



An Undefined Global Threat: A Brief History and the Human Rights Implications of the Lack of a Universal Definition of Terrorism [Article]

Item Type	Article; text
Authors	Horowitz, Samuel I.
Citation	40 Ariz. J. Int'l & Comp. L. 389 (2024)
Publisher	The University of Arizona James E. Rogers College of Law (Tucson, AZ)
Journal	Arizona Journal of International and Comparative Law
Rights	Copyright © The Author(s)
Download date	19/03/2024 22:37:52
Item License	http://rightsstatements.org/vocab/InC/1.0/
Link to Item	http://hdl.handle.net/10150/671327

**AN UNDEFINED GLOBAL THREAT: A BRIEF HISTORY AND THE
HUMAN RIGHTS IMPLICATIONS OF THE LACK OF A UNIVERSAL
DEFINITION OF TERRORISM**

Samuel I. Horowitz*

TABLE OF CONTENTS

I. INTRODUCTION	390
II. BACKGROUND	392
A. History of Terrorism	392
B. Definitions of Terrorism.....	393
1. Definitions of Domestic and International Terrorism in U.S. Law	393
2. Regional Definitions.....	394
C. Toward a Universal Definition.....	396
1. League of Nation Efforts	396
2. UN Efforts	397
III. ANALYSIS	401
A. The Pressing Human Rights Need for a Definition	401
1. Concrete Abuses and Impunity	401
2. The “Terrorist” Label	403
B. Proposed Universal Definition	404
IV. CONCLUSION	409

ABSTRACT

This article seeks to stimulate truly critical thought on terrorism by providing a proposed universal definition. The background of this article briefly touches on the history of terrorism—broadly defined for historical analysis as the use of politically motivated violence by a non-state group against governments or the public. It then examines national and regional definitions of terrorism. Lastly, it provides an overview of international efforts aimed at defining, preventing, and criminalizing terrorism. The analysis explains why the lack of a universal definition is such a pressing issue for human rights. This article argues that the problem is one of both over- and under-inclusiveness: over-inclusiveness as to the proscribed conduct and under-inclusiveness as to perpetrators. Finally, the analysis proposes a universal definition of terrorism and presents the framework within which such a definition could be adopted and implemented at the international level.

* J.D., 2020, University of Minnesota Law School; B.A., 2017, University of Wisconsin-Madison; A.A., 2014, Defense Language Institute. The author is a practicing attorney with experience and an educational background in international relations, international organizations, human rights law, humanitarian law, and criminal law.

I. INTRODUCTION

Terrorism, defined broadly, is not a new phenomenon. Politically motivated violence has been around “since the start of recorded history.”¹ Its effectiveness as a tactic² against a stronger or more technologically advanced opponent, like other forms of unconventional warfare,³ has been proven throughout modern history.⁴ The United States alone spends tens—if not hundreds—of billions of dollars every year to combat terrorism.⁵ Yet the problem does not seem to be getting any better—quite the opposite in fact.⁶ The lack of a universal definition of terrorism is a massive impediment to measuring, analyzing, understanding, and ultimately preventing it.

The cliché that “one man’s terrorist is another man’s freedom fighter” is a lazy excuse for the absence of a universal definition. A definitional focus on the victims of terrorism and the condemned conduct itself, rather than the perpetrators, makes this abundantly clear.⁷ Other excuses, such as the unwillingness of states to yield sovereignty⁸ or the general complexities of the issue, though perhaps more intellectually palatable, have become useless truisms just the same. Despite being commonplace in the international arena⁹, it is highly counter-intuitive that there is international consensus on the approval or condemnation of a concept and substantial subsequent action without consensus on the definition of the concept itself. How can representatives in the international community and in individual states effectively pass judgment and act on something that is not sufficiently

¹ TODD SANDLER, *TERRORISM: WHAT EVERYONE NEEDS TO KNOW* 10–11 (2018); Bastian Herre et al., *Terrorism*, OUR WORLD IN DATA (Jan. 2018), <https://ourworldindata.org/terrorism> (describing a Jewish terrorism campaign against Romans in the first century).

² SANDLER, *supra* note 1, at 9–10; ALAN B. KRUEGER, *WHAT MAKES A TERRORIST?: ECONOMICS AND THE ROOTS OF TERRORISM* 14 (2007).

³ This is not to equate the tactic of terrorism with warfare, but to say that it has been used in the course of armed conflicts historically and into the present. Whether occurring within or outside the context of an armed conflict, terrorism is and must be treated as a criminal act.

⁴ SANDLER, *supra* note 1, at 22–23.

⁵ *Id.* at xv.

⁶ See Herre et al., *supra* note 1; Manfred Nowak & Anne Charbord, *Introduction to USING HUMAN RIGHTS TO COUNTER TERRORISM* 1, 1–4 (Manfred Nowak & Anne Charbord eds., 2018).

⁷ It makes little difference to someone who was maimed and whose family has been killed whether a state or a non-state actor did the killing.

⁸ In that states would lose the ability to define a course of criminal conduct as they see fit, and therefore, be expected by the international community to enforce or ignore conduct that meets or does not meet the definition, respectively.

⁹ See Laura Westra, *Faces of State Terrorism*, in 15 *STUDIES OF CRITICAL SOCIAL SCIENCES* 6 (2012); Robert A. Stein & Richard J. Goldstone, *Introduction to THE RULE OF LAW IN THE 21ST CENTURY* 9, 9–10 (Robert A. Stein & Richard J. Goldstone eds., 2015) [hereinafter *THE RULE OF LAW*].

defined? The answer, which is supported by the ever-increasing human and monetary costs of the “war on terror,” is that they cannot.

In the space created by the lack of a universal definition, states make their own definitions of what terrorism is.¹⁰ This all too frequently results in the criminalization of conduct such as general dissent or the mere sharing of information.¹¹ The label “terrorist” has become a derogatory term that can be deployed to dehumanize entire populations,¹² often followed by violations of fundamental rights.¹³ It also allows states to label opposition parties as terrorists, even when the opposition has not engaged in terrorist conduct.¹⁴ It has even been argued that the word “terrorist” itself has become so politically loaded that its mere use prevents objective research.¹⁵

This article seeks to provide a proposed universal definition of terrorism and stimulate truly critical thought on the subject. Intellectually honest critical thought on the issue of terrorism requires a multidisciplinary, and above-all, empathetic approach.¹⁶ Part II briefly touches on the history of terrorism, broadly defined for the purpose of historical analysis as “the use of politically-motivated violence by a non-state group against governments or the public.”¹⁷ It then examines national and regional definitions of terrorism and provides an overview of international efforts aimed at defining, preventing, and criminalizing terrorism.

¹⁰ Anthony Richards, *Defining Terrorism*, in ROUTLEDGE HANDBOOK OF TERRORISM AND COUNTERTERRORISM 13, 14 (Andrew Silke ed. 2018).

