

17 September 2012

The Challenge of Defining Terrorism

Establishing a universally accepted definition of terrorism remains a work in progress. Headway has been made, Ben Saul confirms, but an ultimately successful definition will have to walk a fine line. It will, in other words, have to reconcile political expediency with international law.

By Ben Saul for ISN

Despite the vast mobilization of global attention and resources to countering terrorism, the international community remains deadlocked on the fundamental question of what actually constitutes 'terrorism'. Even the shock of 9/11 was not enough to break a century of impasse about how to define it in international law.

While the world has nevertheless managed to successfully pursue many practical counter-terrorism measures, the failure to define terrorism continues to hinder maximally effective global cooperation. Moral ambiguity and political incoherence persists at the heart of global counter-terrorism, not least because there political agreement on the morality and legitimacy of certain types of political violence is still lacking.

A World of Definitions

At first sight it may seem obvious as to what should be considered as an act of terrorism. As former British Ambassador Sir Jeremy Greenstock said, 'what looks, smells and kills like terrorism, is terrorism'. The ordinary textual meaning of 'terrorism' refers to extreme fear. A literal meaning is not, however, particularly helpful in legally defining terrorism, since many forms of violence, from mugging to rape to piracy, can cause terror, yet such crimes are not generally thought of as 'terrorism'.

Instead, terrorism is often regarded as a form of illegitimate *political* violence. Again, this raises immediate problems. Some political violence which causes fear is regarded as legally legitimate, such as killing under the laws of war or to restore order during civil unrest. Other political violence may be technically illegal but seen as morally or politically legitimate, such as the assassination of a dictator or rebelling against an authoritarian government.

Disagreement about terrorism is not simply focused upon linguistics, but also basic moral, political and ideological questions about the legitimacy of using violence. Reaching global legal agreement on defining terrorism presupposes agreement about who is entitled to use violence, against whom, and for what purposes. In a world of diverse political, moral and cultural systems, this is no easy task, and explains why disagreement persists.

The League of Nations first sought to define and criminalize terrorism as long ago as the 1930s, but its efforts were undermined by the Second World War. Similar efforts by United Nations General Assembly in the 1970s were thwarted by the politics of decolonization and the Cold War. Whereas developed countries focused on non-state terrorism, developing and socialist countries emphasized 'state terrorism' by colonial powers, while often regarding national liberation violence as a 'just cause' that often justified 'terrorist' means.

More recent efforts to define terrorism can be traced to a ground-breaking Declaration by the General Assembly in 1994, which described terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.

The focus on 'political' violence and causing 'terror' was abandoned in later UN forums. Between 2000 and the present, the UN Sixth Legal Committee has been drafting a universal crime of terrorism for an international treaty. The draft treaty defines terrorism as intentionally causing death or serious injury, or serious damage to public or private property, 'to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act'.

The draft definition is based on that found in a widely accepted 1999 treaty against terrorist financing. This approach is also partly supported by a 2004 Security Council resolution. In 2011, the UN Special Tribunal for Lebanon even claimed that a similar definition of terrorism now amounts to a crime under customary international law.

Despite this apparent progress towards definition, there remain a number of contentious and unresolved issues. First, the UN drafting committee cannot agree on the extent to which liberation violence in armed conflict should be covered, and how far government forces should be exempt from it. Who is a terrorist thus remains unsettled.

Second, the Security Council has suggested that coercive violence is only terrorism if it also qualifies as a crime under existing criminal treaties (such as on hijacking or hostage taking). A UN human rights expert on terrorism also prefers the Council's narrower approach, even if it risks excluding certain violence not covered by the existing treaties (such as terrorism using small arms, or attacks on infrastructure).

Third, many common law countries (such as Britain, Canada, Australia, South Africa and New Zealand), and such civil law countries as Italy, insist that terrorism requires a political, religious or ideological motive - in addition to intimidation or coercion. For them, terrorism is not terrorism unless the violence is motivated by such aims, differentiating it from ordinary private violence (such as terrorizing people for financial gain). This view reflects the 1994 Declaration by the General Assembly.

