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REASONS FOR DEFINING AND CRIMINALIZING "TERRORISM" IN INTERNATIONAL LAW

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RESUMEN: Ante la ausencia de una definición internacional del terrorismo o la existencia del delito como tal, este artículo explica las razones políticas para definir y tipificar al terrorismo como delito es decir, se hace énfasis en el porqué en lugar de cómo definirlo. La base racional para la definición y tipificación es que el terrorismo va seriamente en detrimento de los derechos humanos, pone en riesgo al estado y las políticas de paz, y amenaza la paz y seguridad internacionales. Definir al terrorismo como delito en lo particular, normativamente reconoce y protege valores e intereses vitales de la comunidad internacional; y simbólicamente expresa condena social y estigmatiza a los delincuentes. Así, las exageradas ambiciones inherentes a los tratados sectoriales serían clarificadas por una respuesta más calibrada diferenciando la violencia pública de la privada.

ABSTRACT: In the absence of an international definition or crime of terrorism, this article explains the policy rationale for defining and criminalizing terrorism —why, rather than how, to define it—. The core rationale for definition and criminalization is that terrorism seriously undermines fundamental human rights, jeopardizes the State and peaceful politics, and threatens international peace and security. Defining terrorism as a discrete crime normatively recognizes and protects vital international community values and interests, symbolically expresses community condemnation, and stigmatizes offenders. The overreach inherent in sectoral treaties would be clarified by a more calibrated response which differentiates political from private violence.

RÉSUMÉ: Suite a l'absence d'une définition internationale du terrorisme, qualifiant ce lui-ci de crime, cet article explique les raisons politiques qui permettent définir et qualifier le terrorisme comme crime ou délit, la présente met l'accent sur les causes au lieu d'une analyse sur comment définir le terrorisme. Cet article donne des bases rationnelles qui permettent définir et qualifier le terrorisme comme un crime, la dite qualification est justifier par le fait que le terrorisme affecte sérieusement les Droits de l'homme, met en risque l'Etat de Droit et ses politiques de paix, le terrorisme menace la paix et la sécurité internationale. Définir le terrorisme comme un crime particulier, permettra de reconnaître et protéger les valeurs et intérêts vitales de la Communauté Internationale par le biais d'un instrument juridique, et d'une manière chercher a éradiquer les pratiques dénonces par la société, en stigmatisant les délinquants et de cette manière donner une réponse dirigé qui clarifiera les ambitions des traités sectoriels tout en différenciant la violence publique et privée.

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I. INTRODUCTION

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

In State practice, viewed through the lenses of United Nations organs and regional organizations, the principal bases of criminalization are that terrorism severely undermines: (1) fundamental human rights and freedoms; (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 the international community's desire to 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 is considered wrongful about terrorism, it is then easier to progress to define the constituent elements of terrorist offences with appropriate legal precision.

1 Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 IYBHR 13, 23-25; Murphy, 'United States Proposals on the Control and Repression of Terrorism', in Bassiouni (ed), *International Terrorism and Political Crimes* (Charles C Thomas, Illinois, 1975), 493, 503; Bassiouni, 'Methodological Options for International Legal Control of Terrorism', in Bassiouni (ed), *infra*, 485, 487.

The rationale for criminalization is anchored in an examination of the common features of international crimes; the objectives of international criminological policy; and the relationship of the criminal law to discretionary political responses to terrorism. This article is mindful of avoiding the proliferation of international offences and so addresses problems of multiple charges and convictions. The rationale for definition depends on the purpose of definition, and the emphasis here is on definition in criminal law, rather than in other branches of international law —such as humanitarian law, human rights law, law on the use of force, or refugee law— which may, or may not, call for different definitions.

II. Nature of International Crimes

An international crime is conduct prohibited by the international community as criminal. This bland positivist account merely identifies a crime by its source (State consent in a treaty, or through custom formation), but does not explain *why* the international community chooses to stigmatize conduct as deserving of international (or transnational)[2] criminal prohibition and punishment. The policy rationale for criminalization is often obscure, and the 'rapid expansion' of the criminal law's 'material scope has not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalization, like individual autonomy, welfare, harm and minimalism'.[3]

1. *Grave Conduct of International Concern*

One general explanation for criminalization was suggested in the *Hostages* case, in which the US Military Tribunal at Nuremberg stated that: "An international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for

2 A distinction can be drawn between international (customary) crimes of universal jurisdiction and more limited transnational (treaty) crimes (or 'crimes of international concern'): Goodwin-Gill, 'Crime in International Law' in Goodwin-Gill and Talmon (eds), *The Reality of International Law* (Clarendon, Oxford, 1999) 199, 205-208; see also Boister, 'Transnational Criminal Law?' (2003) 14 *EJIL* 953. Meron, 'Is International Law Moving Towards Criminalization?' (1998) 9 *EJIL* 18.

3 Boister, *op. cit*., 957.

some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances".[4]

The prohibition of conduct as criminal is ordinarily a matter falling within the reserved domain of domestic jurisdiction, and there is value in preventing the proliferation of superfluous or duplicate international offences —and unnecessary liabilities on individuals— to ensure the systemic integrity and coherence of international criminal law.

However, as the Tribunal noted, conduct is internationally criminalized where it is of such gravity that it attracts international concern. Conduct may be of international concern because it has transboundary effects or threatens 'the peace, security and well-being of the world';[5] causes or threatens public harm of great magnitude;[6] or violates natural or moral law and 'shocks the conscience' of humanity.[7] International criminal law thus seeks to protect the shared values considered important by the international community,[8] rather than comprising socially expedient or technical rules.[9] As a result, 'a greater degree of moral turpitude attaches' to an international crime,[10] which is not merely the product of social prejudice, indignation, distaste or disgust.[11]

There is inevitable subjectivity in identifying universal values, or in appealing to natural law as the basis of criminalization,[12] and 'make-be-

4 *Hostages* case (1953) 15 Ann Dig 632, 636.

5 1998 Rome Statute, pmbl; MC Bassiouni, *Crimes Against Humanity* (Martinus Nijhoff, Dordrecht, 1992), 46-47. Criminalization of piracy is warranted since it occurs beyond territorial jurisdiction, on the high seas.

6 A Cassese, *International Criminal Law* (OUP, Oxford, 2003), 22.

7 *Idem*; *Eichmann* (1961) 36 ILR 5 (Distr Crt Jerus), 12; *R v Finta* [1994] 1 SCR 701, 812; H Lauterpacht (ed), *Oppenheim's International Law: vol I Peace* (8th ed, Longmans, Green and Co, London, 1955), 753.

8 MC Bassiouni, 'A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"', in MC Bassiouni (ed), *Legal Responses to International Terrorism* (Martinus Nijhoff, Dordrecht, 1988), XV, XL; Cassese, n6, 22-23; Bassiouni, n5, 46; MC Bassiouni, *International Criminal Law* (Sijthoff and Noordhoff, The Netherlands, 1980), 1, 13, 17, 19; MC Bassiouni, 'Criminological Policy', in A Evans and J Murphy (eds), *Legal Aspects of International Terrorism* (ASIL, Washington DC, 1979), 523; C Jones, *Global Justice* (OUP, Oxford, 2001), 176-179.

9 J Smith, *Smith and Hogan: Criminal Law* (10th ed, Butterworths, London, 2002), 17; H Hart, *The Concept of Law* (2nd ed, OUP, Oxford, 1997), 229-230.

10 *Tadic (Appeal)*, ICTY-94-1 (15 Jul 1999), 271.

11 A Ashworth, *Principles of Criminal Law* (3rd ed, OUP, Oxford, 1999), 43; H Hart, 'Immorality and Treason', in R Dworkin (ed), *The Philosophy of Law* (OUP, Oxford, 1986), 83, 85.

12 I Tallgren, 'The Sense and Sensibility of International Criminal Law' (2002) 13 EJIL 561, 564; Boister, n2, 969-970.

lieve universalism' undermines the law's authority.[13] Despite cultural differences between States and their communities, over time consensus has emerged on core international crimes, evolving in an ad hoc and piecemeal fashion rather than by a systematic policy of criminalization.[14] International moral agreement is not innate, but varies over time,[15] shaped by community concerns about public safety and social order. As with other crimes, there is nothing *intrinsically* criminal about terrorism, which is situated in its own historical and political context.

2. *International Element*

In the *Hostages* case, the US Military Tribunal laid down the criterion that conduct must be of such a nature that its suppression in domestic law alone would not be sufficient. Sectoral anti-terrorism treaties typically apply only where there is an international element to conduct. For example, the 1997 Terrorist Bombings Convention and the 1999 Terrorist Financing Convention do not apply where an offence is committed in a single State, the alleged offender is in the territory of that State, and no other State has a Convention basis to exercise jurisdiction.[16] There is a similar provision in the Draft Comprehensive Convention, which also stipulates that the victims must not be nationals of the State where the offence is committed.[17]

Although international crimes require an international element,[18] this does not mean that prohibited conduct must always physically or materially transcend national boundaries, although domestic terrorism may threaten regional peace and security 'owing to spill-over effects' such as cross-border violence and refugee outflows.[19] Genocide, war crimes and

13 M McDougal and H Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 AJIL 1, 1.

14 Bassiouni, n5, 45; see also MC Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 Case Western Reserve JIL 27, 32; E Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' (1999) 81 IRRC 531. Although the ILC attempted to codify and progressively develop international crimes in its 1954 and 1996 Draft Codes of Offences against the Peace and Security of Mankind: ILC Reports (1954), UN Doc A/2693 and (1996), UN Doc A/51/10.

15 K Kittichaisaree, *International Criminal Law* (OUP, Oxford, 2001), 3.

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

17 Draft Comprehensive Convention, art 3.

18 Bassiouni, n5, 46-47; Bassiouni, 'A Policy-Oriented Inquiry', n8, XXIV.

19 Report of the Policy Working Group on the UN and Terrorism, UN Doc A/57/273, S/2002/875, 12.

crimes against humanity may be wholly committed in a single jurisdiction. While these crimes often involve State action because of their scale or gravity, such involvement is not essential. Further, conduct need not threaten peace and security to constitute an international crime, where such conduct infringes international values.[20]

Thus if terrorism injures values or interests deserving international protection —such as human rights—[21] then domestic and international varieties should be equally criminalized. This is the approach followed regionally in the EU Framework Decision, which does not differentiate between the criminalization of domestic or international terrorism, as long as motive elements of altering or destroying a State, or intimidating a people, are satisfied. It is not the existence of a *physical* international element which attracts international jurisdiction; but the egregious nature of the interests affected.