¹¹ See Counter-Terrorism and Border Security Bill 2017-19, HL Bill [142] (UK) (criminalizing expressions of opinion or belief supportive of proscribed organizations, increasing sentences for certain offenses, and increasing periods of surveillance); Counter Terrorism Act, No. 268 (2018) (Sri Lanka) (repealing and “replacing” the even broader Prevention of Terrorism Act of 1978 and criminalizing conduct that could include the sharing of information); Anti-Terrorism Proclamation, No. 652/2009, pt. 2, § 3 (2009) (Eth.) (defining the offense of terrorism as “intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or economic, or social institutions of the country.”).

¹² See Sue Veres Royal, *Fear, Rhetoric, and the “Other”*, 4 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 405, 407–08.

¹³ See SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014) (examining the Central Intelligence Agency’s (CIA) expansive use of torture and secret detention against those suspected of having ties to terrorism); Christopher J. Coyne & Abigail R. Hall, *The Drone Paradox: Fighting Terrorism with Mechanized Terror*, 23 INDEP. REV. 51, 55–57 (2018) (citing estimates from multiple sources showing that thousands of people—including at least hundreds of civilians—have been killed by U.S. drone strikes since 2003).

¹⁴ Richards, *supra* note 10, at 14.

¹⁵ *Id.* at 13, 15.

¹⁶ See SANDLER, *supra* note 1, at xvi. See also KRUEGER, *supra* note 2, at 1–10 (employing economics, political science, psychology, and sociology to examine terrorism and to dispel myths about those who choose to engage in it).

¹⁷ SANDLER, *supra* note 1, at 9–10; KRUEGER, *supra* note 2, at 14–15.

Part III explains why the lack of a universal definition is such a pressing issue for human rights, arguing that the problem is one of both over- and under-inclusiveness: over-inclusiveness as to the proscribed conduct, and under-inclusiveness as to the perpetrators. Part III also provides a recommended—albeit aspirational and perhaps unpalatable to some state actors—universal definition of terrorism and presents the framework within which such a definition could be adopted and implemented at the international level.

II. BACKGROUND

A. History of Terrorism

The frequently-cited first recorded instance of conduct resembling terrorism was that of the Sicarii of the Zealots.¹⁸ The Zealots were a Jewish political movement opposed to Roman rule.¹⁹ A subset of the Zealots, the Sicarii, carried concealed daggers in public places and attacked people friendly to Rome, including other Jews.²⁰

Additional historical examples of terrorism include the Assassins of Persia,²¹ the American Revolution,²² Anti-Czarist terrorists,²³ Anarchist terrorists,²⁴ Anticolonial terrorists,²⁵ Zionist terrorists in Israel,²⁶ Latin American guerrillas,²⁷ Palestinian terrorists,²⁸ and Irish²⁹ and Basque³⁰ separatists.

Some scholars have distinguished modern or “new” terrorism from historical examples by their transnational character, horizontal organizational structure, indiscriminate targeting, and religiosity.³¹ The actions of organizations like Al-Qaeda, Boko Haram, and ISIS—and indeed the organizations themselves—are characterized as new terrorism.³² However, aside from indiscriminate targeting, this distinction is largely useless from a criminal definitional standpoint because

¹⁸ See SANDLER, *supra* note 1; Herre et al., *supra* note 1. See also *Zealot*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Zealot> (last visited Nov. 18, 2018) (providing further description of the zealots and their activities).

¹⁹ *Zealot*, *supra* note 18.

²⁰ *Id.*

²¹ See SANDLER, *supra* note 1, at 10–11.

²² See *id.*

²³ See Leonard Weinberg, *A History of Terrorism*, in ROUTLEDGE HANDBOOK OF TERRORISM AND COUNTERTERRORISM, *supra* note 10, at 34, 35–36.

²⁴ See SANDLER, *supra* note 1, at 11.

²⁵ See *id.* at 12.

²⁶ See Weinberg, *supra* note 23, at 39.

²⁷ See *id.* at 40.

²⁸ See *id.*

²⁹ See *id.* at 40, 44–45.

³⁰ See *id.* at 45.

³¹ Weinberg, *supra* note 23, at 46–48; SANDLER, *supra* note 1, at 12–15, 33.

³² See Weinberg, *supra* note 23, at 45–54; SANDLER, *supra* note 1, at 13.

these characteristics have little to no impact on the offensive conduct itself. Rather, these characteristics may be important for preventing terrorism and addressing conditions conducive to it.

B. Definitions of Terrorism

1. Definitions of Domestic and International Terrorism in U.S. Law

U.S. law defines the crime of terrorism as activities that “involve violent acts or acts dangerous to human life that . . . appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.”³³ Although the law distinguishes domestic from international terrorism, that distinction does not affect the criminal elements of the offense. Interestingly, given the amount of attention and resources devoted to fighting international terrorism, “domestic terrorist incidents far outnumber transnational incidents” in the United States.³⁴

The United States also defines terrorism in 22 U.S.C. § 2656f as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”³⁵ This definition does not require any threshold for the violence such as death or serious injury, and, most glaringly, precludes state responsibility for acts of terrorism.

The Animal Enterprise Terrorism Act also assigns the label of terrorism, with all its baggage, to the conduct of environmental activists.³⁶ Though the Act only includes the word “terrorism” in its title, it still imposes severe penalties³⁷ for conduct—like intimidation³⁸—that may not otherwise be so condemnable.

International consensus is made all the more difficult when definitions of terrorism differ even within a single country, as evidenced by the differing definitions used by government agencies in the United States.³⁹ The Central Intelligence Agency (CIA), National Counterterrorism Center (NCTC), and the Department of State have all adopted the language of 22 U.S.C. § 2656f(d)(2), which recognizes only “subnational groups or clandestine agents” as potential perpetrators of acts of terrorism; while the Department of Homeland Security, Federal Bureau of Investigation (FBI), Department of Defense, and—though not

³³ 18 U.S.C. § 2331(1), (5) (defining “international” and “domestic” terrorism in U.S. law).

³⁴ SANDLER, *supra* note 1, at 6.

³⁵ 22 U.S.C. § 2656f(d)(2).

³⁶ See 18 U.S.C. § 43 (also known as the Animal Enterprise Terrorism Act).

³⁷ See 18 U.S.C. § 43(b)(5) (allowing for imposition of a life sentence and a fine if death of another individual occurs).

³⁸ 18 U.S.C. § 43(a)(2)(B).