Finally, the Lebanon Tribunal's decision has been met with derision by most international lawyers. The fact that the UN cannot agree on a treaty defining terrorism is proof enough that there cannot yet exist a globally agreed crime.

Why Should Terrorism Be Legally Defined?

While the notion of terrorism is notoriously slippery, the label is so often used precisely because of its power to stigmatize and delegitimize those to whom it is applied. One reason to legally define terrorism is to bring it within the law, and rescue it from being deployed as a term of political abuse. The word terrorism has popular symbolic resonance, and encapsulates a widely held sentiment that certain kinds of extreme political violence deserve to be condemned. International law should serve the global community's instinct by criminalizing terrorism as a global public wrong. It can only do so, however, if it can first agree on when political violence is legitimate and illegitimate.

Through the United Nations, many resolutions have expressed the international community's opinion that terrorism is repugnant because it (1) seriously undermines human rights; (2) jeopardizes political order and peaceful, deliberative politics (replacing speech with violence); and (3) can threaten international peace and security. These are principled reasons for defining and criminalizing terrorism, to protect vital community values and interests and to express the world's condemnation of it.

There are also very pragmatic reasons for defining and criminalizing terrorism. Before 9/11, the lack of definition was legally inconsequential, since no legal rights or obligations hinged on the term 'terrorism'. The world avoided the term and instead focused on adopting practical treaties dealing with particular methods of terrorism, such as hijacking or hostage taking, but without calling it 'terrorism' as such.

Since 9/11, that has changed. In Resolution 1373 of 2001, the Security Council used its powers to *require all States* to implement measures against 'terrorist acts' and 'terrorists', according those terms operative legal significance but without defining them. (The Council's later definition in 2004 was not legally binding.) As a result, governments were authorized to unilaterally and subjectively define terrorism, leading to extremely divergent and vague definitions – many of which criminalize legitimate opponents and violate human rights.

Whether one dislikes the term terrorism, it now has legal consequences and cannot be ignored. Defining terrorism would help to guide states in legislating against terrorism and confine the scope of cooperation required by international law only to conduct that is genuinely terrorist activity. It would also enable practical law enforcement cooperation, particularly the extradition of terrorists for commonly agreed terrorist crimes, and cooperation between law enforcement agencies in investigations and intelligence.

Towards a Working Definition

The best definition of terrorism is one which would confine itself to violence committed to intimidate a population or coerce a government or international organization in the name of a political, religious or ideological purpose. At the same time, the definition should exclude legitimate forms of political protest in a democratic society which are not commonly regarded as 'terrorist' in nature.

As regards liberation violence and state terrorism, the simplest solution is to leave such violence to be regulated by the existing laws of war. Killing civilians in violation of international humanitarian law is already a war crime, whether committed by state or non-state forces. Adding further liability for 'terrorism' to such crimes is a rather pointless theoretical exercise.

It is more difficult to address violence outside armed conflict which may be considered by many to be legitimate, yet might technically constitute terrorist crimes – that is, political violence to coerce a government. Political rebellion is the hardest example. Rebels who use illegal violence against the police or military in a dictatorship might be morally and politically justified as a last resort; Syria today is a good example.

The Universal Declaration of Human Rights even refers to the importance of upholding human rights so as to avoid the need to rebel. Hannah Arendt famously said that many democracies, from Rome to the United States, were founded in crime – what was once called rebellion, and what some now might call terrorism.

Governments have always repressed rebels using their own criminal laws. But it is a different matter altogether for international law to criminalize rebellion, to extradite rebels back to face dictators, and for the world to become complicit in political repression. As long as rebels do not indiscriminately kill

civilians, proportionate political resistance should not be defined as terrorism. International law should preserve the historical zone of freedom accorded to rebels who play by the rules of humanity.

It remains to be seen whether the international community will adopt a principled definition of terrorism. UN negotiations begin again in 2013, and delegations remain poles apart on the key controversies. At the same time, the world should be wary of bad compromises for the sake of moving on. No definition is still better than one which violates human rights - whether by punishing rebels, or immunizing state forces or liberation movements from instrumentally murdering civilians.

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Publisher

[International Relations and Security Network \(ISN\)](#)

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