

THE IMPOSSIBILITY OF DEFINING TERRORISM

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The legal definition of terrorism has very high importance. This is so both because it determines which actions count as acts of terrorism, and hence who is regarded as a terrorist, but also because the definition of terrorism triggers a range of controversial extensions of police and prosecutorial powers. This article provides a comprehensive analysis of the central dilemmas that must be confronted to develop an adequate definition of terrorism. These include the questions of whether acts count as acts of terrorism only if they have a particular political purpose, what acts are sufficiently harmful to count as acts of terrorism, whether acts of terrorism are distinguished by the identity of those targeted, whether acts of terrorism are distinguished by the methods that terrorists use, and the importance of the identity of the terrorists themselves. It examines a range of legal definitions across jurisdictions in the light of the framework developed. It is argued that there is no prospect for a fully adequate definition of terrorism: the definition will inevitably be over-inclusive. A number of reasons explain this, but the central one is that courts lack the expertise to distinguish adequately legitimate political resistance from terrorism. Tensions that this problem has created in the case law are explored, not only in the criminal law, but also in the civil law. We then briefly examine the extent to which the discretion of officials can ameliorate this problem, highlighting the weakness of this solution. Overall, we conclude, disappointingly, that the standards that we ought to find in other areas of criminal justice cannot be met in the area of terrorism.

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We are often secure in our knowledge that a terrorist attack has been committed when we see it, yet a credible definition of terrorism eludes us. The IRA bombing of the Grand Hotel in Brighton on October 12, 1984, the lethal destruction of the Twin Towers by al Qaida on September 11, 2001, the beheading of the American journalist Daniel Pearl by a Pakistani terrorist organization on February 1, 2002, the Bali bombings of October 12, 2002, and the attack on the London Underground on July 7, 2005, are all clearly acts of terrorism.

Any adequate definition of terrorism must capture these cases. They share some salient features. In each case death was caused. Each occurred outside the context of war. In each case, some political, religious, or ideological purpose was served. But the individuals who perpetrated the acts were not state actors, although some had ambitions (ambitions that were in some cases realized) to become state actors. In each, a public spectacle was created, causing outrage and fear in many quarters but celebration in others. Which of these features renders these acts terrorist acts? Which should play a role in the legal definition of terrorism?

The difficulties of finding an adequate definition are well recognized politically. Lord Carlile of Berriew, reviewing the definition of terrorism in U.K. law in 2007, indicated that he was unable to find a paradigm definition of terrorism and that it may be impossible to do so.¹ In this he concurred with Lord Lloyd of Berwick, who conducted perhaps the most important review of terrorism legislation in the United Kingdom in 1996.²

Our aim is not to propose a complete definition of terrorism. Rather, we aim to distinguish different features of the problem of defining terrorism, drawing out different dilemmas to which these features give rise. These dilemmas, we will suggest, are fairly intractable; no definition in law will be ideal. This is not simply because defining terrorism is subject to the push and pull of politics. It is because different ambitions that we ought to have for the definition of terrorism pull in different directions. Our aim is thus to explore why making progress on the definition of terrorism is so difficult even for those who are careful and well-motivated.

1. *The Definition of Terrorism* (HMSO 2007) Cm 7052.

2. *Inquiry into Legislation against Terrorism* (HMSO 1996) Cm 3420.

Perhaps the most serious problem that we identify is the following trilemma. Horn 1: Define terrorism narrowly to exclude from the definition all attacks on the state and its officials. In doing so terrorism law will not be suitable for the purposes that we have for it. Horn 2: Define terrorism broadly to include all attacks on the state and its officials. In that case terrorism law will in principle, and probably in practice, apply to legitimate freedom fighters. Horn 3: Define terrorism in a way that discriminates between legitimate and illegitimate attacks on the state and its officials. This involves a range of legal actors making political judgments that they have inadequate expertise to make.

This trilemma illuminates the inevitable role of legal process in ensuring that terrorism law operates fairly. But the legal process around terrorism law is ill-suited to the determination of what are often political judgments. State officials charged with the task of applying the law lack the expertise to discriminate adequately between legitimate freedom fighting and terrorism (because this is not their function), almost certainly resulting in the restriction of the liberty of some people whose conduct is not morally wrong.

The structure of the essay is as follows. In Section I, we outline two ambitions that we ought to have for the definition of terrorism and sketch five different dilemmas that arise for such a definition. The five dilemmas are: (1) how to determine what purpose a person must have to be a terrorist; (2) how to determine the kinds of acts that can count as acts of terrorism; (3) who can be a target of terrorist action; (4) what kinds of methods terrorists must have; and (5) what kind of agent can be a terrorist. These dilemmas are evaluated in Sections II–VI. We demonstrate just how intractable these dilemmas are.

A natural response to these intractable dilemmas is to rely on official discretion to ensure the just application of terrorism law in practice. In our conclusions, we highlight significant limitations of official discretion as a form of protection against unjust treatment. We conclude that there is no choice in terrorism law but to tolerate some level of injustice, not only in practice but also in the law itself.

I. TWO AMBITIONS FOR A DEFINITION OF TERRORISM

The definition of terrorism should meet two ambitions. One is that it corresponds reasonably closely to the moral idea of terrorism. The definition

of terrorism ought not to label as terrorists those whom the label does not fit. In defining terrorism, we ought to be guided by the principle of fair labelling.³ This is partly so that terrorism law has its appropriate condemnatory effect: it marks out an importantly distinctive wrong that has widespread public recognition.⁴ The term “terrorism,” as it appears in public discourse, may be contested and to some extent unclear in its scope and application. Nevertheless, there is some conduct, such as that which we identified at the beginning of this article, that clearly falls within the public understanding. There is other conduct, including serial killing and organized crime for profit, that though it has something in common with terrorism, falls outside of the public understanding of terrorism. What we need to do is to identify the moral core of terrorism, if indeed there is one, and ensure that the definition in the law does not depart too far from this core.

The other ambition is that the definition is fit for purpose: that it appropriately triggers the use of terrorism law. The body of terrorism law consists of an extended set of state powers that apply where terrorism is concerned. The definition of terrorism determines when these powers are triggered. They include powers at various stages of the criminal process, as well as some noncriminal or quasi-criminal measures. These powers may be used only where terrorism is concerned, and hence their application depends on the definition of terrorism.

The powers that are found in terrorism law are very extensive across jurisdictions. For example, the police and security services have an extended range of surveillance and other investigatory powers, including stop-and-search powers, when they are investigating terrorism.⁵ The period

3. For discussion of this principle, see, e.g., A. ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 78–80 (6th ed. 2009); J. Chalmers & F. Leverick, *Fair Labelling in Criminal Law*, 71 *MOD. L. REV.* 217 (2008); V. Tadros, *Fair Labelling and Social Solidarity*, in *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH* 67–80 (J. Roberts & L. Zedner eds., 2012).

4. This ambition is familiar in discussions of the definition of terrorism. See, e.g., B. Saul, *Civilising the Exception: Universally Defining Terrorism*, in A. MASFERRER, *POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM* 79–100 (2012).