³⁹ See Chris C., *Definition of Terrorism*, SEC BRIEF.ORG (Apr. 8, 2014) [hereinafter *Definitions of Terrorism*], <https://www.secbrief.org/2014/04/definition-of-terrorism/>.

part of the U.S. government—North Atlantic Treaty Organization (NATO) operate under definitions that more closely resemble 18 U.S.C. § 2331.⁴⁰

Although they differ in who may perpetrate acts of terrorism and who the victims may be, the United States' definitions of terrorism all require some level of violence and a broader social or political purpose. However, because terrorism is criminalized and its perpetrators are subjected to severe penalties, discrepancies between definitions could mean the difference between life and death for the accused.

2. Regional Definitions

There are at least seven regional conventions directed at terrorism.⁴¹

Some regions have taken the sectoral approach to defining terrorism.⁴² Others—the Organization for African Unity, the European Union, and the League of Arab States—have created generic definitions of terrorism, which have been criticized for their vagueness and susceptibility to abuse.⁴³ One of the most contentious points in creating a universal definition of terrorism, made apparent in the Arab and African conventions, is whether to exclude national liberation movements. The Arab and African conventions provide explicit exclusions from their respective definitions of terrorism for struggles based on national liberation and self-determination “in accordance with international law, ‘including armed struggle against colonialism, occupation, aggression and domination by foreign forces.’”⁴⁴

The Organization for African Unity defines terrorism as:

any act which is a violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: intimidate, put in fear, force or induce any government, body institution, the general

⁴⁰ See *Definitions of Terrorism*, *supra* note 39.

⁴¹ HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 17, 26 (2005).

⁴² The sectoral approach has involved the criminalization of acts that have been used by terrorist actors or that have come to be associated with terrorism. Amrith Rohan Perera, *The Draft United Nations Comprehensive Convention on International Terrorism*, in *RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM* 151, 154 (Ben Saul ed.) 2014.

⁴³ DUFFY, *supra* note 41, at 26–27, 29.

⁴⁴ *Id.* at 17, 36.

*public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or create general insurrection in a state; or any promotion, sponsoring contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing or procurement of any person with the intent to commit any act referred to [above].*⁴⁵

Article 3 of Directive 2017/541 defines terrorism as:

*intentional acts [or threats including potentially lethal attacks and extensive destruction to property] . . . which, given their nature or their context, may seriously damage a country or international organisation [where committed with the aim of]: seriously intimidating a population, or unduly compelling a Government or an international organisation to perform or abstain from performing any act, [or] seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.*⁴⁶

Article 2(1) of the Arab Convention on the Suppression of Terrorism defines terrorism as:

*[a]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources.*⁴⁷

The definitions provided by these conventions, though differing in the scale and scope of conduct constituting terrorism, share several similarities. They all consider acts endangering life and designed to intimidate or spread fear as sufficient to constitute terrorism. Additionally, threats to carry out the proscribed acts are all criminalized as terrorism by the conventions. They all also require some

⁴⁵ Org. of African Unity [OAU] Convention on the Prevention and Combating of Terrorism art. 1(3), July 14, 1999, [hereinafter African Convention] (emphasis added).

⁴⁶ Council Directive 2017/541, art. 3, 2017 O.J. (L 88) 6 (EC) [hereinafter European Directive] (emphasis added).

⁴⁷ League of Arab States, Arab Convention for the Suppression of Terrorism art. 2(1), Apr. 22, 1998 [hereinafter Arab Convention] (emphasis added).

sort of motive for the act: as broad as any “motive[] or purpose[] . . . in the advancement of a[] . . . criminal agenda,”⁴⁸ as in the Arab Convention; or specific motives such as the intent to “seriously intimidate [a] population,”⁴⁹ as in the European Directive.

Beyond these textual likenesses, the definitions also share a susceptibility to abuse by those enforcing them.⁵⁰ Perhaps the definition most prone to abuse is that of the African Convention, which could be used to classify the organization or promotion of a protest that may damage cultural heritage as an act of terrorism.⁵¹ The differences between these definitions make international cooperation in preventing and punishing terrorism, however it is defined, more difficult because conduct that constitutes terrorism in one region may be completely legal conduct in another part of the world.

C. Toward a Universal Definition

Modern international efforts at creating a universal definition of terrorism have thus far failed to achieve their goal. In place of a universal definition, the international community has adopted the sectoral approach.⁵² However, international efforts at establishing a universal definition have continued, reinvigorated by the events of September 11 and sustained attention by the international community.⁵³

1. League of Nation Efforts

Following several high-profile assassinations in 1934,⁵⁴ The League of Nations began drafting two conventions that dealt with terrorism.⁵⁵ The League began by adopting a resolution on December 10, 1934, that stated:

It is the duty of every State neither to encourage nor tolerate on its territory, any terrorist activity with a political purpose and . . .

⁴⁸ Arab Convention, *supra* note 47, art. 1(2).

⁴⁹ European Directive, *supra* note 46, art. 3.

⁵⁰ See DUFFY, *supra* note 41, at 27, 29.

⁵¹ See African Convention, *supra* note 45 (classifying terrorism in Article 3(a) as “any act . . . which may cause damage to . . . cultural heritage and is calculated or intended to . . . induce any . . . body . . . to adopt or abandon a particular standpoint.”). Article 3(b) expands 3(a) to include promotion and organizing of the act.

⁵² See Perera, *supra* note 42.

⁵³ DUFFY, *supra* note 41, at 23; TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* 100–01 (2006).

⁵⁴ These assassinations included that of Yugoslav King Alexander and the French foreign minister in Marseilles carried out by Yugoslav terrorists. See BECKER, *supra* note 53, at 152; Weinberg, *supra* note 23, at 34, 38–39.

⁵⁵ Perera, *supra* note 42, at 152; see also Weinberg, *supra* note 23, at 34, 38–39.

every State must do all in its power to prevent and repress acts of this nature and must for this purpose, lend its assistance to Governments that request it.⁵⁶

This resolution was followed by the Convention on the Prevention and Punishment of Terrorism of 1937 (1937 Convention).⁵⁷ The 1937 Convention is notable because it included an international legal definition of terrorism.⁵⁸ Article II of the 1937 Convention defined terrorism as “[a]ll criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”⁵⁹ The 1937 Convention was accompanied by a convention establishing an international criminal court, which had jurisdiction over the crime of terrorism.⁶⁰ The outbreak of World War II and the subsequent dissolution of the League of Nations prevented these conventions from entering into force.⁶¹ Nonetheless, the inclusion of terrorism in the 1937 Convention was made all the more noteworthy by its absence from the Rome Statute, which established the International Criminal Court (ICC) more than half a century later.⁶²

2. UN Efforts

Both the UN Security Council and General Assembly have passed many resolutions and conventions aimed at combatting terrorism without establishing a universal definition of terrorism. They have done this by condemning and outlawing individual acts commonly used by perpetrators of terrorism, known as the sectoral approach.⁶³ The international community, under the aegis of the UN, has created 19 international legal instruments aimed at preventing acts of terrorism.⁶⁴ This sectoral

⁵⁶ Perera, *supra* note 42, at 152 (quoting Council of the League of Nations Res. art. II, League of Nations Doc. C.543 1934 VII (1934)).