3. *The 'International Community'*

In national legal systems, the criminal law underpins, serves and protects the values and interests of the national community.[22] While domestic analogies should be cautiously drawn, international criminal law similarly presupposes an international community,[23] as constructed by its members,[24] and even though it may lack clarity.[25] Those who doubt the coherence of the international community, and thus decry the weakness of international criminal justice,[26] overstate those problems. First, the international community is no less 'coherent' than many modern, pluralist

20 P. Macklem, 'Canada's Obligations at International Criminal Law', in R Daniels, P Macklem and K Roach (eds), *The Security of Freedom* (Univ Toronto Press, Toronto, 2001) 353, 355.

21 UNSubComHR (53rd Sess), Terrorism and Human Rights: Progress Report by Special Rapp K Koufa, 27 Jun 2001, UN Doc E/CN.4/Sub.2/2001/31, 13; D Partan, 'Terrorism: An International Law Offence' (1987) 19 Connecticut L Rev 751, 763. Cf M Flory, 'International Law: An Instrument to Combat Terrorism' in Higgins (ed), 30, 30 (international law is only concerned with cross-border terrorism).

22 R Muellerson, *Ordering Anarchy* (Martinus Nijhoff, The Hague, 2000), 88.

23 P Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 50.

24 B Anderson, *Imagined Communities* (Verso, London, 1983), 15; H Seton-Watson, *Nations and States* (Westview Press, Colorado, 1977), 5.

25 A Paulus, 'The Influence of the United States on the Concept of the "International Community"', in M Byers and G Nolte (eds), *United States Hegemony* (CUP, Cambridge, 2003), 57, 58, 60.

26 S Holmes, 'Why International Justice Limps' (2002) 69 Social Research 1055, 1066.

national communities, where power, authority, identity, and values are contested by diverse sub-national groups.

Second, individuals in national communities can still appreciate and adhere to international values, since national citizenship is not an exclusive marker of personal identity or allegiance.[27] It is possible to assert the primacy of national law while concurrently realizing the value of the Nuremberg principles; indeed, the Rome Statute of the ICC accords such primacy to national courts. Third, when national communities uniformly demand vengeance, international trials become most important to ensure fair prosecutions[28] —particularly against 'terrorists'—.[29]

A more difficult problem lies in identifying the 'international community' which designs, and is served by, international criminal law. Kennedy claims the 'international community' is a 'fantasy' of objective agreement, when it is really the product of a small bureaucratic technical class.[30] Clearly, a positivist account is insufficient —if States 'make' international law and comprise its community, it is unsurprising that States will seek to outlaw anti-State violence (including terrorism)—. There is a danger that the morality or national interests of dominant States may be disguised as a shared international morality of common interests;[31] a hegemonic State may 'arrogate to itself the exclusive power to lay down the definitive interpretation of the universal'.[32]

In considering whether (and how) to criminalize terrorism, the views and interests of a wider range of participants in the international system must be taken into account, so that regulation of terrorism does not descend into a Statist technique of illiberal control. As Lauterpacht writes, 'if there is law to be found in every community, law… must not be wholly identified with the law of States'.[33] The international community

27 Schmitt, quoted in J Habermas, *The Inclusion of the Other* (Polity, Cambridge, 2002), 181; see also J Finnis, 'Natural Law: The Classical Theory', in J Coleman and S Shapiro (eds), *Oxford Handbook of Jurisprudence and Legal Philosophy* (OUP, Oxford, 2002), 1.

28 G Robertson, 'Lynch mob justice or a proper trial', *Guardian*, 5 Oct 2001.

29 J Paust, 'Antiterrorism Military Commissions: Courting Illegality' (2001) 23 Michigan J Intl L 1.

30 D Kennedy, 'The Disciplines of International Law and Policy' (2000) 12 Leiden JIL 9, 83-84.

31 N Krisch, 'Hegemony and the Law on the Use of Force', Paper at ESIL Conference, Florence, 13-15 May 2004, 5; Boister, n2, 973.

32 C Douzinas, 'Postmodern Just Wars', in Strawson J (ed), *Law after Ground Zero* (Glass-House Press, London, 2002), 29, 29.

33 Lauterpacht, n7, 10; see also Allott, n23, 50.

is comprised of a 'whole array of other actors whose actions influence the development of international legal rules'.[34] For Habermas, while 'there is not yet a global public sphere', there are now 'actors who confront states from within the network of an international civil society'.[35]

Diversity in a decentralized community does not preclude the existence of the community; international criminal law does not presuppose a monolithic community, just as national law does not depend on a homogenous society. As Abi-Saab writes, '[r]ather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment'.[36] Terrorism, for instance, is a global danger that has 'united the world into an involuntary community of shared risks'.[37]

4. *Legal Politics and Political Laws*

A question remains whether terrorism is too 'political' for agreement to be reached on definition. It would be a mistake for any law against terrorism to attempt to 'remain neutral in respect to competing values, and claims', as Bassiouni suggests.[38] International criminal justice is not a 'technical-instrumental-oriented enterprise', but is densely implicated in international politics.[39] Just as other international crimes partly rest on an 'intuitive-moralistic' foundation,[40] so too can it not be expected that terrorism is capable of definition by objective calculation or rational deduction.

The absence of any immutable content of 'terrorism' is no reason to refrain from forging a political consensus on definition; less still is it a basis for believing that terrorism is *inherently* indefinable.[41] In the past, liberal and illiberal States have supported the criminalization of other

34 E Kwakwa, 'The International Community, International Law, and the United States', in Byers and Nolte (eds), n25, 25, 27.

35 Habermas, n27, 177.

36 G Abi-Saab, 'Whither the International Community' (1998) 9 EJIL 248, 249; Boister, n2, 972.

37 Habermas, n27, 186.

38 Bassiouni, 'Methodological Options', n2, 485.

39 F Mégret, 'The Politics of International Criminal Justice' (2002) 13 EJIL 1261, 1280.

40 Tallgren, n12, 564.

41 *Cfr*. G Sliwowski, 'Legal Aspects of Terrorism', in D Carlton and C Schaerf (eds), *International Terrorism and World Security* (Croom Helm, London, 1975), 69, 76.

conduct,[42] demonstrating that consensus is possible even where it interferes in sovereign criminal jurisdiction. Further, that terrorism was historically directed against few States, such as the US, UK, France and Israel, is not fatal to the broader appeal of a prohibition. Indeed, 'a system of thought may be true, and hence non-relativistic, even though it has developed within a tradition that is historically and culturally specific'.[43] Certain values may be 'universalizable', if not yet universal.[44]

There must, however, be an awareness that criminalizing politics (or judicializing the public sphere by punishing political enemies)[45] 'strengthens the hand of those who are in a position to determine what acts count as "crimes" and who are able to send in the police'.[46] What is then important are principles of transparency and broad participation in the politics of law-making, to determine 'the common interest of society'[47] and to avoid a 'democratic deficit' in law-making.[48] Only through an inclusive process is definition of terrorism likely to be widely regarded as legitimate, and not 'wielded to fit the interest or the whim of any one member of the community'.[49]

III. International Criminological Policy

1. *Criminological Purposes of Criminalization*

In domestic criminal law, criminalization is often said to advance certain criminological or policy purposes: punishment or retribution; incapacitation; rehabilitation; and general and specific deterrence.[50] Ashworth identifies the three main purposes of criminal law as declaratory, preventive and censuring.[51] International criminal law seeks to se-

42 Mégret, n39, 1268.

43 D Rodin, *War and Self-Defense* (Clarendon, Oxford, 2002), 8.

44 M Reisman, 'Aftershocks: Reflections on the Implications of September 11' (2003) 6 Yale Human Rights and Development LJ 81.

45 T Todorov, 'The Limitations of Justice' (2004) 2 J Intl Crim Justice 711, 714.

46 M Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law'(2004) 2 J Intl Crim Justice 810, 825.

47 Allott, n23, 32.

48 Boister, n2, 957-958.

49 P Jessup, 'Diversity and Uniformity in the Law of Nations' (1964) 58 AJIL 341, 352.

50 See generally T Honderich, *Punishment: The Supposed Justifications* (Polity, Cambridge, 1989).

51 Ashworth, n11, 36.

cure similar objectives, although its criminology is underdeveloped,[52] and its sentencing policy confused.[53] In *Simic (Sentencing)*, the 'main general sentencing factors' in ICTY jurisprudence were found to be 'deterrence and retribution',[54] and the Rome Statute's preamble affirms that punishment and prevention of crimes are key purposes of the ICC.

While imprisonment promotes punishment and deterrence, criminalization also furthers these goals by expressing community repugnance at conduct and invoking 'social censure and shame'.[55] The purposes served by criminalization may, however, vary in different contexts, and pluralistic ideas of justice should not be sacrificed to 'western ethical aggression'.[56] For example, prosecutions in post-conflict societies may contribute to national reconciliation and rehabilitation, while in other contexts restorative or alternative models of justice may be more appropriate.[57]

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

Proscription may still be effective despite the absence of a universal enforcement system. While international criminal law primarily has a re-

52 P Roberts and N McMillan, 'For Criminology in International Criminal Justice' (2003) 1 J Intl Crim Justice 315, 318; Tallgren, n12, 564; D Zolo, 'Peace through Criminal Law?' (2004) 2 J Intl Crim Justice 727, 728.

53 R Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 J of Intl Crim Justice 64, 65; A Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law' (2002) 51 ICLQ 583, 583.

54 *Simic (Sentencing)*, ICTY-95-9/2 (17 Oct 2002), 32-33; see also *Todorovic (Sentencing)*, ICTY-95-9/1 (31 Jul 2001), 28-29; *Krnojelac*, ICTY-97-25-T (12 Mar 2002), 508; *Kunarac*, ICTY-96-23 and ICTY-96-23/1-T (22 Feb 2001), 838; *Kunarac*, ICTY-96-23 and ICTY-96-23/1-A (12 Jun 2002), 142; *Celebici (Appeal)*, ICTY-96-21-A (20 Feb 2001), 806; *Furundzija,* ICTY-95-17/1-T (10 Dec 1998) 288; *Tadic (Sentencing)*, IT-94-1-Tbis-R117 (11 Nov 1999), 9.