5. See, e.g., stop-and-search powers under § 60 Protection of Freedoms Act 2012 (and its predecessor, §§ 44 and 45 Terrorism Act 2000) in the United Kingdom; the wide powers of intelligence and information gathering, and detention under the U.S. PATRIOT Act 2001.

of precharge and pretrial detention is increased for cases involving terrorism.⁶ A wide range of broad and often vaguely defined criminal offenses apply to terrorism, including offenses relating to the planning and preparation of terrorist acts,⁷ membership, support, or wearing the uniform of terrorist organizations,⁸ terrorist financing,⁹ encouraging acts of terrorism, and failing to provide the police with assistance in preventing acts of terrorism or apprehending terrorist suspects.

Furthermore, regimes of civil detention have been created to apply to those suspected of being involved in terrorism. Various civil measures to control terrorist financing, including forfeiture of terrorist property and asset freezing,¹⁰ have been applied. And immigration powers are extended when applied to those who are suspected of being involved in terrorism or terrorism-related organizations.

These measures do, of course, vary from jurisdiction to jurisdiction. However, there is a certain degree of uniformity in these measures, which is unsurprising given international pressure, especially from the United States and from the European Union, to assist in the global fight against terrorism.¹¹

Of course, we may doubt whether all of these powers ought to exist, or ought to exist in their current form. If there are problems with them, reformulating the definition of terrorism will not solve those problems. They must be considered on their own merits. We assume that there are *some* extra powers that ought to exist to control terrorism, and the definition of terrorism ought to be defined in a way that triggers whatever extra powers there ought to be.

Developing a definition of terrorism requires us to identify and resolve a number of distinct dilemmas. These include the following:

6. See, e.g., extended detention powers under Schedule 8 of the Terrorism Act 2000 in the United Kingdom.

7. See, e.g., § 5 of the Terrorism Act 2006, prohibiting acts preparatory to acts of terrorism.

8. See, in the United Kingdom, Part II of the Terrorism Act 2000, as amended by the § 21 of the Terrorism Act 2006.

9. See, in the United Kingdom, Part III of the Terrorism Act 2000.

10. Terrorism Act 2000 §§ 23–31, as amended by the Counter-Terrorism Act 2008 § 34–9.

11. See J. Hodgson, *Legitimacy and State Responses to Terrorism: Britain and France*, in *LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION* (J. Tankebe & A. Liebling eds. 2013); *EU COUNTER-TERRORISM OFFENCES: WHAT IMPACT ON NATIONAL LEGISLATION AND CASE-LAW?* (F. Galli & A. Weyembergh eds. 2012).

- (a) *The Terrorist Purpose.* Is terrorism restricted to the pursuit of certain goals, for example, political goals? If so, is *any* political goal sufficient to amount to a terrorist purpose? Are nonpolitical goals sufficient for a terrorist purpose? And could there be acts of terrorism that lack any particular goal?
- (b) *The Terrorist Action.* What kinds of act count as acts of terrorism? Should we include only acts that kill or cause serious injury, or should we also include damage to property, or threats to do any of these things?
- (c) *The Terrorist Target.* Can anyone be a target of a terrorist action? Are terrorist actions restricted to attacks on noncombatants, and if so, how do we define “combatant”? Or can combatants in an armed conflict be terrorist targets?
- (d) *The Terrorist Method.* Do terrorist acts need to relate to the pursuit of the terrorist purpose in particular ways? Is terror central to terrorism, or can acts that neither terrorize nor intimidate people be acts of terrorism?
- (e) *The Terrorist Agent.* Can anyone commit an act of terrorism? Do terrorists always act in groups, or can individuals acting alone be terrorists? Can a state, or its representatives, commit acts of terrorism?

In aiming to resolve these dilemmas we must keep the two ambitions for the definition of terrorism in mind. We will not aim to resolve all of them ourselves but rather to highlight the difficulties in resolving them. Given that there are many dilemmas of terrorism, there are many potential definitions.¹² There is no way to canvas them all. Isolating each feature of the definition, though it fails to consider the way in which features interact with each other, is the best way to proceed.

II. THE TERRORIST PURPOSE

The terrorist purpose determines whether, to constitute an act of terrorism in law, that act must have a specific purpose. For example, acts of terrorism might be restricted to acts that have certain political ambitions, or may extend to acts done in service of religious goals, or other goals. It seems

12. For other approaches to defining terrorism, see, e.g., T. Weigend, *The Universal Terrorist*, 4 J. INT'L CRIM. JUST. 912 (2006); C. Walker, *The Legal Definition of 'Terrorism' in United Kingdom Law and Beyond*, in PUBLIC LAW 331 (2007).

somewhat appropriate to restrict acts of terrorism according to the purpose. The acts of terrorism that we are most familiar with have political or religious ambitions. However, doing so also poses problems. We will identify some approaches to this question from different jurisdictions and evaluate difficulties that arise.

Some definitions of terrorism restrict the terrorist purpose, but not to political aims. For example, § 1 of the Terrorism Act 2000 in the United Kingdom indicates that acts count as acts of terrorism only if they are pursued for the purpose of “advancing a political, religious, racial or ideological cause.” The acts referred to in our opening paragraph satisfy this condition. This aspect of the U.K. definition is mirrored in other common law jurisdictions,¹³ but most definitions of terrorism do not include this feature.

The definition recommended by the High-Level Panel on Threats, Challenges and Change to the U.N. Security Council (HLP) refers to “action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act . . . is to intimidate the population, or to compel a Government or an international organization to do or to abstain from doing any act.” Agreement even on this definition could not be secured in the Council for the reason that some member states thought that such action would sometimes be justified.¹⁴ Section 802 of the U.S. PATRIOT Act of 2001 also defines terrorist acts as those that appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government, or to affect government conduct. There is no requirement for political or religious motivation.

The German definition reproduces that set out in the 2002 European Union Framework Decision on combating terrorism.¹⁵ Terrorism is defined as specified acts that aim at seriously intimidating the population,

13. For example, the Australian definition, introduced by § 100.1(1) of the Security Legislation Amendment (Terrorism) Act 2002 (Cth) and the Canadian definition in § 83.01 of the Canadian Criminal Code, as well as in Hong Kong and South Africa.

14. For discussion, see B. Saul, *The Definition of “Terrorism” in the UN Security Council: 1985–2004*, 4 CHINESE J. INT’L LAW 141 (2005); and J. Boulden, *Terrorism*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 427–36 (T.G. Weiss & S. Daws eds., 2007). The U.N. Special Tribunal for Lebanon claimed to have identified a customary international definition of terrorism (though it actually applied Lebanese law), but it is doubtful that this is true. See, further, Saul, *supra* note 4.

15. Council Framework Decision of 13 June 2001 on combating terrorism (2002/475/JHA).

at unlawfully coercing a public authority or international organization through the use or threat of force, or at significantly impairing or destroying the fundamental political, constitutional, economic, or social structures of a state or international organization, and which may seriously damage a state or an international organization. Again no ulterior purpose needs to be shown.