⁵⁷ *Id.*

⁵⁸ Perera, *supra* note 42, at 152.

⁵⁹ *Id.* (quoting Convention for the Prevention and Punishment of Terrorism art. II, League of Nations Doc. C.546.M383 1937 V (1937) [hereinafter League Convention]).

⁶⁰ Perera, *supra* note 42, at 153. *See* Convention for the Creation of an International Criminal Court, League of Nations Doc. C. 547.M.384 1937 V (1937).

⁶¹ Weinberg, *supra* note 23, at 38–39.

⁶² *See* Rome Statute of the International Criminal Court art. 5, 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute] (identifying only genocide, crimes against humanity, war crimes, and the crime of aggression as the crimes within the jurisdiction of the International Criminal Court).

⁶³ *See* Perera, *supra* note 42.

⁶⁴ *International Legal Instruments*, U.N. OFFICE OF COUNTER-TERRORISM, <https://www.un.org/counterterrorism/international-legal-instruments> (last visited Feb. 19, 2024).

approach has criminalized conduct including hijacking of aircraft,⁶⁵ attacks against diplomatic and other protected persons,⁶⁶ hostage taking,⁶⁷ bombings,⁶⁸ and financing.⁶⁹

Of these sectoral treaties, the most relevant to the definitional problem of terrorism is the Terrorism Financing Convention, which provided “the first general definition of terrorism in a[n] [international] treaty.”⁷⁰ The Financing Convention defined terrorism as:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁷¹

This definition requires an act of serious violence intended to endanger life. It identifies civilians and noncombatants as the targets of terrorism. It further requires that the act be perpetrated with the purpose of “intimidating a population” or compelling action or inaction by “a government or international organization.”⁷²

While the Security Council and the Counter Terrorism Committee have essentially allowed states to define terrorism however they choose,⁷³ the General Assembly, with the goal of developing a universally accepted definition of

⁶⁵ See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, T.I.A.S. No. 6,768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, T.I.A.S. No. 6,681, 860 U.N.T.S. 105.

⁶⁶ See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, T.I.A.S. No. 8,532, 1035 U.N.T.S. 167.

⁶⁷ See International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

⁶⁸ See International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1997, T.I.A.S. 02-726, 2149 U.N.T.S. 256.

⁶⁹ See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197 [hereinafter Financing Convention].

⁷⁰ PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 384 (Oxford Univ. Press ed., 2013).

⁷¹ Financing Convention, *supra* note 69, art. 2(1)(b).

⁷² *Id.*

⁷³ DUFFY, *supra* note 41, at 31; BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 49 (2006) [hereinafter SAUL, DEFINING TERRORISM]. However, the Security Council, in UNSCR 1566, has provided a definition—though not under Chapter VII—that has come to be used by states as a de minimis standard that domestic definitions must cover. See S.C. Res. 1566, ¶ 3 (Oct. 8, 2004); Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Prot. of Human Rights While Countering Terrorism), *Rep. of the Special Rapporteur on the Promotion and Prot. of Human Rights While Countering Terrorism*, ¶ 34, U.N. Doc. A/73/361 (Sept. 3, 2018).

terrorism, created an Ad Hoc Committee in Resolution 51/210 in 1996.⁷⁴ Though unsuccessful to date, the definition of terrorism in the Ad Hoc Committee's Comprehensive Draft Convention represents the closest step towards international consensus.⁷⁵ Article 2(1) of the Draft Comprehensive Convention provides:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:

- a. Death or serious bodily injury to any person; or
- b. Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- c. Damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss;

When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.⁷⁶

Article 5 of the Draft Comprehensive Convention precludes justification for terrorist acts by stating that “under no circumstances [are terrorist acts] justifiable by considerations of a political, philosophical, ideological, racial, ethnic or other similar nature.”⁷⁷ Additionally, Article 18 of the Draft Comprehensive Convention text is an exclusion clause that removes “[t]he activities of armed forces during an armed conflict” and “[t]he activities [of] . . . the military forces of a State in the exercise of their official duties” from the purview of the Convention.⁷⁸

The definition provided by the Draft Comprehensive Convention is expansive both because of who it allows to be held accountable for terrorism and who and what it identifies as targets of terrorism. The Draft Comprehensive Convention definition allows for any actor to be liable for an act of terrorism (subject to the exclusion clause). It does not identify only civilians or non-combatants as targets of terrorism—as would be the case under international humanitarian law—but “any person.” It goes beyond protecting lives to include

⁷⁴ DUFFY, *supra* note 41, at 32.

⁷⁵ See BECKER, *supra* note 53, at 109–11, 116 (identifying similarities between national legislation passed since the Draft Comprehensive Convention as evidence that there is growing international consensus on the general definition of terrorism contained in Article 2 of the Convention).

⁷⁶ Draft Comprehensive Convention Against International Terrorism (Consolidated Text), U.N. Doc. A/59/894, at 9 (2005) [hereinafter Draft Comprehensive Convention].

⁷⁷ Draft Comprehensive Convention, *supra* note 76, at 10.

⁷⁸ *Id.* at 16.

“public or private property,” “the environment,” and “major economic loss.”⁷⁹ It mirrors many other definitions of terrorism in requiring the purpose of intimidating a population or compelling action or inaction by a government or international organization.

Also relevant to the definitional discussion is UN Security Council Resolution 1566 (Resolution 1566).⁸⁰ Resolution 1566 provides the following non-binding definition of terrorism:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.⁸¹

Resolution 1566 was adopted in part as a response to criticisms from international human rights bodies and civil societies on the lack of uniformity and overbroad nature of national definitions of terrorism adopted following Resolution 1373 (itself adopted in the aftermath of September 11th).⁸² International legal scholar Ben Saul believes that the “relatively narrow” definition provided by Resolution 1566 could serve as a “starting point” for a universal definition,⁸³ but that a motive element should be added to reflect “the special character of ‘terrorism’ as an offence against the political process or other public oriented interests.”⁸⁴

Despite some progress, more than 25 years after the Ad Hoc Committee to define terrorism was established, the international community is still without a universal definition of terrorism. It is imperative that the international community adopt a universal definition so that it can cooperate effectively and avoid the abuses that have accompanied the “war on terror.”

⁷⁹ Draft Comprehensive Convention, *supra* note 76, at 9.

⁸⁰ See Ben Saul, *Criminality and Terrorism, in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 133, 145 (Salinas de Frías et al. eds., 2012).

⁸¹ S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

⁸² Saul, *Criminality and Terrorism, supra* note 80, at 144.

⁸³ *Id.* at 146, 169.

⁸⁴ Saul, *Criminality and Terrorism, supra* note 80, at 147, 169.