55 Australian Law Reform Commission, *Principled Regulation* (Report 95, Sydney, 2002), 65.

56 A Garapon, 'Three Challenges for International Criminal Justice' (2004) 2 J Intl Crim Justice 716, 720.

57 See, eg, S Chesterman, 'No Justice Without Peace? International Criminal Law and the Decision to Prosecute', in S Chesterman (ed), *Civilians in War* (Lynne Rienner, Colorado, 2001), 145.

pressive function,[58] its normative role should not be understated.[59] The mere existence of a criminal prohibition has normative value —signifying condemnation and stigmatization of conduct— irrespective of prosecutions.[60] The identification of a crime, multilateral support for it, and its dissemination are non-prosecutorial modes of giving weight to a prohibition, producing 'general pressure' to conform.[61] As Lemkin wrote of genocide, 'if the law was in place it would have an effect —sooner or later'—.[62] Inevitably, ineffective enforcement undermines the normative weight and deterrent value of a prohibition.[63] Yet even scarce prosecutions may support a prohibition, if they are appropriately targeted and publicized, and conducted by the principled exercise of prosecutorial discretion.

Criminalizing terrorism has a number of criminological implications. Bassiouni argues that incapacitation, through imprisonment, is one of the most credible theories of punishment for terrorists, since it neutralizes the threat of re-offending.[64] Yet incapacitation is already served by prosecuting terrorism as ordinary crime, so this rationale does not specifically justify criminalizing terrorism, unless terrorist offences trigger enhanced penalties and thus prolong incapacitation. International criminal law historically prohibited conduct without agreeing on penalties, 'due to widely differing views' on the gravity of crimes and the harshness of punishment.[65] Yet as Ashworth writes, 'one of the main functions of criminal law is to express the *degree* of wrongdoing, not simply the fact of wrongdoing'.[66] An international treaty could, however, specify special penalties for terrorism, as in the 2002 EU Framework Decision.[67]

Retribution or punishment is the most significant factor supporting the distinct criminalization of terrorism, since conviction socially stigmatizes and condemns the offender and provides some sense of justice for

58 Cassese, n6, 20.
59 *Idem*.
60 Ashworth, n11, 36.
61 Hart, n9, 220.
62 Rosenthal, quoted in S Power, *A Problem from Hell* (Flamingo, London, 2003), 55.
63 G Blewitt, 'The Necessity for Enforcement of International Humanitarian Law' (1995) 89 ASIL Proc 298, 298; R Goldstone, 'International Law and Justice and America's War on Terrorism' (2002) 69 Social Research 1045, 1046.
64 Bassiouni, 'Criminological Policy', n8, 527-528.
65 Cassese, n6, 157.
66 Ashworth, n11, 37.
67 2002 EU Framework Decision, art 5.

victims.[68] In contrast, it is doubtful whether some terrorists are likely to be deterred by either imprisonment or condemnation by legal systems whose legitimacy they reject.[69] The publicity gained by detention may even be beneficial to an ideologically-motivated offender's cause, or have a martyr effect.[70] Suicide bombers are particularly unlikely to be concerned about apprehension and prosecution. It is also for these reasons that rehabilitation is often inapplicable to an offender 'opposed… to the social system into which he is to be resocialized'.[71]

Nevertheless, criminalization is a useful symbolic mechanism for condemning and stigmatizing unacceptable behaviour.[72] It may be too much to expect that the criminal law alone will effectively suppress terrorism, and such expectation may be an exercise of deception, irrationality or quasi-religious hope.[73] Criminalization is only one small part of the overall international response to terrorism.[74] Further, Baudrillard fittingly warns that 'though we can range a great machinery of repression and deterrence against physical insecurity and terrorism, nothing will protect us from this mental insecurity'.[75]

Yet turning even an irrational hope against terrorism is not mere impotence: 'norm setting eventually changes reality, however arduous the process'.[76] Criminalization is valuable if it helps the international community recognize and condemn violence for what it is —even if it is

68 Bassiouni, 'A Policy-Oriented Inquiry', n8, xlii; Bassiouni, 'Criminological Policy', n8, 527-528.

69 A Rubin, 'Terrorism, "Grave Breaches" and the 1977 Geneva Protocols' (1980) 74 ASIL Proc 192, 193; Bassiouni, 'Criminological Policy', n8, 525-527; see also A Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale Univ Press, New Haven, 2002), 15-33; P Wilkinson, *Terrorism and the Liberal State* (Macmillan, London, 1977), 66, 180.

70 MC Bassiouni, 'A Policy-Oriented Inquiry', n8, XLII, XXXIII; see also Rubin, ibid, 193.

71 Bassiouni, ibid, XLI-XLII; see also Rubin, ibid, 193.

72 C Walter, 'Defining Terrorism in National and International Law', in C Walter et al (eds), *Terrorism as a Challenge for National and International Law* (Springer, Heidelberg, 2004), 23, 45.

73 Tallgren, n12.

74 D Freestone, 'Legal Responses to Terrorism: Towards European Cooperation?', in J Lodge (ed), *Terrorism: A Challenge to the State* (Martin Robertson, Oxford, 1981), 195, 200; see UNODC, 'Classification of Counter-Terrorism Measures' (2002), classifying responses in these categories: I. Politics and Governance; II. Economic and Social; III. Psychological-communication-educational; IV. Military; V. Judicial and Legal; VI. Police and Prison System; VII. Intelligence and Secret Service; VIII. Other.

75 J Baudrillard, 'Hypotheses on Terrorism', in J Baudrillard, *The Spirit of Terrorism and Other Essays* (trans C Turner, Verson, London, 2003), 49, 81.

76 D Rieff, 'Fables of Redemption in an Age of Barbarism' (2002) 69 Social Research 1159, 1168.

known that such violence is likely to continue—. While punishment of terrorists may not meet 'basic requirements of deterrence, retribution, incapacitation and resocialization', 'no alternative solutions… have yet been found'[77] —other than defensive, pre-emptive, or centrifugal wars. When asked if a piece of paper would stop Hitler or Stalin, Lemkin exclaimed: 'Only man has law…. You must build the law!'—.[78]

2. *Vengeance and the Problem of Evil*

Criminalization should not, however, serve as an instrument of populist vengeance. The exemplary function of international criminal justice risks degrading or victimising an accused on the altar of popular values, while the law's retributive function may primitively inflict suffering without any broader correctional purpose.[79] Invidious moralization tends to accompany reference to terrorism, casting it as a titanic, Manichean, existential struggle of polarities: humanity and inhumanity; civilization and barbarism; freedom and fear; modernity and pre-modernity; liberal democracy and apocalyptic, eschatological, phantasmagorical nihilism; law and outlaw; friend and enemy; the West and Others; Christianity and Islam; light and dark; good and evil.[80]

Clearly, the term terrorism is imbricated in a dense ideological discourse.[81] Habermas warns that 'moralization brands opponents as enemies, and the resulting criminalization… gives inhumanity a completely free hand'.[82] A State will often seek 'to usurp a universal concept in its struggle against its enemy, in the same way that one can misuse peace,

77 C Van den Wijngaert, *The Political Offence Exception to Extradition* (Kluwer, Boston, 1980), 220.

78 Quoted in Power, n62, 55.

79 Zolo, n52, 731-733.

80 See, eg, US President Bush, Address to UNGA, NY, 23 Sept 2003; Spanish PM Aznar (CTC Chair), quoted in 'Defeating Terror Requires Dedication by All, Spanish Leader Tells Security Council', UN News Service, NY, 6 May 2003; R Holbrooke, 'Just and Unjust Wars: A Diplomat's Perspective' (2002) 69 Social Research 915, 917. For criticism of this discourse, see J Petman, 'The Problem of Evil in International Law', in J Petman and J Klabbers (eds), *Nordic Cosmopolitanism* (Martinus Nijhoff, Leiden, 2003), 111; S Chan, *Out of Evil: International Politics and the New Doctrine of War* (IB Tauris, London, 2004); Krisch, n31, 23-24; P Berman, *Terror and Liberalism* (Norton, London, 2003), 182-183.

81 J Mertus, '"Terrorism" as Ideology: Implications for Intervention' (1999) 93 ASIL Proc 78.

82 Habermas, n27, 189.

justice, progress, and civilization'.[83] Regarding terrorism as a human rights violation encourages just wars against terrorism 'in the name of a globalised humanity',[84] and encourages the instrumentalisation of human rights.[85] For Schmitt, subsuming political relations within moral categories of good and evil turns the enemy into 'an inhuman monster that must not only be repulsed but must be totally annihilated'[86] —positing terrorism as a new enemy of humanity (*hostis humani generis*)—.[87] In the words of the UN legal counsel, terrorism 'threatens all States, every society and each individual'.[88]

Thus in 1986, it was possible for Friedlander to hysterically urge Old Testament justice upon terrorists —public execution to humiliate and degrade them— to '[t]reat them as the monsters that they really are'; to 'metaphorically spit in their bestial faces'; and to 'terrorize the terrorist barbarians'.[89] Others have called for abandoning reactive criminal law responses in favour of offensive military action,[90] or to treat terrorists as pirates or 'outlaws'.[91] In the UK, the Archbishop of Canterbury cited Jesus in calling for terrorists who harm children to have millstones placed around their necks and be cast into the sea.[92] If terrorism is presented as an absolute threat, then counter-terrorism measures must also be unlimited.[93] Labeling opponents as terrorists de-legitimizes, discredits, dehu-

83 C Schmitt, *The Concept of the Political* (trans G Schwab, Chicago, 1996), 54; see also D Fidler, 'The Return of the Standard of Civilisation' (2001) 2 Chinese JIL 137; R Coupland, 'Humanity: What is it and How does it Influence International Law?' (2001) 83 IRRC 969.

84 P Fitzpatrick, 'Enduring Right', in Strawson (ed), n32, 37, 41; see also Douzinas, n32, 25.

85 C Chinkin, 'Terrorism and Human Rights', Paper at ESIL Conference, Florence, 13-15 May 2004.

86 Schmitt, n83, 36.

87 Krisch, n31, 23-24; N Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"?' (2001) 48 Netherlands Intl L Rev 271, 290.

88 H Corell, 'The International Instruments against Terrorism', Paper at Symposium on Combating Intl Terrorism: The Contribution of the UN, Vienna, 3-4 Jun 2002, 2.

89 R Friedlander, 'Punishing Terrorists' (1986) 13 Ohio Northern Univ L Rev 149, 150, 155.

90 C Carr, *The Lessons of Terror* (Little, Brown, London, 2002), 8-9.

91 M Forster, 'Exclusionism and Terror: May Terrorists be Excluded from the Protection of the Human Rights Treaties?', Paper at All Souls-Freshfields Seminar, Univ Oxford, 25 Mar 2004; Y Dinstein, 'Terrorism as an International Crime' (1989) 19 IYBHR 55, 56.