The French definition of acts of terrorism also requires no political or other motivation.¹⁶ Article 421-I of the *Code pénal* lists five sets of actions that constitute acts of terrorism “where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror.” And although the Canadian definition included a requirement for proof of religious or political motivation, this was subsequently challenged and found to be a disproportionate limit on fundamental freedoms.¹⁷

Although the U.K. definition is comparatively narrow in requiring a terrorist purpose, it may also be considered too broad. As it stands, § 1 could be applied to some forms of industrial action, especially those related to essential services and so might create a serious risk to the health or safety of the public under § 1(d).¹⁸ It might also apply to protests and demonstrations designed to influence the government, where some pockets of violence occur, such as those against the Iraq war or the increase in student fees. When the bill that became the Terrorism Act 2000 was debated in Parliament, it was explicitly stated that trade disputes were not intended to fall within the definition.¹⁹ If that was the aim, an exception should have been included in the statute rather than leaving the matter to prosecutorial discretion. Clarity on this matter is especially important in a context where

16. The French might be said to have invented the term “terrorism.” It was first used to describe the Reign of Terror instituted by the Jacobin government. Although the Jacobins were also revolutionaries, “terrorist” was not used in an antigovernment context until 1866 (in relation to Ireland) and 1883 (in relation to Russia). See also, Hodgson, *supra* note 11.

17. See K. Roach, *The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive*, in LAW AND LIBERTY IN THE WAR ON TERROR 39 (A. Lynch, E. MacDonald, & G. Williams eds., 2007).

18. Ben Golder & George Williams, *What is ‘Terrorism’? Problems of Legal Definition*, 27(2) UNSW L. J. 270 (2004), give, as an example of this, a long-running nurses’ dispute where hospital staffing levels were seriously reduced. Strikes and protests are excluded from, e.g., the Australian and Canadian definitions of terrorism. See also, Saul, *supra* note 4.

19. See the comments of Charles Clarke, HC Deb Standing Committee D, 18 January 2000, col. 31.

the police are increasingly using their counterterrorism powers against those engaged in public protest.²⁰

It is difficult to know whether the presence of a political motive ought to be part of the definition of terrorism. Whether there is more reason to prevent violent acts that are done for a political motive depends on two things. The first is the quality of the political aim. Take the destruction of property by animal rights protesters with the aim of preventing animal testing for cosmetic products. Other things being equal, some might think that the destruction of property for this reason is not as grave morally as the destruction of property for no reason. That depends on whether cosmetic companies have a moral right to test their products on animals. Destruction of property to prevent animal testing for life-saving medicines is more gravely wrong, we might conclude, if animal testing is justified. Other things being equal, better to pursue a good end by evil means than to pursue a bad end by evil means.

The other consideration is the institutional context in which the act takes place. It is important to remember that U.K. terrorism law applies to those engaging in struggles anywhere in the world, for any cause, and in any political context.²¹ In some contexts pursuing political aims violently might be wrong in part because it subverts a legitimate political process. The extent to which destroying property to prevent animal testing is wrong depends in part on the availability of alternative means to secure this end. For this reason, terrorism in democratic states might be considered worse than terrorism in nondemocratic states. Terrorism undermines the assurance each citizen has that all political conflicts will be resolved through the democratic process. Other things being equal, it is better to pursue our aims through nonviolent means. The democratic process may be valued both for its tendency to produce good outcomes and for the respect that it symbolizes and fosters among citizens.

This argument does not apply in nondemocratic states, especially states that restrict free speech. In those states there will normally be no adequate peaceful means by which legitimate political aims may be pursued. Terrorism may be wrong for other reasons, but in these states it

20. See the examples discussed in this report by the United Kingdom's Joint Committee on Human Rights, *DEMONSTRATING RESPECT FOR RIGHTS? A HUMAN RIGHTS APPROACH TO POLICING PROTEST* (March 2009).

21. See § 1(4) of the Terrorism Act 2000.

lacks the wrong-making feature that we are focusing on here. These moral distinctions are difficult to capture within a legal definition.

Earlier international definitions of terrorism recognized the right to self-determination and excepted acts of resistance against oppressive (and typically colonial) regimes. In contrast, the U.N. Draft Comprehensive Convention against International Terrorism provides no exceptions within the definition of terrorism.²² This has been the sticking point for some nations, who in discussions in April 2011, continued to underline their requirement for a clear distinction to be drawn between terrorism and the legitimate right of peoples to self-determination and to resist foreign occupation.²³ The legitimacy of the political purpose of the action is also irrelevant to U.K. terrorism law. Section 1(4)(d) of the Terrorism Act 2000 extends liability to those planning terrorist acts designed to influence non-U.K. governments. The nature of these governments is not qualified in any way. They are not required to be legitimately established or democratically elected, or to be signatories to any international covenant or convention.

The Court of Appeal discussed the scope of this provision in *R v F*.²⁴ In that case the appellant was a Libyan man whose friends and family members had allegedly been murdered by, or on behalf of, Gaddafi's regime. He was granted asylum in the United Kingdom, demonstrating "that he has a well justified fear of persecution if he were returned to his native country."²⁵ He was charged with two counts of being in possession of a document or record likely to be useful to a person committing or preparing acts of terrorism under § 58(1)(b) of the Terrorism Act 2000. He denied one charge and asserted that the second related to the establishment of a movement opposing the Libyan regime in which only Colonel Gaddafi himself, his secret police, and his army would be targeted. Civilians and foreigners

22. Article 6 states, "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the present Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature." See Annex III of the Report of the Ad Hoc Committee established by U.N. General Assembly Resolution 51/210 (Dec. 17, 1996), 6th Session (Jan. 28–Feb. 1, 2002).

23. See the Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 (Dec. 17, 1996), 15th session (April 11–15, 2011). These discussions are in their twelfth year.

24. [2007] EWCA Crim 243, [2007] QB 960.

25. [2007] EWCA Crim 243, ¶ 3.

were not to be harmed. As a matter of construction, he argued that the Terrorism Act 2000 is not designed to protect tyrants and dictators, and that the restrictions on the rights and liberties of U.K. citizens entailed by the Act²⁶ should not be for the benefit of wholly undemocratic regimes.

The Court rejected this reasoning. It found no reason to construe the Act's reference to "the government of a country other than the United Kingdom" as implying a country that is similarly legitimate or representative; nor did it think this was an assessment that a jury could make. The Court stated:

... terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause.²⁷

Consequently, F's claim that his actions should not be construed as being connected with terrorism as defined under § 1 of the Act failed.²⁸ His second ground of appeal inevitably failed for the same reason.²⁹ He argued that he had a defense of reasonable excuse under § 58(3) of the Act for the possession of documents, in that they originated as part of an effort to challenge an illegal or undemocratic regime. The Court ruled that "for such an excuse to be 'reasonable', the carefully constructed definition of terrorism in s. 1 of the Act would become inoperative."³⁰

However, this analysis has not always been rigorously applied, and for good reason. In *R v AY*,³¹ the defendant was a Somali who possessed the

26. The Court of Appeal did not contest the submission ([2007] EWCA 243 at ¶ 14) that "the legislation as a whole creates serious inroads into and restrictions on what we in this country have for many years regarded as inalienable freedoms, now cemented and amplified in the European Convention of Human Rights (ECHR)."

27. *Id.* at ¶ 32.

28. As firearms and explosives were anticipated, under § 1(3) of the Act, there was in fact no requirement to show that the actions were designed to influence the Government of whatever country. *See* ¶ 28.

29. *See also, SS (Libya) v Secretary of State for the Home Department*, [2011] EWCA Civ 1547, where, in the context of immigration and the exception to protection under the Refugee Convention (discussed further below), the Court of Appeal held that it was "very difficult to categorise as anything other than terrorism" the death of 165 Libyan officials and the injury of 159 others resulting from three attempts to assassinate Colonel Gaddafi.