III. ANALYSIS

A. The Pressing Human Rights Need for a Definition

Despite, or perhaps because of, the international attention given to combatting terrorism and preventing loss of life, the serious human rights violations caused or aided by the counter-terrorism regime have been largely ignored and continue nearly unabated. By placing a legal obligation on states to pass counter-terrorism legislation, the UN Security Council heightened the legal exigency of defining the term.⁸⁵

1. Concrete Abuses and Impunity

The lack of a universally agreed-upon definition of terrorism, in conjunction with universal condemnation of the concept of terrorism, has resulted in a massive roll-back of fundamental human rights.⁸⁶ Martin Scheinin, a former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, has declared that “the breadth and severity of human rights violations caused by counter-terrorism measures is alarming.”⁸⁷ Abuses in the war on terror have been exacerbated by the Security Council’s “dismissive approach to human rights.”⁸⁸ The Security Council’s post-facto adoption of human rights language in its counter-terrorism resolutions has been insufficient to prevent states from adopting counter-terrorism legislation that violates human rights.⁸⁹ Police and surveillance powers have expanded greatly at the expense of the rights to life, liberty, security, privacy, freedom of opinion, and freedom of association. Under the banner of counter-terrorism, states now have sprawling powers to detain and interrogate,⁹⁰ engage in mass surveillance,⁹¹ and criminalize “preparatory offences.”⁹² States have also engaged in torture, secret detention, extraordinary rendition, and the use of military tribunals against those they have labeled as terrorists.⁹³

⁸⁵ SAUL, *DEFINING TERRORISM*, *supra* note 73, at 5; DUFFY, *supra* note 41, at 33.

⁸⁶ Martin Scheinin, *Impact of Post-9/11 Counter-Terrorism Measures on All Human Rights*, in *USING HUMAN RIGHTS TO COUNTER TERRORISM*, *supra* note 6, at 92.

⁸⁷ Scheinin, *supra* note 86, at 123.

⁸⁸ *Id.* at 97. *Accord* Manfred Nowak & Anne Charbord, *Key Trends in the Fight against Terrorism and Key Aspects of International Human Rights Law*, in *USING HUMAN RIGHTS TO COUNTER TERRORISM*, *supra* note 6, at 12, 19.

⁸⁹ Nowak & Charbord, *supra* note 6, at 22, 24–25.

⁹⁰ Scheinin, *supra* note 86, at 109–10.

⁹¹ *Id.* at 118–21.

⁹² *Id.* at 121–22.

⁹³ Nowak & Charbord, *supra* note 6, at 25, 35.

One of the greatest threats to human rights created by the counter-terrorism regime are drone strikes.⁹⁴ Drone strikes, beyond the threat of loss of life, can have a massive psychological impact on communities.⁹⁵ Drone strikes, or the threat and fear of them, can also disrupt education, access to healthcare, and the exercise of numerous other civil, political, economic, social, and cultural rights.⁹⁶ Drone strikes—like the larger military response to terrorism to which they belong⁹⁷—may also be counter-productive because they can “breed resentment and discontent” that may aid “militant recruitment and motivate[] terrorist activity.”⁹⁸

Not only have states committed serious human rights violations while claiming to combat terrorism, but they have also enjoyed impunity for their violations.⁹⁹ The definitional problem of terrorism, and specifically the prevalence of “overly-broad or vague definitions,” has contributed to the lack of accountability for state actors guilty of violations.¹⁰⁰ The far-reaching discretion afforded to government officials and law enforcement personnel in countering terrorism has also provided ample opportunity for abuse.¹⁰¹ Perhaps nowhere was this impunity on greater display than with former President Barack Obama’s failure to sufficiently investigate or prosecute perpetrators of torture, extraordinary rendition, and secret detention in the years following the September 11 attacks.¹⁰² Such inaction, especially by the “leader of the free world” and a country that claims to value the rule of law and human rights, creates precedent for other governments to neglect their duties to investigate and prosecute those who have committed grave violations. Additionally, despite Obama’s promises to close the Guantanamo Bay detention center,¹⁰³ there are still 30 people detained there.¹⁰⁴ In contrast, the European Court of Human Rights has held some states accountable for their participation in the

⁹⁴ See Ben Emmerson QC, *New Counter-Terrorism Measures: Continuing Challenges for Human Rights*, in USING HUMAN RIGHTS TO COUNTER TERRORISM, *supra* note 6, at 125, 126.

⁹⁵ *Id.* at 127.

⁹⁶ *Id.* at 127–28.

⁹⁷ Emmerson, *supra* note 94, at 125 (citing UN Global Counter-Terrorism Strategy, UN Doc. A/RES/60/288 (2006)).

⁹⁸ *Id.* at 128.

⁹⁹ Nowak & Charbord, *supra* note 6, at 13; Lisa N. Oldring, *Questions of Accountability in Countering Terrorism*, in USING HUMAN RIGHTS TO COUNTER TERRORISM, *supra* note 6, at 300, 302, 312.

¹⁰⁰ Oldring, *supra* note 99, at 312.

¹⁰¹ *Id.* at 314.

¹⁰² See David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all> (examining President Obama’s decision “to look forward as opposed to looking backwards” with regard to the CIA’s practices post-9/11).

¹⁰³ Jackie Northam, *Obama’s Promise to Close Guantanamo Prison Falls Short*, NPR (Jan. 23, 2013, 3:35 AM), <https://www.npr.org/2013/01/23/169922171/obamas-promise-to-close-guantanamo-prison-falls-short>.

¹⁰⁴ *Current Detainees*, N.Y. TIMES: GUANTANAMO DOCKET, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current> (last visited May. 30, 2023).

violation of fundamental human rights and required compensation of victims.¹⁰⁵ State practice has made it clear that without a universal definition of terrorism to constrain domestic legislation, “any counter-terror resolution will be open to abuse.”¹⁰⁶

2. The “Terrorist” Label

The definitional problem of terrorism extends to and reinforces the politicization of the term. Terrorism has become a pejorative label assigned to individuals and groups that a government dislikes,¹⁰⁷ rather than a label for a specific act. The label ignores the fact that some organizations designated as terrorist organizations “simultaneously engage in legal nonviolent activities.”¹⁰⁸ It further serves to delegitimize the goals of those to whom it is assigned.¹⁰⁹ States engaged in this labeling practice include China (with regard to Uighur separatists), Russia (with regard to Chechen separatists), India (with regard to Kashmiri militants), Indonesia (with regard to insurgents in Aceh and West Papua), Nepal (with regard to Maoist insurgents), Morocco (with regard to an Islamist movement), Israel (with regard to Palestinians), the Maldives (with regard to an opposition politician), and Uzbekistan (with regard to a group of people who had organized public demonstrations).¹¹⁰ The terrorist label does not only apply to an act of terrorism, but also to the individual or group, in perpetuity or until the state decides it no longer applies¹¹¹—thus removing the protections of the Geneva Conventions to fighters or members of non-state armed groups with continuous combat functions involved in an armed conflict who are no longer actively participating in hostilities. The label likewise affects even those people who are identifiable as combatants

¹⁰⁵ See generally *Abu Zubaydah v. Lith.*, App. No. 46454/11 (Aug. 8, 2018), <http://hudoc.echr.coe.int/eng?i=001-183687>; *El-Masri v. The Former Yugoslav Republic of Maced.*, App. No. 39630/09 (Dec. 13, 2012), <http://hudoc.echr.coe.int/eng?i=001-115621>; *Al Nashiri v. Pol.*, App. No. 28761/11 (Feb. 16, 2015) <http://hudoc.echr.coe.int/eng?i=001-146044>; *Nasr & Ghali v. It.*, App. No. 44883/09 (May 23, 2016) <http://hudoc.echr.coe.int/eng?i=001-161245>.