92 N Paton Walsh et al, 'Putin's warning as terror deaths top 360', *Observer*, 5 Sep 2004.

93 Krisch, n31, 24.

manizes and demonizes them,[94] casting them as fanatics who cannot be reasoned with.[95]

Yet it is precisely because terrorism remains undefined that it lends itself to abuse in the service of unbounded moral abstraction, ideological causes, and imperial projects. The moralizing attaching to terrorism is not, however, a reason to avoid the term, so much as a reason to define it. While the term implies judgment and condemnation,[96] by defining terrorism it is possible to finally appreciate precisely what is being judged and condemned. Definition fixes a legal standard against which to test and constrain political claims that opponents are terrorists, limiting ideological and political abuse of the term. Definition can harness and tame a term has powerful symbolic resonance for, and embodies vital social judgments by, the international community of States and peoples.

It is not sufficient to simply object that the term is too potent to ever be legally deployed, since it will continue to be aggressively used in the political and public spheres as long as it remains undefined. As such, definition may help to limit the worst excesses. Definition could provide a constructive interpretation which satisfactorily expresses the community's emotional attachment to the term, but simultaneously protects those accused of terrorism from being reviled as unlimited 'personifications of evil'.[97] By sketching the contours of terrorism as an international public wrong, definition could foil outrageous demands that terrorists, as evil people, must surrender their human dignity.

3. *Trivialization and Misuse of Terrorism Offences*

Criminalization of terrorism should also not punish trivial infringements. Recent prosecutions and convictions for international terrorism offences illustrates this problem. In the US, investigative referrals for these offences increased five-fold from 142 persons in the two years before 11 September 2001, to 748 persons in the two years from 11 Sep-

94 UN Policy Working Group, n19, 14.

95 T Kapitan, 'The Terrorism of "Terrorism"', in J Sterba (ed), *Terrorism and International Justice* (OUP, Oxford, 2003), 47, 52; R Overy, 'Like the Wehrmacht, we've descended into barbarity', *Guardian*, 10 May 2004.

96 C Gearty, *The Future of Terrorism* (Phoenix, London, 1997), 11, 31-44.

97 Douzinas, n32, 27.

tember 2001 to 30 September 2003.[98] Convictions increased seven-fold in the same period, from 24 to 184. Yet of the 184 persons convicted, 171 received minor sentences (80 received no prison sentence, and 91 less than one year in prison). Despite the large increase in convictions, fewer persons received prison sentences of five or more years (three people in 2001-03, versus six in 1999-2001).[99] These sentencing trends suggest that international terrorism offences are capturing minor conduct, even though such offences should address the most serious conduct, attracting the highest penalties.[100]

The exercise of discretion by US federal prosecutors is also revealing. Sixty per cent of (domestic and international) terrorism referrals were declined by prosecutors (1,048 cases), while 30 per cent of additional 'anti-terrorism' referrals were declined (506 cases).[101] Of all referrals declined, nearly 35 per cent were declined for lack of evidence of criminal intent or the existence of an offence, or lack of federal interest. A further 15 per cent were declined for 'weak or insufficient admissible evidence'. While the statistics reflect the difficulties of gathering evidence against terrorism, they also suggest over-zealous law enforcement, based on flimsy evidence, unverified suspicion, and racial profiling. Excessive enforcement is a response to political and public demands for action against terrorists, by-passing evidentiary controls and investigative protocols. Increased enforcement does not necessarily correlate with any increase in terrorist activity.[102]

In the UK, by mid-2004 there were only six convictions under 2000 anti-terrorism legislation, out of 98 persons charged and over 500 arrested.[103] While many cases are pending due to the complexities of terrorism trials, the DPP stated that many arrested for terrorism are eventually prosecuted for minor offences.[104] By December 2003, 100 of about 500 terrorist suspects arrested were charged only with fraud or identity

98 Transactional Records Access Clearinghouse (TRAC), 'Criminal Terrorism Enforcement since the 9/11/01 Attacks', Special Report, 8 Dec 2003.

99 However, the majority of cases referred were still pending after 30 Sep 2003 and more complex criminal matters, potentially leading to higher sentences, take longer to prosecute.

100 Similar patterns were recorded for domestic terrorism offences. As Ashworth, n11, 17, writes: 'criminal law, being society's strongest form of official censure and punishment, should be concerned only with the central values and significant harms'.

101 TRAC, n98.

102 *Idem*.

103 C Dyer, 'Terror cases "too complex", says DPP', *Guardian*, 20 May 2004.

104 *Idem*.

theft, while 50 faced deportation.[105] As the in US, immigration proceedings are a common way of dealing with people detained under terrorism laws, but against whom there is insufficient evidence to prosecute.[106] These trends illustrate the well-known problem of emergency powers being used to capture ordinary crimes,[107] contaminating the legal system.[108]

IV. Terrorism as a Discrete International Crime

Since the early 1960s, much of the physical conduct comprising terrorist acts has been criminalized in international treaties,[109] 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

105 D. McGoldrick, *From '9-11' to the Iraq War 2003* (Hart, Oxford, 2004), 38.

106 S. Murphy, 'International Law, the United States, and the Non-military "War" against Terrorism' (2003) 14 AJIL 347, 357.

107 R Dworkin, 'Terror and the Attack on Civil Liberties', *NY Rev Books*, 6 Nov 2003; C Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism', Study for the Council of Europe, Jan 2002, 5; D Eggen, 'Scoundrels take refuge in Patriot Act', *SMH*, 22 May 2003; Press Association, 'Judge's doubts on prosecution', *Guardian*, 24 Mar 2004; E Allison, 'Police killer battles to win parole', *Guardian*, 29 Jul 2004.

108 C Gearty and J Kimbell, *Terrorism and the Rule of Law* (KCL CLRU, London, 1995), 66-67.

109 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 Sept 1963, entered into force 4 Dec 1969, 704 UNTS 219); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 Dec 1970, entered into force 14 Oct 1971, 860 UNTS 105); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 Sept 1971, entered into force 26 Jan 1973, 974 UNTS 177); 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 Dec 1973, entered into force 20 Feb 1977, 1035 UNTS 167); 1979 International Convention against the Taking of Hostages (adopted 17 Dec 1979, entered into force 3 June 1983, 1316 UNTS 205); 1980 Convention on the Physical Protection of Nuclear Material (adopted 3 Mar 1980, entered into force 8 Feb 1987, 1456 UNTS 101); 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 Mar 1988, entered into force 1 Mar 1992, 1678 UNTS 221); 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 Mar 1988, entered into force 1 Mar 1992, 1678 UNTS 304); 1988 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 Feb 1988, entered into force 6 Aug 1989, 974 UNTS 177); 1991 Convention for the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 Mar 1991, entered into force 21 June 1998, 30 ILM 726); 1997 International Convention for the Suppression of Terrorist Bombings (adopted 15 Dec 1997, entered into force 23 May 2001, in UNGA res 52/164 (1997)); 1999 International Convention for the Suppression of the Financing of Terrorism (adopted 9 Dec 1999, entered into force 10 April 2002, in UNGA res 54/109); 2000 UN Convention against Transnational Organized Crime (adopted 15 Nov 2000, entered into force 29 Sep 2003). A nuclear terrorism convention and a comprehensive anti-terrorism convention are still being negotiated in the UN General Assembly Sixth (Legal) Committee.

those crimes are present. Yet dealing with terrorist acts in this way lacks 'specific focus on terrorist per se', since it fails to differentiate between privately motivated violence and violence committed for political reasons: "Not all hijackings, sabotages, attacks on diplomats, or even hostage-takings are 'terrorist'; such acts may be done for personal or pecuniary reasons or simply out of insanity. The international instruments that address these acts are thus 'overbroad'".[110]

Overreach undermines 'the moral and political force of these instruments as a counter-terrorism measure'.[111] Despite the adoption of the sectoral treaties, the term 'terrorism' continues to exhibit descriptive and analytical force in international legal discussion, suggesting that, for the international community, it captures a concept beyond the mere physical, sectoral acts comprising terrorism. That term 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.[112]

In particular, the international community has expressed is disapproval of 'terrorism', *as such*, on a number of grounds since the early 1970s. These include that terrorism is a particularly 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 concerns about its vagueness, while preserving the symbolic force attached to the term by the international community. Regional anti-terrorism instruments are significant in this regard, since some of them have deliberately defined terrorism as a discrete offence and thus differentiated it from ordinary crime.[113]

110 G Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 Ohio Northern Univ L Rev 97, 115.

111 *Idem*.

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

113 See, eg, 1998 Arab Convention on the Suppression of Terrorism (adopted 22 Apr 1998; entered into force 7 May 1999); 1999 Organization of African Unity Convention on the Prevention and Combating of Terrorism (adopted 14 Jul 1999, entered into force 6 Dec 2003); 1999 Organization of the Islamic Conference Convention on Combating International Terrorism (adopted 1 July 1999, not yet in force, annexed to res 59/26-P); 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (adopted 4 Jun 1999, entered into

1. *Terrorism as a Serious Human Rights Violation*

International criminal law often prohibits conduct which infringes values protected by human rights law, without proclaiming those values directly.[114] Numerous resolutions of General Assembly since the 1970s,[115] and of the Commission on Human Rights since the 1990s,[116] assert that terrorism threatens or destroys basic human rights and freedoms, particularly life,[117] liberty and security, but also civil and political, and economic, social and cultural rights. Regional anti-terrorism instruments,[118] and the preamble to the Draft Comprehensive Convention,[119] support the idea that terrorism gravely violates human rights. A UN Spe-

force 4 Jun 1999); 2002 European Union Framework Decision on Combating Terrorism (2002/475/JHA) (adopted 13 Jun 2002, OJ L164/3, 22 Jun 2002, entered into force 22 Jun 2002). Other regional instruments have, however, treated terrorism as ordinary crime: 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 (adopted 2 Feb 1971, entered into force on 16 Oct 1973, 1438 UNTS 194); 1977 Council of Europe Convention on the Suppression of Terrorism (adopted 27 Jan 1977, entered into force 4 Aug 1978, ETS No 90); 1987 SAARC Regional Convention on Suppression of Terrorism (adopted 4 Nov 1987, entered into force 22 Aug 1998); 2002 Inter-American Convention against Terrorism (adopted 3 Jun 2002, in OAS General Assembly res 1840 (XXXII-O/02).

114 Cassese, n6, 23.

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

116 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; UN Com Status of Women res 36/7 (1992), 2.