30. [2007] EWCA 243, ¶ 38.

31. [2010] EWCA Crim 762, [2010] 1 WLR 2644.

Mujahideen Terrorist Handbook, the Mujahideen Explosives Handbook, and videos of instructions on the making of a ball-bearing suicide vest and improvised explosive devices. He was charged with the same § 58 offense and raised the reasonable excuse defense. He argued that he was entitled to an excuse because he downloaded the material in the belief, held on reasonable grounds, that the Somali people, and in particular those associated with the Islamic Courts Union (ICU; an organization to which he belonged), had been the victims of unlawful and disproportionate force and needed to be defended using armed force. The ICU was not at the time a proscribed organization.

It was held that if he could demonstrate that the information was to be used solely for defensive purposes, he might be entitled to a defense of reasonable excuse for the purposes of § 58(3). Implicitly, it would not amount to a reasonable excuse if the intentions of the defendant were that the information should be used for offensive reasons in the course of a civil war. It would not amount to a reasonable excuse for holding the material even if it was to be used for a combination of offensive and defensive reasons. The court suggested that the fact that the side is the “better” or more respectable side is irrelevant, because what a combat group in a civil war does is inevitably not simply defensive, but is a mixture of defensive and offensive operations.³²

Referring to the distinction between offensive and defensive participation in a civil war is hardly satisfactory. Supporting offensive action in a war is often justified on self-defensive grounds. In war the best form of defense is often attack. If the Court were right, any information that George Orwell possessed which would have assisted him in the fight against fascism in the Spanish Civil war would have rendered him a criminal—hardly a welcome result.

Furthermore, the distinction between defense and offense in the course of war is hardly clear-cut, and may be meaningless. Does not almost all defensive conduct in war involve attacking one’s enemy? Even in domestic self-defense the distinction is unclear. In some cases it seems clear that my

32. [2010] EWCA Crim 762, para 20. It is somewhat unclear from the judgment whether the intention was to rule out from the scope of the excuse all cases where the defendant was not intending to support purely defensive action. It is worth noting that it was the defense who raised the possibility that the defense should be available if the defendant was intending to act in defense of others.

acts are purely defensive. If you try to punch me and I hold your wrist to prevent you doing this, I act in a purely defensive way. But suppose I strike my assailant on the arm to get her to drop a weapon. Am I acting purely defensively, or also offensively?

In the context of war, things are even more difficult to evaluate. If those attacked in an unjust war perpetrate strikes on enemy combatants, are their acts purely defensive or also offensive? If this is interpreted as the use of force only to restrain an ongoing attack, the category is almost redundant: no use of force in armed conflict is purely defensive in the sense that grabbing a person's wrist is purely defensive.

But if striking a person's arm to get them to drop a weapon is purely defensive, the category is very extensive. Many wars are conducted for defensive reasons, and once war is under way, there is a sense in which all combatants are defending themselves and their citizens against attack. Perhaps almost all acts of war ought to count as defensive when the cause one is fighting for is defensive, for they all aim at disarming one's enemy and preventing their attacks. How a jury is to evaluate whether a person's actions are "purely defensive" is thus completely unclear. It may include no acts of war at all or very many acts of war.

A range of difficult questions must be answered to determine whether violent resistance against tyrannical governments is justified. For example, violent action for political ends may either disrupt or enhance the power of illegitimate regimes. It is often very difficult to know which outcome will be realized. Violent resistance is justified, we might think, only if it has some prospect of success.³³ When it fails, it can strengthen the hand of tyrannical regimes by helping them to persuade their citizens that the use of emergency powers is necessary for peace and stability, or at least to provide a public rationale for the use of those powers.

Furthermore, although the struggle against tyranny is often to be welcomed, those struggling against illegitimate regimes may not always count as legitimate freedom fighters even if they have good prospects of success. This is so for two reasons. First, a group's ends may not always justify its means, for example, targeting innocent civilians. We will discuss this further in a moment. Secondly, whether a group's aims of overthrowing illegitimate

33. Although, see D. Statman, *On the Success Condition for Legitimate Self-Defense*, 118 ETHICS 659 (2008).

governments are to be supported depends on their own political ambitions and prospects.

The recent conflict in Libya illuminates this problem. Few shed a tear over the departure of the Gaddafi regime, but the quality of the regime to arise in its wake is unclear. This is one reason why the U.N. mandate in Libya was only to protect civilians and not to further the ends of those struggling against Gaddafi,³⁴ although as we will see in a moment, not all political actors acknowledge this. It may be that the appellant's own cause in *R v F*, were it successfully pursued, would have done little to improve the situation in Libya for his political ambitions were unclear.

Despite these qualifications we should not assume that it is always wrong to assist one side in a civil war against another, and hence we should not criminalize possession of information that provides such assistance unless defendants are given with the opportunity to demonstrate that things would be better were their side to win. Greece, for example, provides a statutory defense for acts aimed at establishing or restoring democratic regimes or in the exercise of fundamental or political civil rights.³⁵

In short, the primary difficulty of the terrorist purpose is the following: Whether the ends of violent action exacerbate, ameliorate, or negate the wrongfulness of violent action is a contingent matter. The idea that it is always wrong to pursue political goals by violent means is obviously false. It may always be wrong to do so if the violence targets civilians. But, as *R v F* demonstrates, not all freedom fighters target civilians.

Perhaps it might be argued that freedom fighters residing in the United Kingdom ought not to support or engage in freedom fighting unless the U.K. government has explicitly committed itself to supporting these causes. It would be wrong, it might be argued, for citizens to act on their own judgments rather than those of the government in supporting political resistance abroad. This seems to us much too restrictive of the liberty of citizens to support the range of just causes around the world to which that the government has not committed itself. Furthermore, even if the argument were correct, it would be wrong to label those who support just causes as terrorists on this basis.

To summarize, the terrorist purpose provides us with the following dilemma. The fact that a person kills with a political purpose may exacerbate

34. U.N. Security Council Resolution 1973 (Mar. 17, 2011).

35. Lord Carlile, *The Definition of Terrorism* (HMSO 2007) Cm 7052.

the wrongness of their conduct or it may ameliorate or even justify attacking others, depending on the quality of the purpose and the quality of the act done in service of it. In referring to the terrorist purpose in the definition of terrorism, but without specifying what that purpose is, terrorism almost inevitably includes legitimate freedom fighters. Even the U.K. courts, though, have been reluctant to take this to its logical conclusion in all cases, as *R v AY* demonstrates. The distinction between *AY* and *F* seems arbitrary. In failing to distinguish good from bad terrorist purposes, the courts are placed in a difficult dilemma: either convict those who seem clearly justified in planning to use defensive force, or attempt to distinguish between good and bad purposes. We will return to this dilemma when we consider the terrorist target.

III. THE TERRORIST ACTION

The terrorist action refers to the immediate action that terrorists take to advance their goals—normally acts of killing and maiming. The most important reason to create special laws to control terrorism is that acts of terrorism have caused, and have the potential to cause, great harm, especially death.³⁶ It can be difficult to prevent these acts for a range of reasons, including the powerful motivation that some terrorists have, the fact that they work in groups, and the fact that some of them are willing to make great sacrifices for their cause.