¹⁰⁶ Lisa Ginsborg, *One Step Forward, Two Steps Back: The Security Council, “Foreign Terrorist Fighters”, and Human Rights*, in USING HUMAN RIGHTS TO COUNTER TERRORISM, *supra* note 6, at 195, 235.

¹⁰⁷ BECKER, *supra* note 53, at 85; Richards, *supra* note 10, at 14–15; DUFFY, *supra* note 41, at 18; SAUL, DEFINING TERRORISM, *supra* note 73, at 3.

¹⁰⁸ Gary LaFree, *Conceptualizing and Measuring Terrorism*, in ROUTLEDGE HANDBOOK OF TERRORISM AND COUNTERTERRORISM, *supra* note 10, at 22–23. See also Richards, *supra* note 10, at 15 (stating that acts carried out by organizations designated as terrorist organizations are labeled as terrorist “by virtue of who the perpetrator[s] [are]”).

¹⁰⁹ SAUL, DEFINING TERRORISM, *supra* note 73, at 3, 50; BECKER, *supra* note 53, at 85; Emerson, *supra* note 94, at 165.

¹¹⁰ SAUL, DEFINING TERRORISM, *supra* note 73, at 50–51

¹¹¹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

under the Geneva Conventions because the label will persist after they cease being identifiable as combatants.

B. Proposed Universal Definition

The definitional problem of “terrorism” is not without a solution.¹¹² Despite having spent countless hours and resources engaged in heated debate, experts and representatives of states have yet to present a universal definition for terrorism.¹¹³ They have instead jumped head-first into a quixotic “war on terror” in an effort to eradicate a concept they have failed to define and, with very few exceptions, failed to even attempt to “understand.”¹¹⁴ “Understand” has been placed in quotation marks because, given the innate human aversion to the taking of another human life,¹¹⁵ one must at least consider that a rational¹¹⁶ individual’s decision to engage in terrorism (i.e. directly take the lives of members of the general public and likely sacrifice herself) is made far less easily than the politician’s decision to “go to war” (i.e. send other people to kill or die on her behalf).

A universal definition and accompanying criminalization of terrorism must, in accordance with the rule of law, be applicable to all—including the State.¹¹⁷ If the focus of a definition is placed on what would be acceptable to states, the range of actors that could be held accountable for terrorism would be limited to avoid the potential for states to be accused of, and potentially found guilty and punished for, terrorism. A definition that fails to acknowledge that states can, have, and frequently do engage in or sponsor activities outside of armed conflict that could be considered terrorism—under even narrow definitions—would result in impunity for state actors for crimes for which countless others are put to death in the global “war on terror.”¹¹⁸ The definition should therefore not be limited to individuals or non-state

¹¹² BECKER, *supra* note 53, at 86 (stating that despite difficulties, a “useful legal definition of terrorism is [not] unattainable”).

¹¹³ See Lisa Stampnitzky, *Can Terrorism Be Defined?*, in CONSTRUCTIONS OF TERRORISM (Stohl et al. eds., 2017).

¹¹⁴ See Westra, *supra* note 9, at 12–13.

¹¹⁵ Brockton D. Hunter, *Echoes of War: Combat Trauma, Criminal Behavior, and How We Can Do Better This Time Around*, in THE ATTORNEY’S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT 1, 40 (Brockton D. Hunter & Ryan C. Else eds., 2014) (referencing in n.216 Paul Roscoe, *Intelligence, Coalition Killing, and the Antecedents of War*, 109 AM. ANTHROPOLOGIST 488 (2007); Ashley Montagu, *The Nature of Human Aggression* (2006); Nikolas Tinbergen, *On War and Peace in Animals and Man*, 160 SCI. 1411 (1968); Gwynne Dyer, *War: The Lethal Custom* (1985); Lt. Col. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (1996)).

¹¹⁶ Sandler, *supra* note 1, at 19–20.

¹¹⁷ See Robert A. Stein, *The Rule of Law*, in THE RULE OF LAW, *supra* note 6, at 11–14 (identifying universal applicability of the law as a core principle to the rule of law).

¹¹⁸ See Westra, *supra* note 9, at 65–67.

actors as some definitions, either on paper or in practice, are.¹¹⁹ Marcello di Filippo, echoing others who would differentiate between state and individual acts of terrorism, asserted that “[d]ifferent sets of legal provisions have historically developed for violent conduct carried out by state agents or by private persons,” and that it would be “intractable” for a single definition of terrorism to apply to both sets of actors.¹²⁰ His assertion, while perhaps empirically defensible, blatantly ignores the legal frameworks established by the Genocide Convention, the Rome Statute, and the Convention against Torture.¹²¹ These documents all allow for state actors to be held accountable for their offenses.¹²²

A universal definition of terrorism must allow for any actor, state or non-state, who engages in terrorist conduct to be held accountable. Some have argued that states and their military forces should be excluded from a definition of terrorism because other fields of international law govern states in this area.¹²³ This argument has had enough support to result in the exclusion clause of the Draft Comprehensive Convention.¹²⁴ However, the existing laws may not be sufficient to hold state actors accountable for terrorist conduct that occurs outside of an “armed conflict” for the purposes of the Geneva Conventions or that does not reach the threshold of crimes against humanity.¹²⁵ The potential for impunity is too great to outright exclude state actors from the universal definition.

The definition must condemn and criminalize only serious offenses and avoid “punish[ing] trivial infringements.”¹²⁶ Some current definitions, like those of the Arab League and European Union, classify as terrorism “any act or threat of

¹¹⁹ See League Convention, *supra* note 59 (defining terrorist acts as those committed against a State, though not precluding State responsibility); 22 U.S.C. § 2656f, (defining terrorism as perpetrated by “subnational groups or clandestine agents”); SAUL, DEFINING TERRORISM, *supra* note 73, at 189 (stating that “[d]eliberate or ‘official’ State action designed to terrorize remains excluded” from the Draft Convention); *id.* at 251–52 (identifying cases in international tribunals that avoided the language of terrorism in disputes between states). *But see* SAUL, DEFINING TERRORISM, *supra* note 73, at 222 (citing a Security Council resolution that labeled Iraqi acts as terrorism following Iraq’s invasion of Kuwait).