117 UNGA resols 3034 (XXVII) (1972), 1; 32/147 (1977), 1; 34/145 (1979), 3; 38/130 (1983), 1; 40/61 (1985), 2-3; 42/159 (1987), pmbl, 2-3; 44/29 (1989), pmbl, 2; 46/51 (1991), pmbl, 2; 49/60 (1994), pmbl; 1996 Decl, pmbl.

118 2002 EU Framework Decision, pmbl (1)-(2); 1998 Arab Convention, pmbl; 1999 OIC Convention, pmbl; 1971 OAS Convention, pmbl; 1999 OAU Convention, pmbl; see also OAS General Assembly, AG/RES 1840 (XXXII-O/02), pmbl; OAS Decl of Lima to Prevent, Combat, and Eliminate Terrorism, 26 Apr 1996, pmbl and 1; Decl of Quito, IX Mtg of the Rio Group, Sep 1995; OAU Ministerial Communiqué on Terrorism, 11 Nov 2001, Central Organ/MEC/MIN/Ex-Ord (V) Com, 3; Council of Europe (Cttee Ministers), Guidelines on Human Rights and the Fight against Terrorism, 11 Jul 2002, pmbl [a]; European Parlia res A5-0050/2000, 16 Mar 2000, 41-42; OIC (Foreign Ministers), Decl on Intl Terrorism, Kuala Lumpur, 1-3 Apr 2002, 7; NAM, XIV Ministerial Conf, Final Doc, Durban, 17-19 Aug 2004, 100; NAM, XIII Conf of Heads of State or Government, Final Doc, Kuala Lumpur, 25 Feb 2003, 107.

119 UNGAOR (57th Sess), Ad Hoc Cttee Report (2002), Supp 37 (A/57/37), annex I: bureau paper.

cial Rapporteur observes that 'there is probably not a single human right exempt from the impact of terrorism'.[120]

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.

Although some resolutions have condemned terrorism for violating the right to live free from fear,[121] there is no explicit human right to 'freedom from fear, which a crime of terror might seek to protect. Such protection may, however, be implied from other provisions. First, the 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,[122] and the new African Court on Human and People's Rights 'will address the need to build a just, united and peaceful Continent free from fear, want and ignorance'.[123]

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.[124] In 1944, the British jurist Brierly also spoke of the prospects for 'freedom from fear' in a reasonably secure international or-

120 Koufa (2001), n21, 28.

121 UNGA resols 50/186 (1995), pmbl; 52/133 (1997), pmbl, 2; 54/164 (2000), 2; UNComHR resols 1996/47, pmbl; 1997/42, pmbl; 1998/37, pmbl, 2; 1999/27, pmbl, 2; 2000/30, pmbl, 2; 2001/37, pmbl, 2; 2002/35, pmbl, 1-2; 2003/37, pmbl, 2; UNSubComHR resols 1996/26, pmbl; 2001/18, pmbl; 2002/24, pmbl.

122 UNDP, *Human Development Report 1994* (OUP, NY, 1994), 23.

123 2003 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 30 Dec 2003.

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

der.[125] Its inclusion in the UDHR reflects an internationalization of American aspirations, partly at the urging of Eleanor Roosevelt. These treaty provisions support the criminalization of serious violations of the nascent right to live free from fear, which is captured fairly precisely by prohibiting terrorism.

Second, implementing the right to liberty and security of person (ICCPR, art 9(1) and 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.[126]

Yet an ordinary textual interpretation would give the term 'security' a meaning distinct from 'liberty'.[127] The UDHR drafting records are instructive. Some States were concerned about the vagueness and lack of definition of the right to 'security' of person in article 3.[128] While a request for a definitive interpretation of 'security' was rejected,[129] the US explained that 'security' was chosen as the most comprehensive and concise term to express 'physical integrity',[130] and that was the prevailing interpretation.[131] Some States added, without opposition, that security also referred to 'moral integrity'.[132]

125 J Brierly, *The Outlook for International Law* (Clarendon, Oxford, 1944), 75.

126 UNHRC (16th Sess), General Comment No 8: ICCPR, Article 9, 30 Jun 1982; *Bonzano v France*, 18 Dec 1986, Ser A, (1987) 9 EHRR 297. In Europe, security has been referred to in disappearance of prisoner cases such as *Timurtas v Turkey* (App 23531/94), 13 Jun 2000, (2001) 33 EHRR 121.

127 C Ovey and R White, *European Convention on Human Rights* (3rd ed, OUP, Oxford, 2002), 103.

128 UNGAOR (3rd Sess), 3rd Cttee Summary Records of Mtgs, 21 Sep 8 Dec 1948, 143 (Panama), 189 (Guatemala), 190 (Cuba, Uruguay), 192 (Cuba).

129 *Ibidem* 190 (Philippines).

130 *Ibidem* (US).

131 *Ibidem* (US, France), 157 (Netherlands), 189 (Haiti), 191 (China), 192 (Guatemala), 194 (Philippines).

132 *Ibidem*, 189 (Haiti), 192 (Chile), 193 (Venezuela). Yugoslavia gave as an example of a violation of security of person the lynching of black Americans in the US: *infra*, 158 (Yugoslavia).

Other States objected that 'security' did not fully encompass the idea of physical integrity,[133] preferring a reference to 'integrity' instead of security,[134] but a proposal to insert 'physical integrity' into the draft provision was narrowly rejected.[135] Ultimately, the reference to liberty and security in article 3 was adopted by 47 votes to 0, with 4 abstentions.[136] Some States voted for article 3 on the express understanding that 'security' referred to physical integrity,[137] or physical, moral and legal integrity.[138] Costa Rica had earlier argued that 'security' implied a conferring of legal status on US President Roosevelt's ideal of 'freedom from fear', and Haiti abstained from voting because its suggestion for an express reference to 'freedom from fear' was rejected.[139]

If the right to security means a right to physical, and possibly moral, integrity, it is arguable that terrorism attacks the right to security of person in both its physical and psychological dimensions. So much is recognized by the OIC Convention, which states that terrorism is a 'gross violation of human rights, in particular the right to… security'.[140] In one writer's view, human rights discourse 'recognises the danger that subversive violence poses to liberal democratic society, but recasts this as a threat to human security rather than a menace to a particular territory or sovereign space'.[141] The right to security is, however, more limited in meaning than the expansive concept of 'human security' which gained some currency in the 1990s.[142]

Few human rights violations are characterized as international crimes, and usually the remedy for a rights violation is enforcement of the right rather than criminal punishment of the violator.[143] While human rights law and international criminal law may overlap, 'states do not yet

133 *Ibidem*, 164 (Cuba), 193 (Ecuador).
134 *Ibidem*, 145 (Cuba), 174 (Belgium).
135 *Ibidem*, 188 (19 votes to 17, with 12 abstentions).
136 *Ibidem*, 191. The reference to the right to life was separately adopted by 49 to 0, with 2 abstentions. art 3 as a whole was adopted by 36 to 0, with 12 abstentions: 193.
137 *Ibidem*, 193 (Guatemala), 194 (Philippines).
138 *Ibidem*, 192 (Chile), 193 (Venezuela).
139 *Ibidem*, 175 (Costa Rica), 172, 193-194 (Haiti).
140 1999 OIC Convention, pmbl [emphasis added].
141 C Gearty, 'Terrorism and Human Rights', Paper at ESIL Conference, Florence, 13-15 May 2004, 2.
142 D Newman, 'A Human Security Council? Applying a "Human Security" Agenda to Security Council Reform' (2000) 31 Ottawa L Rev 213, 222.
143 S Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed, OUP, Oxford, 2001), 13.

regard many violations of international humanitarian and human rights law, including some truly cruel and heinous conduct, as criminal in nature'.[144] As the Inter-American Court of Human Rights found in the Velasquez Rodriguez case, human rights law is not punitive, but remedial.[145] Human rights treaties do not require prosecution of violators as a necessary remedy,[146] although 'the obligation to ensure rights is held to encompass such a duty, at least with respect to the most serious violations'.[147] In addition, the law of State responsibility has long demanded the apprehension, prosecution and punishment of those who injure foreign nationals.[148]

There is no doubt that human rights are, however, 'one source of principles for criminalization',[149] 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.[150] 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'.[151]

Some writers have questioned whether terrorism can violate human rights as a matter of law, where terrorist acts are not attributable to a State.[152] The basis of this argument is that under human rights treaties, only State parties, rather than non-State actors or individuals,[153] legally undertake 'to respect and to ensure' human rights. This position was taken by the EU, the Nordic States and Canada, in supporting the adop-

144 *Ibidem*, 12-13.

145 *Velasquez Rodriguez* case, IACHR, Ser C, No 4, (1988) 9 Human Rights LJ 212, 134.

146 Ratner and Abrams, n143, 152; D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford, 2000), 323.

147 Shelton, *op. cit*., 323.

148 See, eg, *Janes Case (US v Mexico)* (1925) 4 RIAA 82; M Whiteman, *Damages in International Law* (USGPO, Washington DC, 1937), 639.

149 Ashworth, n11, 41.

150 1966 ICCPR, art 7; 1984 Torture Convention, arts 4-5.

151 Ashworth, n11, 41.

152 T Meron, 'When Do Acts of Terrorism Violate Human Rights?' (1989) 19 IYBHR 271, 275.

153 H Steiner, 'International Protection of Human Rights', in M Evans (ed), *International Law* (OUP, Oxford 2003), 757, 776; S von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War on Terror' (2003) 14 EJIL 265, 265; D Pokempner, 'Terrorism and Human Rights: The Legal Framework', in M Schmitt and G Beruto (eds), *Terrorism and International Law* (IIHL and George C Marshall European Center, 2003) 19, 22-23; P Hostettler, 'Human Rights and the 'War' against International Terrorism' in Schmitt and Beruto (eds), *infra*, 30, 32.

tion of the 1994 Declaration on terrorism, who argued that terrorism is a crime but not a rights violation, since only acts attributable to a State can violate human rights (The EU has since reversed its position in the 2002 EU Framework Decision).[154]

Clearly, terrorist acts that are attributable to States under the law of State responsibility will violate States' human rights obligations.[155] 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.[156] 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'.[157] 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.[158] These duties are related to the duty to ensure effective remedies for rights violations.[159]

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.[160] For this reason, in relation to human rights '[m]uch of the significance of the State/non-State (public-private) distinction with

154 UNGAOR 49th Sess, 6th Cttee Report on Measures to Eliminate Intl Terrorism, 9 Dec 1994, UN Doc A/49/743, 19-20 (Germany for the EU and Austria; Sweden for the Nordic States; Canada); see also Sec-Gen Report, Human Rights and Terrorism, 26 Oct 1995, UN Doc A/50/685, 5 (Sweden).