Not all terrorist acts involve killing, however. According to the U.K. definition, an act may amount to an act of terrorism if it involves serious violence against a person, involves serious damage to property, endangers another person's life, creates a serious risk to the health and safety of the public or a section of the public, or is designed seriously to interfere with or disrupt an electronic system.³⁷ Furthermore, merely threatening to carry out such actions is sufficient to amount to terrorism.³⁸

36. *See also*, F.M. KAMM, *ETHICS FOR ENEMIES: TERROR, TORTURE, AND WAR* 75–76 (2011).

37. Terrorism Act 2000 § 1(2).

38. Terrorism Act 2000 § 1(1). In this respect, the definition of terrorism in the 2000 Act is wider than the previous definition in § 20(1) of the Prevention of Terrorism Act 1989, which required violence.

Including threats within the definition of terrorism is controversial. Here is one difficulty: it is sometimes permissible to threaten to do things that one would not be permitted to do. For example, suppose that you are about to kill one of my children. It would be (morally) permissible for me to threaten you that if you kill my child, I will kill two of yours. If you go ahead and kill my child, it would obviously be wrong for me to kill two of yours. Similarly, it may sometimes be permissible for a resistance organization to threaten to kill civilians to encourage the overthrow of a tyrannical regime even if it would be wrong to kill those civilians, were the threat ignored.

Threats of violence to pursue a political goal may also be wrong because it amounts to subversion of the political process. But, as should now be clear, whether it is wrong to make a threat depends on the political context in which the threat is made. Threatening an undemocratic regime to refrain from committing human rights abuses can hardly be objected to on the basis that doing so is undemocratic!

The HLP definition excludes mere threats. It also excludes damage to property or to electronic or computer systems. Insofar as we are motivated to protect citizens against harm, it seems reasonable to focus on the most harmful acts. As our discussion in the previous section suggested, this is not to be established by focusing on the intentions that terrorists may have, but on their likelihood of carrying out those intentions. Consequently, it may be better to refer to the causing of death, serious injury, and perhaps damage to property and electronic systems rather than referring to threats.

Alternatively, perhaps threats should be included within the definition of terrorism as an *addition* to the requirement that harm is done. Uwe Steinhoff suggests that a central feature of terrorism is that it involves the commission of an act of violence accompanied by the implicit or explicit threat that the act of violence will be repeated unless some demand is met.³⁹ This does seem a significant feature of typical acts of terrorism; such a threat is typically essential for terrorists to achieve their aims.

But although this does seem an important feature of many acts of terrorism, we doubt that it should have legal significance. For example, suppose that an organization plans to kill some U.K. citizens in revenge for the war in Iraq. They make no threat that the killing will be repeated. We

39. U. STEINHOFF, ON THE ETHICS OF WAR AND TERRORISM 120–21 (2007). This perfectly describes the video of the beheading of Daniel Pearl.

think that this should constitute a plan to commit a terrorist act, with the legal implications that this entails.

Further criticism of the U.K. definition of the terrorist act concerns the inclusion of destruction to property. The harm that is done through destruction to property is typically insufficiently important to warrant the serious intrusions to liberty that terrorist law permits. Given that there is no exemption from the scope of terrorism for domestic political protest, there is a serious risk that terrorism law is and will be misused to control anti-government protesters who cause damage to property.⁴⁰ Overall, we suspect that the best definition of the terrorist act restricts it to acts that cause death or serious injury, or a grave risk of death or serious injury. Terrorism law is inappropriately extensive to control less grave threats.⁴¹

IV. THE TERRORIST TARGET

The terrorist target refers to the identity of victims of the terrorist action. Can anyone be a terrorist target, or do terrorists only target particular kinds of people? One of the most troublesome issues in defining terrorism concerns how to distinguish terrorism from other acts of violence, especially acts of violence committed during a war. That is not to say that it is wrong to identify any act of killing in the course of war as an act of terrorism. On the contrary, some killings in war do amount to acts of terrorism. The difficulty is how to define terrorism in a way that excludes *any* act of killing in the course of war. After all, killing in war is archetypical political violence.

This aspect of the definition of terrorism is inadequately addressed in U.K. law. Section 1 of the Terrorism Act 2000 appears to render all military combat as acts of terrorism. This has bizarre implications in our current political circumstances. The documents possessed by the defendant in *R v F* appear to outline a plan recently executed by the Libyan rebels and supported

40. See, further, K. Roach, *Sources and Trends in Post 9/11 Anti-Terrorism Laws*, in SECURITY AND HUMAN RIGHTS 242 (B. Goold & L. Lasarus eds., 2007).

41. See also, Saul, *supra* note 4, at 12. Compare the definition identified by the U.N. Special Tribunal for Lebanon (*Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-II-01/I, 16 February 2011), which includes “the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act.”

by the U.K. government. Yet F received a substantial prison sentence for possessing these documents.

One way to distinguish terrorism from legitimate *jus in bello* acts, which we will consider in a moment, is to distinguish between acts that are perpetrated under the orders of a state and acts that are committed by non-state actors. As we will see, it is unsatisfactory to use this method to rule out *jus in bello* acts as acts of terrorism. More importantly, legitimate freedom fighters do not always act unjustly because they lack state authority for their actions—this is so for the obvious reason that the states they struggle against lack the legitimacy to make authoritative decisions.⁴²

A more standard way to distinguish between terrorism and legitimate *jus in bello* acts is to distinguish between acts that target combatants and those that target noncombatants. Terrorism is committed, on this view, only if noncombatants are targeted. This idea is influential in the U.N. context. The definition proposed by the HLP refers explicitly to the targeting of non-combatants.⁴³ Similarly, Article 2(1) of the U.N. International Convention for the Suppression of the Financing of Terrorism (ICSFT) refers to acts intended to cause death or serious bodily injury to civilians “or to any other person not taking an active part in the hostilities in a situation of armed conflict.”⁴⁴ The appellant in *R v Gul (Mohammed)* sought (unsuccessfully) to argue that this approach is now established within international law and that § 1 of the Terrorism Act 2000 should be interpreted accordingly.⁴⁵

42. The idea that state authority is sometimes unnecessary for legitimate military action is a recurrent theme in contemporary just war theory, which has taken an individualistic turn. See, for important examples of this turn, J. McMAHAN, *KILLING IN WAR* (2009), and C. FABRE, *COSMOPOLITAN WAR* (2012).

43. Some philosophers who write about terrorism also restrict the focus to non-combatants. See, e.g., C.A.J. COADY, *MORALITY AND POLITICAL VIOLENCE*, ch. 8 (2008), and STEINHOFF, *supra* note 39, at ch. 5.

44. U.N. General Assembly Resolution 54/9 (Dec. 1999). This definition of “terrorism” was praised by the Canadian Supreme Court in *Suresh v Canada* [2002] 1 SCR 3, ¶ 98. However, it has not been promoted by the U.N. Security Council. For further discussion praising the definition, see Roach, *supra* note 40.

45. [2012] EWCA Crim 280, ¶¶ 42–49. The Court of Appeal concluded (at ¶ 60), “Those who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act.” The appeal is currently pending before the Supreme Court.