¹²⁰ Marcello Di Filippo, *The Definition(s) of Terrorism in International Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 3, 4 (Ben Saul ed., 2014).

¹²¹ See Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Rome Statute, arts. 1, 25; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 4, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter CAT].

¹²² Genocide Convention, *supra* note 121; Rome Statute, *supra* note 121; CAT, *supra* note 121.

¹²³ Perera, *supra* note 42, at 125.

¹²⁴ See Draft Comprehensive Convention, *supra* note 76, at 17.

¹²⁵ SAUL, DEFINING TERRORISM, *supra* note 73, at 24–26; BECKER, *supra* note 53, at 106–07.

¹²⁶ SAUL, DEFINING TERRORISM, *supra* note 73, at 23.

violence”¹²⁷ and “intentional acts,”¹²⁸ respectively. While somewhat constrained by the purpose and effects of the acts, the conduct criminalized by these definitions could be largely benign and undeserving of international condemnation and severe punishment. By requiring the initial conduct to be violent and deadly or life-threatening, the universal definition would exclude conduct that may be destructive or disorderly but falls short of constituting an act of terrorism.

To comply with the requirements of legality and certainty, the definition must be “sufficiently clear and accessible that individuals are able to conform their behavior to the limits of the law.”¹²⁹ It must also preclude retroactivity and the principle of *nullum crimen, nulla poena sine lege*, which holds that there can be neither crime nor punishment for an act that was not illegal when it was committed.¹³⁰ Several states, including Belgium, Canada, and Peru, have adopted definitions of terrorism that human rights bodies found to violate these principles because they provided insufficient degrees of severity and purpose, could be used to discriminate against people on “religious and ideological grounds,” and were too broad and ambiguous, respectively.¹³¹ Other states that have passed overly-broad counter-terrorism legislation include the United Kingdom, Turkey, Brazil, and France.¹³²

To distinguish terrorism from other criminal acts that cause terror, the definition must also require a specific intent to terrorize¹³³ and a purpose that the terror unlawfully compel action or inaction by a group.¹³⁴ Expanding the definition to include any group as opposed to only states or international organizations would make it explicitly clear that state action against any group in the general public can constitute terrorism. Framing the definition in terms of specific intent, as opposed to motive, more closely aligns with international criminal law.¹³⁵ That this framework would create a barrier to prosecution is not sufficient to remove it as a safeguard against an otherwise over-inclusive definition.¹³⁶

¹²⁷ Arab Convention, *supra* note 47.

¹²⁸ See European Directive, *supra* note 46.

¹²⁹ DUFFY, *supra* note 41, at 40.

¹³⁰ SAUL, DEFINING TERRORISM, *supra* note 73, at 57–58; Scheinin, *supra* note 86, at 108.

¹³¹ SAUL, DEFINING TERRORISM, *supra* note 73, at 58 (citations omitted).

¹³² Oldring, *supra* note 99, at 315–17.

¹³³ SAUL, DEFINING TERRORISM, *supra* note 73, at 62 (“[A]ny definition must reflect that some person, or group of people, felt *terror* or were intended to feel *terror*.”); *id.* at 63 (“The serious social stigma which attaches to labelling an offender a ‘terrorist’ should be reserved for those people who cause the grave psychological harm and distress which is signified by the term terrorism.”).

¹³⁴ *Id.* at 61 (“[A] terrorist act is committed . . . wherever there is a public motive, aim, objective, or purpose.”)

¹³⁵ *Id.* at 40–41.

¹³⁶ See *id.* at 41 (citing the ICTR holding in *Akayesu (Judgment)* ICTR–96–4–T (Sept. 2, 1998) ¶ 523 that intent can be inferred); see also Genocide Convention, *supra* note 121, art. II (requiring the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”).

The class sought to be protected by creating a universal definition and criminalizing terrorism must also be addressed. The League Convention defined terrorism as “directed against a State” with the public as the recipients of terror.¹³⁷ The Financing Convention identifies civilians or “other person[s] not taking an active part in the hostilities in a situation of armed conflict” as the victims of terrorist violence.¹³⁸ The Draft Comprehensive Convention’s definition protects “any person” as well as public and private property, including “[s]tate or government facilit[ies],” and the environment.¹³⁹ By excluding the acts of armed forces in an armed conflict and states’ militaries, the Draft Convention represents a further entrenchment of states’ monopoly on the legitimate use of violence. Countries and international organizations are protected by the European Directive’s definition of terrorism.¹⁴⁰ The Arab Convention identifies people, the environment, and public or private property as the objects of terrorist violence.¹⁴¹ Definitions that stray too far from the underlying goal of protecting the general public may greatly expand the class of individuals or groups who can be held accountable for terrorist offenses. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Fionnuala Ní Aoláin, has argued that targeting the general public should constitute “the core to which the legal concept [of terrorism] should be applied.”¹⁴² Attacks on property and critical infrastructure or services should fall under the definition of terrorism when, and only when, they end or jeopardize the lives of the general public. When the focus of the definition is on this targeting, the question of whether national liberation movements should be excluded—the area historically subjected to the most debate—appears outlandish.¹⁴³ It should never be necessary for a national liberation movement to deliberately target the general public, and therefore there is no reason to exclude such movements from liability for terrorist offenses.¹⁴⁴

As this definition of terrorism would seek to also criminalize the conduct it defines, it should address exclusions, defenses (whether justification or excuse), and mitigating or aggravating factors.¹⁴⁵ Whether one agrees with resort to the use of armed force as a political choice for states that one must, at least at this juncture,

¹³⁷ League Convention, *supra* note 59.

¹³⁸ Financing Convention, *supra* note 69, art. 2(1)(b).

¹³⁹ Draft Comprehensive Convention, *supra* note 76, at 6.

¹⁴⁰ European Directive, *supra* note 46.

¹⁴¹ Arab Convention, *supra* note 47, art. 1(2).

¹⁴² Fionnuala Ní Aoláin, *The Complexity and Challenges of Addressing the Conditions Conducive to Terrorism*, in USING HUMAN RIGHTS TO COUNTER TERRORISM, *supra* note 6, at 166, 169, 173. See also SAUL, DEFINING TERRORISM, *supra* note 73, at 64 (“What can rarely, if ever, be justified . . . is the instrumental killing of non-harmful civilians.”); SANDLER, *supra* note 1, at 19–20.

¹⁴³ DUFFY, *supra* note 41, at 35; Richards, *supra* note 10, at 16; BECKER, *supra* note 53, at 86.