155 Meron, n152, 274.

156 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.

157 *Idem*.

158 *Idem*; *Velasquez-Rodriguez*, n145, 172-173; T Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L Henkin (ed), *The International Bill of Rights* (Columbia Univ Press, NY, 1981), 72, 77-78; A Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1996), 105-106, 119; L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 IYBHR 233, 240-241; D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1990) 13 Fordham Intl LJ 1; G Sperduti, 'Responsibility of States for Activities of Private Law Persons', in R Bernhardt (ed), *Encyclopedia of PIL*, Installment 10 (1987), 373, 375; Shelton, n146, 47; 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; Koufa (2001), n21, 29; Schorlemer, n153, 270.

159 1966 ICCPR, art 2(3).

160 Steiner, n153, 776.

respect to the reach of international law… collapses'.[161] 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.[162] 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… to promote respect for these rights and freedoms… to secure their universal recognition and observance", reiterated in UN resolutions.[163] 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.[164] 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.[165]

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".[166]

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.[167] While the provision is not framed as a positive obligation on individuals or groups to observe human rights, by necessary implication it requires as

161 *Idem*.
162 *Velasquez-Rodriguez*, n145, 172-173.
163 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.
164 Clapham, n158, 97-98.
165 1966 ICCPR and 1966 ICESCR, pmbls; see also 1948 UDHR, pmbl.
166 See also 1948 UDHR, art 30.
167 6th Cttee Report, n154, 21.

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.[168] As Clapham observes, individuals are subject to duties in other areas of international law, including IHL and international criminal law.[169]

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.[170] Exceptionally, in Central and South America, the Inter-American Commission on Human Rights condemned 'acts of political terrorism and urban or rural guerilla terrorism', by irregular armed groups in the 1960s-70s, for causing 'serious violations of the rights to life, personal security and physical freedom, freedom of thought, opinion and expression, and the rights to protection'.[171]

Yet following controversy in the OAS in the 1980s on the definition of terrorism and its relationship to human rights, the Inter-American Commission retreated from its earlier position. In 1991, it emphasized that it was the function of the State to prevent and punish private violence, not the role of international rights bodies. There were concerns that directly addressing private violence would confer recognition on armed groups; deprive human rights of its specificity and nexus to international protection; stretch resources; irritate governments; put workers at risk; and relieve States of responsibility.[172] There is also the practical difficulty of non-State groups assuming obligations (to 'ensure' or 'protect' rights) that they lack the minimum organizational capacity to fulfil.[173] Most of these criticisms relate to institutional, supervisory and remedial questions, rather than to the principle of whether private actors do, or do not, violate rights.[174]

168 UNSubComHR, Terrorism and Human Rights: Preliminary Report by Special Rapp K Koufa (1999), UN Doc E/CN.4/Sub.2/1999/27, 22-23.

169 Clapham, n158, 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.

170 Schorlemer, n153, 270.

171 IACommHR res of 23 Apr 1970.

172 Clapham, n158, 122-24; IAComHR, *Annual Report 1990-91*, 504-514.

173 See generally L Zegveld, *The Accountability of Armed Opposition Groups* (CUP, Cambridge, 2002).

174 *Cfr*. Clapham, n158, 93-94: 'International law recognizes that individuals or private bodies are capable of committing violations of human rights'.

Nevertheless, the weight of international practice suggests that it remains difficult to *legally* characterize terrorist acts by non-State actors as violations of human rights, in situations where a State has not failed to diligently fulfil its duties of prevention and protection. In such cases, the rights of victims will only be violated in a descriptive,[175] 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',[176] even descriptive violations of rights are a sufficient ground on which to criminalize terrorism by non-State actors.

2. *Terrorism as a Threat to Democratic Governance or Politics*

In the 1990s, the General Assembly and the UN Commission on Human Rights frequently described terrorism as aimed at the destruction of democracy,[177] or the destabilizing of 'legitimately constituted Governments' and 'pluralistic civil society'.[178] Some resolutions state that terrorism 'poses a severe challenge to democracy, civil society and the rule of law'.[179] The 2002 EU Framework Decision, the 2002 Inter-American Convention, and the Draft Comprehensive Convention are similarly based on the premise that terrorism jeopardizes democracy.[180] Most regional treaties are, however, silent on the effects of terrorism on democracy —including those of the OAU, OAS, OIC, SAARC, CIS and Coun-

175 Steiner, n153, 776.

176 Clapham, n158, 124.

177 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, pmbl; 2002/24, pmbl; 1993 Vienna Decl and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, 17.

178 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.

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

180 2002 EU Framework Decision, recitals 1-2; Draft Comprehensive Convention, pmbl; 2002 Inter-American Convention.

cil of Europe— suggesting that they do not regard terrorism as an offence specifically against democracy.[181]

The idea of terrorism as a threat to 'democracy' or 'legitimately constituted governments' seems to set terrorist acts apart from other conduct that seriously violates human rights. One plausible basis for criminalizing terrorism is that it directly undermines democratic values and institutions, especially the human rights underlying democracy such as political participation and voting, freedom of speech, opinion, expression and association.[182] 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.[183] 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.[184]

As Arendt argues, humans are political beings endowed with speech, but 'speech is helpless when confronted with violence'.[185] For Ignatieff, terrorism 'kills politics, the one process we have devised that masters violence in the name of justice'.[186] Boutros Boutros-Ghali stated that terrorism reveals the unwillingness of terrorists 'to subject their views to the test of a fair political process'.[187] Thus terrorism replaces politics with violence, and dialogue with terror. On this view, terrorism should be specially criminalized because it strikes at the constitutional framework of deliberative public institutions which make the existence of all other human rights possible. Doing so would also concretize and protect the 'emerging right to democratic governance' which is progressively coalescing around the provisions of human rights treaties:[188] 'since 1989

181 Although the Council of Europe stated that terrorism 'threatens democracy': Guidelines, n118, pmbl [a].

182 1948 UDHR, art 29(2); 1966 ICESCR, arts 4, 8(1)(a); 1966 ICCPR, arts 14(1), 21, 22(2); see UN Comm Status of Women res 36/7 (1992), pmbl; Koufa (1999), n168, 26-31.

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

184 Koufa (1999), n168, 32.

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

186 M Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69 Social Research 1137, 1157.

187 Quoted in Koufa (1999), n168, 31.

188 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 JIL 539; G Fox and B Roth (eds), *Democratic Governance in International Law* (CUP, Cambridge, 2000).

the international system has begun to take the notion of democratic rights seriously'.[189]

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',[190] not to mention much denied.[191] The existing right of self-determination permits peoples to choose their form of government, but it does not specify that government must be democratic and a people is free to choose authoritarian rule. International rights of participation in public affairs and voting fall far short of establishing a right to a comprehensive democratic system, unless a particularly 'thin', procedural or formal conception of democracy is accepted.[192] 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 as a precondition of European Community membership.[193] 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.[194]

189 J Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P Alston (ed), *Peoples' Rights* (OUP, Oxford, 2001), 7, 25.

190 S Chesterman, *Just War or Just Peace?* (OUP, Oxford, 2002), 89.

191 In 2003, Freedom House regarded only 88 States as democratic, 55 States as part-democratic, and 49 States as 'not free': *www.freedomhouse.org*.

192 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), chs 3-5.

193 EC, Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 Dec 1991, in (1991) BYBIL 559.

194 See B Roth, 'Evaluating Democratic Progress: A Normative Theoretical Perspective' (1995) 9 Ethics and Intl Affairs 55; Marks, n192.

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], possibly 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 scope of terrorism—.

However, relevant UN resolutions discount this possibility. Over time, States have 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.[195] Thus even just causes, pursued against violent or tyrannical regimes, may not employ terrorist means. As the UN Commission on Human Rights has resolved, 'terrorism… can never be justified as a means to promote and protect human rights'.[196] Most regional instruments support the idea of terrorism as a crime against the State and its security and stability, sovereignty and integrity, institutions and structures, economy and development, rather than as a crime specially against democracy.[197] Even in a community of democracies such as the EU, the distinguishing feature of terrorist offences is the underlying motive to seriously alter or destroy the political, economic or social structures of a State, including its fundamental principles and pillars.[198]

Consequently, based on world opinion expressed through UN and regional organs, it is difficult to argue that terrorism should be criminalized

195 UNGA resols 49/60 (1994), annexed Decl on Measures to Eliminate Intl Terrorism, 3; 50/53 (1995), 2; 51/210 (1996), 2; 52/165 (1997), 2; 53/108 (1999), 2; 54/110 (2000), 2; 55/158 (2001), 2; 56/88 (2002), 2; 57/27 (2003), 2; 58/81 (2004), 2; UNSC res 1566 (2004), 3; 1997 Terrorist Bombings Convention, art 5; 1999 Terrorist Financing Convention, art 6.

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

197 1999 OAU Convention, pmbl; 1998 Arab Convention, pmbl; 1999 OIC Convention, pmbl; SAARC Convention, pmbl; OIC resols 6/31-LEG (2004), pmbl; 6/10-LEG(IS) (2003), pmbl; OAS General Assembly, AG/RES 1840 (XXXII-O/02), pmbl; NAM Final Doc (2004), n118, 100; NAM Final Doc (2003), n118, 107-109; NAM, XIII Ministerial Conf, Final Doc, Cartagena, 8-9 Apr 2000, 88-89.

198 EU Com, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 Sep 2001, COM(2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 6-7.

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 idea of terrorism as a threat to democracy, reflecting the diversity of political systems in the international community.

3. *Terrorism as a Threat to International Peace and Security*

A compelling rationale for criminalizing terrorism is the threat it presents to international peace and security. Resolutions of the General Assembly since the 1970s,[199] and of the Commission on Human Rights since the 1990s,[200] have stated that international terrorism may threaten international peace and security, friendly relations among States, international cooperation, State security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention and the Draft Comprehensive Convention take a similar position, while numerous regional instruments also highlight the threat to peace and security presented by terrorism,[201] particularly given access to modern technology, weapons, transport, communications, and links to organized crime.[202]

The General Assembly has also recalled 'the role of the Security Council in combating international terrorism whenever it poses a threat to international peace and security'.[203] From the early 1990s, the Security

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

200 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 Decl and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, 17.