This would also help to distinguish those freedom fighters who are liable to attack from those who are not. It was suggested that the fact that the rebels only attacked officers of the Gaddafi regime rather than civilians was decisive in determining whether they are liable to attack in accordance with U.N. Resolution 1973, which mandates the use of force to protect civilians. In the minds of at least some members of the U.K. government, arming the rebels, or assisting them in other ways, was permissible in light of this consideration.

Focusing on the distinction between combatants and noncombatants has the merit of identifying as acts of terrorism the pursuit of noble causes using illegitimate means. For example, many people sympathize with the struggle of the Palestinians against Israel to reclaim at least part of the territory that, over the years, the Israelis have occupied. Few amongst those who do will think it legitimate to kill innocent civilians in pursuit of this aim. Such action is normally condemned on the grounds that, even if the killing of civilians saves a greater number of lives overall, it wrongfully harms the civilians killed as a means to pursue this legitimate goal.⁴⁶ In contrast, soldiers may be liable to be killed in the course of war.⁴⁷ This idea appears to have been accepted even by some who have committed acts of terrorism in Israel, aiming to demonstrate that Israeli civilians effectively count as combatants.⁴⁸

A further virtue of this account is that it picks out some seriously wrongful acts that are committed in the course of a war. Many commentators believe that some wrongful acts of war are acts of terrorism. The dropping of nuclear weapons by the United States on Hiroshima and Nagasaki, for example, and the systematic bombing of Dresden in World War II were aimed at terrorizing the populations of Japan and Germany by killing a very large number of innocent civilians. These acts are rightly identified as acts of terrorism. Funding, supporting, encouraging, glorifying, or preparing acts of war of this kind is legitimately criminalized.

46. There are different ways to understand the prohibition on harming people as a means. For discussion, *see, e.g.*, F.M. KAMM, *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES AND PERMISSIBLE HARM*, ch. 5 (2007); V. TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW*, Chs. 6 & 7 (2011).

47. Many now dispute the idea that soldiers engaged in hostilities are all liable to be killed. Those acting proportionally in pursuit of a just cause may not be liable. For an influential account, *see* MCMAHAN, *supra* note 42.

48. *See* Y. SAYIGH, *ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT, 1949–1993*, at 210–15 (1997).

This account also has its problems, though. Although the killing of civilians in the course of war is legally prohibited, contemporary accounts of the liability to be killed in the course of armed struggle do not always exclude attacks on civilians. For example, in his influential account of just war theory, Jeff McMahan argues that civilians may sometimes be liable to be killed if they are responsible for unjust attacks.⁴⁹ Although he believes that attacks that are typically condemned as terrorist acts are nevertheless wrong, it is not obvious that his account can deliver this conclusion.⁵⁰ Furthermore, if killing civilians is necessary to avert a catastrophic defeat, it may be permitted. John Rawls argued that the terror bombing of civilians by Great Britain in World War II would have been permitted had it been necessary to prevent Nazi victory, and he thought that this was indeed the case in the early stages of the war.⁵¹ But perhaps the killing of civilians is wrong often enough to justify its legal prohibition. The legal prohibition could then be reinforced using terrorism law.

Defining terrorism as an intentional attack on noncombatants would rule out counting as terrorists those who attack soldiers in the course of armed conflict, even those who engage in armed conflict against the United Kingdom. This idea was endorsed in part in *Secretary of State for the Home Department v DD (Afghanistan)*,⁵² in which it was held that engaging in hostilities in support of the Taliban in Afghanistan did not necessarily constitute an act of terrorism for the purposes of an immigration appeal.⁵³

This interpretation has the potential to restrict significantly the use of terrorism law. For example, it is a criminal offense to prepare to commit an

49. See McMahan, *supra* note 42, at ch. 5.

50. See, especially, S. Lazar, *The Responsibility Dilemma for Killing in War*, 38 PHIL. & PUB. AFF. 180 (2010).

51. JOHN RAWLS, *Fifty Years after Hiroshima*, in COLLECTED PAPERS 568–69 (2001).

52. [2010] EWCA Civ 1407. This concerned Article 1F(c) of the 1951 Refugee Convention, which denies protection to individuals “guilty of acts contrary to the purposes and principles of the United Nations,” which includes acts of terrorism. “Terrorism” has been defined for this purpose as being directed at primarily civilian targets. See, e.g., the leading case of *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292.

53. ¶¶ 55, 56; the same applies to minor participation, including passive membership of proscribed organizations that employ terrorist as well as military tactics. Contrast the finding of the Canadian Court of Appeal in *R v Khawaja* 2010 ONCA 862. Fighting in Afghanistan fell outside the “armed conflict” exception in the Canadian Criminal Code § 83.01(1)(b)(ii) because Khawaja was not acting “in the course of” an armed conflict, but rather, “at the same time as” an armed conflict.

act of terrorism. Preparing to fight for the Taliban in Afghanistan, on the interpretation in *DD*, would not necessarily satisfy this offense.⁵⁴ Terrorism law, however, has been used to control those individuals living in the United Kingdom who wished to contribute to attacks on British soldiers who are engaged in conflicts in Afghanistan and Iraq. For example, it appears that the control order that was contested in *Secretary for the Home Department v MB*⁵⁵ was imposed to prevent MB from travelling to Iraq to engage in hostilities against Coalition forces. MB denied that he was intending to do this, but even if his denial was false, according to the judgment in *DD* his plan may not have been sufficient to render him a terrorist, undermining the legitimacy of the control order.⁵⁶

A further problem with the account of terrorism proposed in the U.N. context is that it is not always clear when an armed conflict is underway. This was a point of controversy in the Northern Ireland context, for example. Members of the IRA were keen to identify themselves as engaged in a war. The U.K. government resisted this idea, identifying them as ordinary criminals. The line between political resistance and civil war is hardly a clear one. It is also not one that the courts are well placed to draw. Perhaps the courts could rely on international law to establish whether there is an armed conflict. But it must be remembered that international law on armed conflict is not designed with the application of terrorism law in mind, and there is little reason to suppose that the definition in international law is adequate to suit the purposes of terrorism law.⁵⁷

Even if this difficulty could be resolved, there are further problems with defining terrorism with reference to the target of violence. Whom should we count as a combatant?⁵⁸ One possibility is that a person is a combatant

54. Although for the purposes of Article 1F(c) of the Refugee Convention, the Court was here also considering the definition of terrorism under § 1 of the Terrorism Act 2000.

55. [2007] UKHL 46 ¶ 37.

56. The imposition of a control order is permitted only if the Secretary of State has reasonable grounds to suspect that the controlee is or has been involved in terrorism related activity. See § 4 of the Prevention of Terrorism Act 2005 now superceded by the Temporary Prevention and Investigation Measures Act 2011. In *R v Farooqi and others* (2011, unreported) the defendant was convicted of various terrorism-related offenses for attempting to recruit others to fight in Afghanistan against U.K. forces.

57. We lack the space for a full examination of this issue here.

58. Again, a satisfactory answer to this question is beyond the scope of this paper. For discussion of combatant status, see C.A.J. Coady, *The Status of Combatants*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 153–75 (D. Rodin &

if she is currently directly engaged in hostilities, which is the approach of the U.N. ICSFT.⁵⁹ Alternatively, a combatant might be a person who wears the uniform of a soldier. Neither approach is suitable for the purpose of identifying terrorism. It would not adequately exclude legitimate freedom fighters, or even those acting in legitimate self-defense against tyrannical regimes.

