994/18, ¶1; 1996/20, ¶2; 1997/39, ¶1; see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, ¶17.

⁷² Inter-American Convention, pmb1; Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan 2004; OAS Convention, pmb1; SAARC Convention, pmb1; NAM, XIV Ministerial Conf, Final Document, Durban, 17-19 Aug 2004, ¶100; NAM, XIII Conference of Heads of State or Government, Final Document, Kuala Lumpur, 25 Feb 2003, ¶¶107, 110; ASEAN, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, pmb1; 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); EU Commission Proposal, Explanatory Memorandum, op cit, 3, 8.

⁷³ Preambles to UNSC resols 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), ¶1.

⁷⁴ UNSC res 1368 (2001), ¶1.

⁷⁵ UNSC res 1530 (2004), ¶1.

law.⁷⁶ In resolution 1566 of October 2004, it finally adopted a generic definition of terrorism, combining elements from a 1994 General Assembly Declaration (provoking a state of terror) and the 1999 Terrorist Financing Convention (intimidating a population, or coercing a government or international organization). While there are legitimacy costs in circumventing the usual multilateral treaty negotiation context, the definition may at least constrain more draconian national definitions in future.

4. Conclusion

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

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.⁷⁷ Definition would assist in satisfying the double criminality rule in extradition requests, and in establishing a ‘prosecute or extradite’ regime for terrorist crimes.⁷⁸ Definition might also help confine the political offence exception to extradition, should that be considered desirable.⁷⁹ Definition would assist in excluding ‘terrorists’ from refugee status, if terrorism qualifies as serious non-political crime, or contrary to UN purposes and principles.⁸⁰ To the extent that sectoral offences are enumerated within a generic definition, definition would widen the substantive implementation of sectoral treaties.⁸¹

Although not all of these rationales for criminalization are entirely persuasive, taken in conjunction they establish a principled basis on which to respond to the terrorist threat. Criminalization is a powerful symbolic mechanism for delineating internationally unacceptable behaviour, irrespective of whether deterrence of ideologically motivated offenders is feasible. Definition of terrorism could satisfy community demands that ‘terrorists’ be brought to justice,

⁷⁶ UNSC res 1373 (2001), ¶3.

⁷⁷ EU Commission Proposal, Explanatory Memorandum, op cit, 3.

⁷⁸ J Murphy, ‘Defining International Terrorism: A Way Out of the Quagmire’ (1989) 19 Israel YB Human Rights 13, 35.

⁷⁹ See generally C Van den Wyngaert, ‘The Political Offence Exception to Extradition: How to Plug the Terrorist’s Loophole’ (1989) Israeli Yearbook on Human Rights 297; C Van den Wijngaert, *The Political Offence Exception to Extradition* (Kluwer, Boston, 1980); G Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff, Dordrecht, 1998); M Bassiouni and E Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, Dordrecht, 1995).

⁸⁰ See B Saul, ‘Exclusion of Suspected Terrorists from Asylum’, Institute for International Integration Studies (Trinity College, Dublin), Discussion Paper No 26, July 2004.

⁸¹ EU Commission Proposal, Explanatory Memorandum, op cit, 5.

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 abused. Rather than remaining an ambiguous and manipulated synonym for 'evil'—justifying all manner of repressive responses—legal definition would confine the term within known limits.