¹⁴⁴ BECKER, *supra* note 53, at 107 (“Not all acts conducted to advance national liberation are legitimate simply because of the cause they champion.”)

¹⁴⁵ SAUL, DEFINING TERRORISM, *supra* note 73, at 64.

recognize as part and parcel of international law. Armed conflict is well-defined by international treaties and customary international law and should be distinguished from terrorism. Therefore, use of force against a legitimate (i.e. military) target by any actor should not fall within the definition of terrorism.¹⁴⁶ Contention may arise with regard to the double standard of civilian deaths being classified as collateral damage when caused by a state (regardless of the presence of an armed conflict), and as terrorism when caused by non-state actors. This difficulty can be overcome by requiring that the targeting of members of the general public be deliberate or the primary object of attack, as is the case with civilians under international humanitarian law. The definition should explicitly exclude conduct protected by the International Covenant on Civil and Political Rights (ICCPR) and other human rights treaties to prevent states from labeling opponents and dissidents who have not committed violent acts as terrorists.¹⁴⁷ As the international community has already agreed, there should be no justification for the deliberate targeting of the general public to achieve political goals.¹⁴⁸ Excuses under criminal law, such as duress and incapacitated mental state, should still be available. Mitigating and aggravating factors should relate to the scale of the damage or loss of life that resulted from the terrorist incident and the context in which the act occurred.

Whether to include threats in the definition of terrorism is an additional point of contention. If an actor has previously carried out acts of terrorism and is capable of doing so again, her threats may indeed be just as effective at achieving policy objectives as an actual attack. However, what is lacking from mere threats is the injury or death of civilians or non-combatants. A potential work-around to this could be an additional clause in the definition criminalizing credible threats of terrorism from a known terrorist actor, albeit to a lesser degree than a completed act of terrorism.

¹⁴⁶ Nowak & Charbord, *supra* note 6, at 32 (“IHL is . . . based on the premise that certain acts of violence against military objectives are not prohibited, and provides for the possibility of proportionate civilian casualties.”). *Contra* KRUEGER, *supra* note 2, at 54–55 (citing the US State Department definition of terrorism that included “military personnel who at the time of an incident are unarmed or are not on duty” and the US government’s inclusion of “attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the particular site” as terrorism).

¹⁴⁷ See SAUL, *DEFINING TERRORISM*, *supra* note 73, at 66.

¹⁴⁸ See Draft Comprehensive Convention, *supra* note 76, at 8–9; SAUL, *DEFINING TERRORISM*, *supra* note 73, at 7; DUFFY, *supra* note 41, at 19–20 (quoting G.A. Res. 50/53, ¶ 1–2 (Dec. 11, 1995)).

Thus, the definition of terrorism proposed in this article is:

Any act of serious, deadly or potentially deadly violence deliberately committed against the general public with the intent to spread panic and with the purpose of unlawfully compelling a group to do or abstain from doing any act. Conduct protected by the ICCPR, ICESCR, and other human rights treaties shall not be subject to this definition. Conduct during the course of an armed conflict or against military targets shall not be subject to this definition.

This proposed definition applies to any actor, requires a high threshold of the type of conduct that constitutes terrorism, protects innocents in the general public, and requires not just that the actor intended to spread terror, but also had the purpose of compelling action or inaction of a target group, unlike some definitions in which either the intent to spread terror or to compel action is sufficient alone. It explicitly excludes protected conduct and carves out an exception for the well-regulated area of armed conflict. It also considers the fact that an exception only for armed conflict may expose actors who are truly “freedom fighters”—that is, fighters who may yet fall outside the Geneva Conventions as a result of the absence of an armed conflict—to liability for terrorism while they are engaged in a legitimate military struggle.

This article recommends that the UN General Assembly and the Security Council adopt the proposed universal definition of terrorism. The universal definition should be applicable to a criminal penalty and should therefore be commensurate with the rule of law as it pertains to criminal law. After adopting the proposed definition, the General Assembly should draft a Convention on the Prevention and Punishment of the Crime of Terrorism, modeled on the Genocide Convention, and should add the crime of terrorism to the jurisdiction of the ICC through a revision of or additional protocol to the Rome Statute.

IV. CONCLUSION

Given that current counter-terrorism efforts have violated fundamental human rights the world over¹⁴⁹ and the increasing evidence that they may have exacerbated the phenomenon,¹⁵⁰ it is long past time for change. Ní Aoláin has posited that addressing the conditions conducive to terrorism “is an inherently political project . . . that threatens established political elites.”¹⁵¹ Her statement likewise applies to the definitional problem: those in power are loath to allow even the possibility that their actions could be labeled as terrorist, and furthermore derive

¹⁴⁹ See *supra* text accompanying notes 76, 78, 81, 87–93.

¹⁵⁰ See *supra* text accompanying notes 7, 98–99.

¹⁵¹ Ní Aoláin, *supra* note 142, at 194.

great benefit from the ability to define terrorism as they see fit and employ draconian measures against those to whom they have assigned the label. By defining terrorism as a specific act capable of being carried out by any actor, the international community can lessen the extent to which it can be deployed for political gain. The international community would also be able to objectively view a situation labeled as an act of terrorism and determine if a given state's response was justified. If an event were determined not to be an act of terrorism, a state's use of draconian response measures could be condemned. This could reduce the human rights violations associated with the war on terror.¹⁵² The word terrorism must be stripped of what is often purely rhetorical value and potential for abuse, and instead be applied evenly and specifically to a particular act committed with a specific intent toward a particular end.

Though defining and criminalizing genocide after World War II did not put an end to the abhorrent practice, there has not been another genocide on the scale of the Holocaust since.¹⁵³ This is not to understate the horrific loss of life and damage caused by later genocides; rather, it is to suggest that international condemnation coupled with a legal definition and criminalization of genocide may have played a role in preventing even greater tragedy. In the end, defining and “[c]riminaliz[ing] terrorism is only one small part of the overall international response to terrorism.”¹⁵⁴ However, as the international community has not yet adopted a universal definition of terrorism, abuses mount, and terrorism persists, defining terrorism is perhaps the most crucial part to preventing it.

¹⁵² See SAUL, *DEFINING TERRORISM*, *supra* note 73, at 5, 48 (identifying “the pragmatic need for legal controls on political discretions in efforts against terrorism” as another reason for a universal definition of terrorism).

¹⁵³ Several examples of genocides since World War II include the Cambodian genocide perpetrated by the Khmer Rouge in the late 1970s, the Rwandan genocide perpetrated by the Hutus in 1994, the Bosnian genocide perpetrated by Bosnian Serbs in 1995, and the Darfuri genocide in Sudan which began in the early 2000s and has only recently begun to subside.

¹⁵⁴ SAUL, *DEFINING TERRORISM*, *supra* note 73, at 19.