For a clear case, consider the attempt by resistance movements in Nazi Germany to kill Hitler prior to the commencement of hostilities in 1939. This surely ought not to count as an act of terrorism, either morally speaking or with respect to the purposes of terrorism law. Similarly, it was permissible, at least on the assumption that they wish to set up a human rights-compliant government, for freedom fighters in Libya to attack Gaddafi forces in an attempt to overthrow his government, prior to the beginning of any civil war, simply to prevent human rights abuses. Those who plan, fund, or otherwise support an action of that kind ought not to be criminalized.⁶⁰

It is worth noting, in this context, that Clause 14 of Resolution 42/159 of the United Nations General Assembly on measures to prevent international terrorism states that

... nothing in the present resolution could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right referred to in the Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration, the right of these peoples to struggle to this end and to seek and receive support.⁶¹

H. Shue eds., 2008); and McMahan, *supra* note 42, at 11–13. For the legal position, see Protocol I Additional to the Geneva Conventions, 1977. It should again be remembered here that the purposes of distinguishing combatants and noncombatants in international law is not done with the purposes of terrorism law in mind.

59. N.44 above.

60. The death of state officials (not military forces) during assassination attempts upon Colonel Gaddafi were considered terrorism in *SS (Libya) v Secretary of State for the Home Department* [2011] EWCA Civ 1547.

61. U.N. General Assembly Resolution 42/149 (Dec. 7, 1987), <http://www.un.org/documents/ga/res/42/a42r159.htm>.

This ambition will be secured only if violence outside the context of armed conflict can be excluded from the definition of terrorism.

Furthermore, freedom fighting is not the only case where violence outside armed conflict is justified. The assassination of Osama bin Laden on May 2, 2011, should not count as an act of terrorism. It is contested whether the killing was permissible; that may depend, amongst other things, on whether bin Laden posed a threat of violence and whether there was a chance that he would escape capture. Regardless of these facts, though, this killing seems to fall within the U.K. definition of terrorism. Although the killing of bin Laden may have had a defensive aim, it also clearly had political aims, among them to undermine support for al Qaida and to strengthen confidence that the war on terror was being won. This deficiency of the definition would not be significantly improved by restricting acts of terrorism to killing outside the course of armed conflict.

But if Hitler, Gaddafi, bin Laden, and their troops are excluded as terrorist targets on the basis that they are combatants, it is not obvious how to rule out attacks against British troops, police officers, or heads of state even when they are not engaged in an armed conflict. Even the al Qaida attack on the U.S. Pentagon (in contrast with the World Trade Center) would not count as a terrorist attack by these lights on the grounds that it was aimed at a noncivilian target. Some philosophers defend this conclusion.⁶² It is also implicit in domestic Lebanese law, which restricts acts of terrorism to acts that may cause a public danger.⁶³

But whatever its philosophical merits (which we doubt), a legal definition of terrorism that excluded these things could not adequately serve the purposes of terrorism law. If there is any reason to extend the scope of the criminal law and police powers to combat terrorism, surely that reason applies to protection of the police, soldiers who are not currently engaged in a conflict, and politicians in legitimate democratic states.

We face the following dilemma, then. If the terrorist target includes heads of state, government officials, soldiers, and police officers who are not

62. See, e.g., Steinhoff, *supra* note 39, at III–12.

63. This feature of Lebanese law, contained in Article 314 of the Lebanese Criminal Code, led to the acquittal of terrorism charges for those who assassinated Sheik Nizar Al-Halabi in 1975, in Court of Justice, Assassination of Sheikh Nizar Al-Halabi, decision no.1/1997, 17 January 1997, discussed by the U.N. Special Tribunal for Lebanon Appeals Chamber in *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-II-01/I, 16 February 2011.

currently engaged in conflict, all freedom fighting outside the context of armed conflict counts as terrorism for the purposes of U.K. law and is prohibited. Supporting, financing, and encouraging such freedom fighting is also prohibited. However, if the terrorist target excludes heads of state, government officials, soldiers, and police officers who are not currently engaged in a conflict, attacks on U.K. police officers, U.K. soldiers who are not currently engaged in conflict, and U.K. politicians do not amount to acts of terrorism.

United Kingdom law is currently impaled on the first horn of this dilemma, which is unsatisfactory for the reasons just adduced. But the only way to avoid that horn without being impaled on the other is to discriminate between legitimate resistance against human rights-abusing regimes and wrongful attacks on legitimate governments.

Such discrimination is essential to distinguish terrorists from legitimate freedom fighters, but it is also problematic for institutional reasons. U.K. courts lack the expertise and legitimacy to make judgments about what should count as legitimate freedom fighting. Rather than a dilemma, we face a trilemma, the third horn of which would require courts to make political judgments about when violent resistance against illegitimate regimes is warranted.

This surely helps to explain why the Court of Appeal rejected the appeal in *R v F*. In declaring that “there is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause,” the Court of Appeal may appear to endorse the moral judgment that action which falls within the U.K. definition of terrorism could never be legitimate, whatever the circumstances. That claim is both absurd and abhorrent. It would be better to claim that the law must apply to all such cases because the court cannot adequately discriminate between legitimate and illegitimate uses of violence, acknowledging that there may be cases where this leads to serious injustice.

V. THE TERRORIST METHOD

The terrorist method refers to the way in which terrorists aim to achieve their political goals. The violence that they use is normally part of a more complete method of pursuing those goals. That is what the terrorist method focuses on.

Perhaps what is distinctively wrong about terrorism is that it involves an unacceptable method of pursuing political, religious, or ideological goals, not simply because killing is involved, but because terrorists use terror to achieve their ends. This idea has its attractions. It is etymologically appealingly. It also has legal support in some jurisdictions. The use of terror is central to the French definition of terrorism. The related idea of intimidation forms part of the approach of the U.N. ICSFT and the U.N. Special Tribunal for Lebanon, and it is also present within the U.S. definition.⁶⁴ The aim of seriously intimidating a population is one part of the European Union's definition, though unduly compelling a government or international organization will suffice.⁶⁵ It is also reflected to a degree in the definition of terrorism in § 1(i)(b) of the Terrorism Act 2000, which holds that an act or threat will be an act of terrorism only if it is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public.⁶⁶

Philosophers have also defended the importance of terror to terrorism. Samuel Scheffler, for example, suggests that what is significant about standard cases of terrorism is that they use or threaten violence to generate fear with the aim of degrading or destabilizing an existing social order.⁶⁷ Jeremy Waldron also emphasizes that acts of terrorism may degrade the social fabric by instilling fear of attacks in a population.⁶⁸ And Ben Saul

64. § 802(a)(5) of the PATRIOT Act provides that “domestic terrorism” means activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”

65. The E.U. definition is more strongly worded. It stipulates acts with the aim of “seriously intimidating” a population (rather than simply “intimidating”) or “unduly compelling” a Government or international organization to perform or abstain from performing any act (rather than simply influencing a government or international organization). No political or other purpose is specifically required.

66. There is an exception, discussed below, for acts involving firearms or explosives.

67. Samuel Scheffler, *Is Terrorism Morally Distinctive?*, 14(1) J. POL. PHIL. 1–17 (2006), <http://philosophy.fas.nyu.edu/docs/IO/4864/Scheffler-Is-Terrorism-Morally-Distinctive.pdf>.