201 2002 Inter-American Convention, pmbl; 1971 OAS Convention, pmbl; SAARC Convention, pmbl; Special Summit of the Americas, Decl of Nuevo León, Mexico, 13 Jan 2004; NAM Final Doc (2004), n118, 100; NAM Final Doc (2003), n118, 107, 110; ASEAN, Decl on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, pmbl; OSCE, Bucharest Plan of Action for Combating Terrorism, 4 Dec 2001, MC(9).DEC/1, annex, 1; Decision on Combating Terrorism (MC(9).DEC/1).

202 EU Com, n198, 3, 8.

203 UNGA res 50/53 (1995), 7.

Council increasingly acknowledged in general or specific terms that acts of international terrorism may, or do, constitute threats to international peace and security.[204] After the terrorist attacks of 11 September 2001, the Council's language shifted to regarding 'any' act of terrorism as a threat to peace and security[205] —regardless of its severity or international effects—.

At first glance it seems obvious that, by definition, 'international' terrorism must have some negative impact on international relations. Few doubt that the 11 September attacks attacked the 'structures and values of a system of world public order, along with the international law that sustains it'.[206] Yet such consequences cannot be assumed for all terrorist acts. Before 11 September, the Council reserved the right to assess whether particular acts of international terrorism, in the circumstances, were serious enough to threaten peace and security. That measured and calibrated approach has been abandoned in the Council's rush to condemn any act, irrespective of its gravity, as a threat.

For example, a low level international terrorist incident —such as the attempted assassination of a public official by a foreign perpetrator, without the complicity of a foreign State— may not appreciably threaten peace or security, its remaining localized and contained. In the absence of advance definition of terrorism before late 2004, the Council's expansive approach condemned acts of prospectively unknown —and unknowable— scope. Even with definition in 2004, it is not clear that sectoral offences committed to provoke terror, intimidate a population, or compel a government or organization, will always be of sufficient gravity to affect international peace or security.

Whereas previously the Council only referred to acts of *international* terrorism as threats to peace and security, since 2003 the Council has condemned 'any act', 'all acts', and 'all forms' of terrorism,[207] without qualifying such acts as *international*. The Council has involved itself in domestic terrorism, such as the Madrid bombing (wrongly attributed to

204 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.

205 UNSC res 1368 (2001), 1.

206 M Reisman, 'In Defense of World Public Order' (2001) 95 AJIL 833, 833.

207 Respectively: UNSC resols 1516 (2003), 1, 1530 (2004), 1; 1515 (2003), pmbl; and 1516 (2003), 4, 1526 (2004), pmbl, and 1530 (2004), 4.

the domestic group ETA), and Chechen terrorism in Russia.[208] By expanding its sphere of concern to embrace domestic as well as international terrorism, the Council has further pursued the liberal reading of its mandate developed in the 1990s.[209]

Yet the Council's interpretation of its mandate is may be unduly elastic. While domestic terrorism *may* threaten peace and security, it claims too much to assert that *any* act of domestic terrorism does so, just as not all acts of *international* terrorism threaten peace or security. Although all terrorism (domestic or international) is of international *concern* —if it is universally accepted that they are morally repugnant— that is not equivalent to regarding all terrorism as a threat to *peace and security* under the Charter.

To the extent that terrorist acts do threaten peace and security, criminalization is one appropriate means of suppressing it, supplementing the range of other measures available to States and the Security Council. Even where terrorism is directed against an authoritarian State, criminalization may be justified if it helps to avert more serious harm to international peace or security, such as the escalation of regional violence.

V. FURTHER CONSIDERATIONS

1. *Duplication of Coverage by Existing Laws*

A potent pragmatic objection to criminalizing certain conduct as terrorism is the view that domestic laws —and international crimes— already prohibit the same conduct, albeit under different nomenclature, and that the emphasis should be placed on enforcing the existing law rather than developing new norms.[210] Proponents of criminalizing genocide in the 1940s were faced with the same objection: Australia argued that domestic crimes like murder already adequately punished the physi-

208 Respectively: UNSC resols 1530 (2004), 1 (though ETA has transboundary links) and 1440 (2002), 1.

209 See, eg, Chesterman, n190, 121-162, examining Security Council practice in relation to internal conflicts, humanitarian crises, and disruptions of democracy; R Gordon, 'United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond' (1994) 15 Michigan JIL 519; M Berdal, 'The Security Council, Peacekeeping and Internal Conflict after the Cold War' (1997) 7 Duke J Comp and Intl L 71.

210 Bassiouni, n8, XVIII.

cal elements of genocidal conduct.[211] Critics also argued that human rights law —particularly the right to life and freedom from torture— would achieve the same result of preventing genocide.[212]

There is plainly value in preventing the unnecessary proliferation of offences which duplicate existing prohibitions.[213] Individuals must be able to prospectively know, with a modicum of certainty, the scope of their legal obligations, particularly criminal liability. Already, international criminal law imposes a complex array of liabilities, with the deceptively simple categories of war crimes and crimes against humanity comprising numerous distinct (and sometimes overlapping) offences.[214] While no criminal code can be static in the face of changing circumstances, international criminal law embodies only the most serious crimes, which should not vary too greatly over time.

While the law must keep pace with public expectations and social change, gratifying public passion or vengeance are not good reasons for criminalization. As in domestic law, '[c]reating a new criminal offence may often be regarded as an instantly satisfying political response to public worries about a form of conduct that has been given publicity by the newspapers and television'.[215] This critique is pertinent to terrorism, which inflames public sentiment like few other issues. For example, anti-terrorism law in Northern Ireland in the early 1990s was exploited for symbolic significance to placate the electorate,[216] rather than being adopted to meet legitimate law enforcement needs.

While most physical manifestations of terrorism are covered by existing domestic and international crimes —particularly crimes against humanity—[217] there is still a persuasive case for internationlly criminalizing

211 See B Saul, 'The International Crime of Genocide in Australian Law' (2000) 22 Sydney L Rev 527.

212 Power, n62, 75.

213 Bassiouni, 'A Policy-Oriented Inquiry', n8, XXVII.

214 The 1998 Rome Statute lists 34 separate war crimes in international armed conflict and 16 in non-international armed conflict (art 8(2)); and 11 crimes against humanity (art 7).

215 Ashworth, n11, 24.

216 B Dickson, 'Northern Ireland's Emergency Legislation' [1992] PL 592, 597.

217 Certain terrorist acts may qualify as crimes against humanity: J Fry, 'Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction' (2003) 7 UCLA J Intl L and Foreign Affairs 169; A Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 994-995; Schrijver, n87, 287-289; H Duffy, 'Responding to Sep 11: The Framework of International Law', Interrights, Oct 2001, part IV; M Byers, 'Terrorism, the Use of Force and International Law after September 11' (2002) 51 ICLQ 401, 413; Corell,

terrorism. Beyond the physical violence of terrorism lies its unique and distinguishing characteristics —such as the specific intent to terrorize, intimidate or coerce; or the existence of a political motive—. These elements, which are additional to the physical violence of terrorism, are not adequately reflected in existing criminal prohibitions —just as the genocidal destruction of a group is not adequately embodied in other crimes such as murder or even extermination—.

An intermediate mode of criminalization is to categorize terrorism as a crime against humanity, as proposed at the 1998 Rome Conference, and by Russia in 2001.[218] This would avoid creating an entirely new category of international crime and integrate terrorism into the existing hierarchy (and jurisprudence) of crimes, rather than setting it apart as a crime *sui generis*. It would also set up the crime against humanity of terrorism as a counterpart to the war crime of terrorism in armed conflict.[219] One drawback is that crimes against humanity only encompass widespread or systematic conduct. Although this ensures that only very serious conduct is internationally criminalized, it would drastically reduce the scope of terrorism by excluding conduct below that threshold. Another disadvantage is identified by Mégret, who argues that: "No two equally meaningful qualifications can ever be given to the same act so that, confronted with a choice, one should always opt for the most specific description available, in accordance with the principles of sound conceptual economy".[220]

In contrast, subsuming the narrower category of terrorism under the overall label of crimes against humanity risks diluting the *lex specialis* into the l*ex generalis*.[221] In this light, it is preferable to establish terror-

n88, 17; D Brown, 'Holding Armed Rebel Groups and Terrorist Organisations Accountable', Åbo Akademi Institute for Human Rights, 2002, 40-42. In *Menten* (1981) ILR 75, 331, 362-363, the Netherlands Sup Crt held that crimes against humanity require conduct to form part of a system of terror, or of a policy consciously pursued against a group.

218 Pravda, 'Russia Proposes that Terrorism be Classified as Crime against Humanity', 6 Nov 2001; *cfr*. P Van Krieken (ed), *Terrorism and the International Legal Order* (Asser Press, The Hague, 2002), 107.

219 Some argue that terrorism should be criminalized as a peace-time equivalent of a war crime: ILA Report (60th Conf), Cttee on Intl Terrorism: 4th Interim Report (1982), 349-356; *cfr*. Scharf M, 'Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence between International Humanitarian Law and International Criminal Law?' (2001) 7 ILSA J Intl and Comp Law 391.

220 F Mégret, 'Justice in Times of Violence' (2003) 14 EJIL 327, 345.

221 *Idem*.

ism as a separate category of international (or transnational) crime, not coupled to the restrictive conditions of war crimes (requiring an armed conflict) or crimes against humanity (requiring widespread or systematic acts). Discrete categorization would also preserve the distinct moral condemnation attached to terrorism by the international community.

2. *Multiplicity of Charges and Convictions*

A further concern about the proliferation of offences is the problem of prosecuting and convicting individuals for multiple overlapping offences, based on the same conduct.[222] This problem is not unique to terrorism and international tribunals have developed recent jurisprudence on the issue.[223] The ICTY found that cumulative convictions for different offences may punish the same criminal conduct where 'each statutory provision involved has a materially distinct element not contained in the other'.[224] If each offence does not require 'proof of a fact not contained in the other', then 'a conviction should be entered only under the more specific provision… with the additional element'.[225]

Thus in *Galic*, the ICTY refused to permit convictions for the crimes of terror and attack on civilians based on the same conduct, and instead entered a conviction only for the more specific crime of terror (with the additional element of the 'primary purpose of spreading terror').[226] In contrast, cumulative convictions for the crimes of terror and murder and inhumane acts were permitted, since they were not based on the same acts.[227] Pre-trial, the ICTY allows cumulative or alternative charges to be filed for the same conduct, since before the evidence is presented at trial,

222 Cassese, n6, 212-218.

223 See generally A Bogdan, 'Cumulative Charges, Convictions and Sentencing in the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda' (2002) Melbourne JIL 1.

224 *Celebici (Appeal)*, ICTY-96-21-A (20 Feb 2001), 412; *Galic*, ICTY-98-29-T (5 Dec 2003), 158.

225 *Celibici (Appeal)*, *op. cit*., 412-413; *Kupreškiæ*, ICTY-95-16 (14 Jan 2000), 683-684; *Galic*, *op. cit.*, 158.

226 *Galic*, *op. cit*., 162.

227 *Ibidem*, 163-164. The ICTY has also found that genocide does not subsume persecution and extermination, and permitted cumulative convictions: see *Krstic (Appeal)*, ICTY-98-33-T (19 Apr 2004).

it may be difficult for prosecutors to know precisely which offences will be supported by the evidence.[228]

3. *Discretion and Law: Never Negotiate with Terrorists?*

Sometimes prosecution of terrorists may interfere with other international interests. Despite the maxim of some States to 'never negotiate with terrorists', *realpolitik* sometimes forces States to adopt a less stringent path. Negotiating with terrorists may be necessary to peacefully or humanely end terrorist incidents, or to resolve longstanding terrorist campaigns. At the former level, in the Achille Lauro hijacking in 1986, Egypt and Italy attempted to negotiate an end to the crisis (and save the lives of hostages), while the US used military force and declared itself 'completely averse to… any form of negotiation'.[229] Conversely, in 1986 US President Reagan secretly agreed to sell arms to Iran in return for promises to seek the release of US hostages.[230] It is a perennial humanitarian dilemma of governments whether to pay ransom to save hostages.[231]

At the latter level, three iconic figures —Yasser Arafat (PLO), Jerry Adams (IRA), and Nelson Mandela (ANC)— were at some point responsible for terrorism by their organizations. While their degree of responsibility differs, it is startling how persons once regarded (even imprisoned) as terrorists were later embraced as legitimate representatives of political movements, entitled to a share of State power, or even to Nobel Prizes

228 *Delalic (Appeal)*, ICTY-96-21-A (20 Feb 2001), 400 (cumulative charging); *Kupreškiæ*, n225, 727 (alternative charging).

229 Quoted in A Cassese, *Terrorism, Politics, and Law* (Polity, Cambridge, 1989), 127; see also G Gooding, 'Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers' (1987) 12 Yale JIL 158. Paradoxically, Abu Abbas, organizer of the Achille Lauro action, was apprehended in Iraq in 2003 and died in US custody in 2004, even though the US had earlier revoked his international arrest warrant, and Israel had granted him immunity from prosecution in 1999: R Tait, 'Hijacking mastermind dies in Iraq', *Guardian*, 10 Mar 2004; AP, 'Achille Lauro terrorist caught in Baghdad: US', *SMH*, 16 Apr 2003; J Risen and D Johnston, '85 Hijacker is captured in Baghdad', *NY Times*, 16 Apr 2003.

230 E McWhinney, *Aerial Piracy and International Terrorism* (Martinus Nijhoff, Dordrecht, 1987), 171.

231 See G Sacerdoti, 'States' Agreements with Terrorists in order to Save Hostages: Non-Binding, Void or Justified by Necessity?', in N Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff, Dordrecht, 1990), 25; J Hooper, 'Italians ready to pay ransom for release of hostages held in Iraq', *Guardian*, 21 Apr 2004; M Baker and C Banham, 'Arroyo pulls out troops to save a life', *SMH*, 15 Jul 2004; J Miller, 'US Plans to Act More Rigorously in Hostage Cases', *NY Times*, 18 Feb 2002.

(Arafat in 1994, Mandela in 1993). All were absolved of criminal responsibility for terrorism, as a precondition of involvement in political settlements —in contrast to the leader of the Tamil Tigers, Velupillai Prabhakaran, who was sentenced to 200 years in prison, *in absentia*, while simultaneously negotiating peace with the Sri Lankan government—.[232]

These are not arguments against criminalizing terrorism, but acknowledge that in some circumstances, a discretion not to prosecute (or extradite) may need to be exercised,[233] or amnesties or immunities conferred, to preserve fragile peace agreements or ensure the survival of transitional governments.[234] The cost of these approaches is that criminal justice —including punishment, retribution, deterrence, and satisfaction for victims— is traded for other public goods. Yet political decisions of this kind are not entirely outside the realm of law, which is infused with discretionary concepts such as amnesty, pardon and immunity, to help ensure its flexibility and legitimacy. There is no dichotomy between discretion and law: 'A discretion can only exist within the law'.[235]

Where terrorism affects multiple States, waiving prosecution or extradition should 'only be exercised in agreement between the nation and the States whose citizens and property are the object of the terrorists' acts'.[236] Illegitimate reasons for failing to bring terrorists to justice might include appeasement, fear of reprisals, or the protection of commercial interests.[237] The more serious the terrorist acts involved, the stronger the justification must be for waiving prosecution or extradition. Such decisions should not be taken arbitrarily or unilaterally, but based on a careful balancing of vital community interests, such as humanitarian needs, long-term peace, or sustainable political solutions.

232 A Waldman, 'Rebel leader sentenced to 200 years' jail as talks start', *SMH*, 2 Nov 2002.

233 Historically, selectivity in international prosecutions has been based on unstated or opaque reasons, undermining perceptions of legitimacy: Zolo, n52, 730; Garapon, n56, 717.

234 Y Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 IRRC 583, 624; R McCarthy, S Goldenberg and N Watt, 'Amnesty for Iraqi insurgents', *Guardian*, 5 Jul 2004; 'Putin sets Chechnya amnesty in train', *Guardian*, 15 May 2003.

235 I Brownlie, 'The Decisions of the Political Organs of the United Nations and the Rule of Law', in R MacDonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht, 1993), 91, 95-96.

236 T Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 IYBHR 75, 128.

237 S Rosen and R Frank, 'Measures against International Terrorism', in Carlton *et al*. (eds), n41, 60, 63.

Where terrorism threatens *international* peace and security, the Security Council is the natural body in which to consider claims of amnesty or immunity. Indeed the Charter posits peace and security as higher values than justice, given its fleeting references to human rights, the preservation of domestic jurisdiction and sovereignty, and the absence of provisions on humanitarian intervention. Charter obligations prevail over other treaty obligations,[238] and, as in the Lockerbie aerial incident, the certainty of criminal treaty responses to terrorism may need to yield to security interests.[239] Article 16 of the Rome Statute explicitly recognises that the Council may postpone the investigation or prosecution of an international crime for a renewable 12 month period.[240]

Council interference with treaty frameworks is not to be lightly presumed, and the discontinuance of the Lockerbie case in the ICJ has ensured that the availability and conditions of review of Council measures that conflict with other treaty obligations remain undecided. State participation in anti-terrorism treaties may be less attractive if they do not offer certainty and predictability, due to vulnerability to Council interference. There is also a danger that powerful States may attempt to circumvent treaty regimes by pursuing Council measures. At the same time, the Council's broad discretion under the Charter cannot be unduly fettered in dealing with serious terrorist threats to security, and criminal law responses may not always be the appropriate solution.

VI. 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

238 UN Charter, art 103.

239 *Lockerbie (Libya v UK) (Provisional Measures)* (1992) ICJ Reports 3, 39-41; see also V Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88 AJIL 643.

240 Although under art 103 of the UN Charter, the Council may impose obligations overriding States' commitments under any other treaty.

justifications for prohibiting and criminalizing terrorism, regarding it as a special crime against human rights, the State and peaceful politics, and international peace and security. Consensus on what is wrongful about terrorism allows progress to be made on legal definition.

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.[241] Definition would assist in satisfying the double criminality rule in extradition requests, and in establishing and fulfilling a 'prosecute or extradite' regime for terrorist crimes.[242] Definition might also help confine the political offence exception to extradition for terrorist offences, should that be considered desirable by the international community.[243] Definition would further assist in excluding 'terrorists' from refugee status, if terrorism qualifies either as serious non-political crime, or is contrary to UN purposes and principles.[244] To the extent that sectoral offences are enumerated within a generic definition, definition would widen the substantive implementation of sectoral treaties.[245]

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

241 EU Com, n198, 3. Whether harmonization is desirable as an end in itself is beyond this discussion.

242 Murphy, 'Defining International Terrorism', n1, 35.

243 See generally G Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff, Dordrecht, 1998); C Van den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the Terrorist's Loophole' (1989) IYBHR 297; Van den Wijngaert, n77; M Bassiouni and E Wise, *Aut Dedere Aut Judicare* (Martinus Nijhoff, Dordrecht, 1995); A Sofaer, 'The Political Offence Exception and Terrorism' (1986) 15 Denver JIL and Policy 125; M Shapiro, 'Extradition in the Era of Terrorism: The Need to Abolish the Political Offence Exception' (1986) 61 NYU L Rev 654.

244 1951 Refugee Convention, arts 1(F)(b)-(c); see also 2002 Inter-American Convention, arts 12-13; EU Council, Common Position on Combating Terrorism (2001/930/CFSP), OJ L344/90 (28 Dec 2001), arts 16-17; UNGA res 49/60 (1994), 5(f); 1994 Decl, 3, 5(f); 1996 Decl, 3; UNSC resols 1269 (1999), 4; 1373 (2001), 3(f)-(g), 5; 1377 (2001), pmbl; *Gurung v Home Secretary* [2003] Imm AR 115; *Pushpanathan v Canada* [1998] 1 SCR 982; *T v Home Secretary* [1996] AC 742; B Saul, 'Exclusion of Suspected Terrorists from Asylum', IIIS Discussion Paper 26, Dublin, Jul 2004; M Zard, 'Exclusion, Terrorism and the Refugee Convention' (2002) 13 Forced Mig Rev 32; G Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E Feller et al (eds), *Refugee Protection in International Law* (CUP, Cambridge, 2003), 425; W Kälin and J Künzli, 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes' (2000) 12 IJRL (Special Supp) 46.

245 EU Com, n198, 5.

symbolic mechanism for delineating internationally unacceptable behaviour, even if deterrence of ideologically motivated offenders is unlikely. Definition of terrorism could satisfy community demands that 'terrorists' be brought to justice, without surrendering justice to populist vengeance, or criminalizing trivial harms. By defining terrorism, it is possible to structure and control the use of a term which, historically, has been politically and ideologically much abused. Rather than remaining an ambiguous and manipulated synonym for 'evil' —justifying all manner of repressive responses— legal definition would confine the term within known limits.