68. See JEREMY WALDRON, *Terrorism and the Uses of Terror*, in TORTURE, TERROR AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 48–79 (2010). The E.U. definition separates these two factors. Terrorist acts are those committed with the aim of seriously intimidating the population, or seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organization.

advocates this idea as an important aspect of the definition of terrorism in law.⁶⁹

These accounts of terrorism aim to identify conduct that is almost always wrong, even if it is done in service of a valuable political cause. The cause may be good, but the means by which it is pursued is almost always wrong. However, it is also too restrictive to require terror for an act of terrorism to be complete. Scheffler and Waldron focus on the effects of terrorism on the general population. This would exclude those who target only the police, soldiers, and/or politicians. As we have already seen, it would be unwarranted to restrict the operation of terrorism law to the civilian population in the context of legitimate, human rights-compliant regimes.

Furthermore, this approach identifies only those terrorist attacks that are intended to cause widespread fear in a population. It would obviously be inadequate for the definition of terrorism to include acts that *will* cause fear as a side effect where fear is not the intention. Ordinary serious crime causes fear of further crime as a side effect. So if fear is distinctive as a component of terrorism, it must be *directly intended fear*. And this is indeed central to the accounts of Scheffler and Waldron. But it is difficult to believe that the intention to cause fear is central to the concept of terrorism, let alone fear accompanied by the ambition of eroding the social fabric. And even if it is, it is still more difficult to believe that the law ought to include reference to terror as a mandatory part of the definition.

First, some of the standard cases of terrorism that we identified at the beginning of this essay were not obviously conducted with the intention to cause widespread fear. For example, the beheading of Daniel Pearl may not have been intended to cause fear in the general population, but in only a section of the population (Americans in Pakistan). Perhaps it was intended to cause horror or outrage, but the kind of widespread anxiety that terrorism has sometimes caused may not have been the purpose of those who beheaded Pearl. Identifying the beheading of Pearl as an act of terrorism ought not to depend on whether those who killed him intended to cause widespread fear. This idea is accommodated in the U.K. definition: it is sufficient that acts are done to intimidate the public or a section of the public (or to influence the government or an international governmental organization).

69. See Saul, *supra* note 4.

It is undoubtedly true that one of the ways in which some familiar terrorist organizations aim to further their ends is through intimidation. But the focus on intimidation may be too narrow even if we restrict the target of the intimidation to a section of the population. Waldron himself notes terrorists may act simply on retributivist inclinations.⁷⁰ Terrorists may regard harm done to their enemies as an end in itself. They may be motivated to kill their victims because they think their victims deserve to die for acts they have perpetrated, or that they are responsible for, or simply because they think that their victims are evil.

Some real-world examples may best be characterized in this way. For example, in 1996, four armed men killed eighteen Greek tourists outside a hotel in Cairo. The organization al-Gama'a al-Islamiya admitted responsibility for the attack, indicating that the tourists had been mistaken for Israeli nationals. It was ostensibly motivated as retaliation for Israeli attacks on Southern Lebanon.

Is retaliation aimed at intimidating the public? It might or might not be. It may be that these attacks are carried out to deter the Israelis from mounting future attacks on Lebanon and so are designed to influence a government. But it may also be that they aimed only at retribution. We know from punishment theory that those seeking retribution may not have any further aim in making perceived wrongdoers suffer. As Michael Moore puts it, "punishment is justified, for a retributivist, solely by the fact that those receiving it deserve it."⁷¹ Suppose that the members of al-Gama'a al-Islamiya, who perpetrated the 1996 attack, were retributivists. Perhaps they believed that those responsible for the attacks on Southern Lebanon deserved to suffer, and that all Israeli citizens were collectively responsible for the attacks. It is not uncommon for terrorist organizations to endorse broad and implausible versions of collective responsibility to justify their conduct.⁷² If this were the case, killing is the method by which retribution is sought. Or rather, killing simply *is* the retribution—pulling the trigger of the gun is the method by which it is sought.

Suppose that we discover that retribution really was the motivation of al-Gama'a al-Islamiya in perpetrating these attacks. Are we to conclude

70. WALDRON, *supra* note 68, at 69–70. See also Kamm, *supra* note 36, at 74.

71. M. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 153 (1997).

72. See, e.g., Jeff McMahan's discussion of Osama bin Laden's letter to the U.S. people, *supra* note 42, at 232–35.

from this that their act is not an act of terrorism? Does that mean that we should not treat an organization that glorifies retribution as having encouraged an act of terrorism for the purposes of § 1 of the Terrorism Act 2006? This conclusion is difficult to accept. It does not necessarily seem difficult to accept according to the best philosophical account of terrorism. Perhaps it is the right view of terrorism *as an idea* that it is restricted to acts intended to cause terror. We doubt that this is true, but it is plausible. The reason why it is difficult to accept is that if it is legitimate to restrict the encouragement of terrorism at all, then it is surely permissible, using the same law, to restrict the encouragement of acts like those performed by al-Gama'a al-Islamiya.

The acts of al-Gama'a al-Islamiya do clearly fall within the definition of a terrorist act according to the Terrorism Act 2000. This is because, according to § 1(3), the aim of intimidating the people or influencing government or an international governmental organization need not be present in cases where the terrorist act is committed using a firearm or an explosive.

This qualification may render the definition of terrorism in some ways too broad. If a person uses a firearm or explosive to further a political, religious, or ideological cause, she commits an act of terrorism. But suppose that a person kills prostitutes because he believes that his religion commands him to do so. This conduct amounts to terrorism in U.K. law. This does not seem to be sufficiently distinct from someone who does the same thing motivated simply by hatred. It is difficult to believe that the ambitions of terrorism law are advanced legitimately by casting the net this widely.

But § 1(3) also fails to remedy the problem under consideration. As we have learned from 9/11, although firearms and explosives are dangerous, they are not uniquely dangerous. Vehicles can cause a great deal of harm; so can poisons and infectious diseases. If these methods are used to exact retribution, the acts do not count as acts of terrorism. And if the acts are prepared, encouraged, financed, and so on, these supporting acts are not criminalized by terrorism law.

Furthermore, it is not only retributive motivations, such as those described above, that might fall outside the scope of § 1. Consider the attack on the *USS Cole* on October 12, 2000. Al Qaida claimed responsibility for the attack. It is not obvious what its motivation was, but it may not have been aimed at altering U.S. policy. It may have been aimed at demonstrating that the United States was vulnerable to al Qaida attacks to encourage recruitment into al Qaida. And the motivation for that may have been to help the organization pursue struggles in the Middle East,

North Africa, and elsewhere. Demonstrating that the United States was vulnerable to attack almost certainly helped to increase al Qaida's public profile and to demonstrate to potential recruits that their cause was not hopeless. If this was its aim, it was neither trying to influence any government nor attempting to intimidate the public. Overall, although there is some reason to do so, we doubt that definitions of terrorism should refer to terror or intimidation.

VII. THE TERRORIST AGENT

A final controversy about the definition of terrorism concerns the nature of the terrorist agent. The most important controversy is whether a state itself, or an agent acting for the state, can count as a terrorist agent. It should be unsurprising that states themselves can commit terrorist acts. After all, the origin of the concept of terrorism appears to lie in state action to control political opponents, and only gradually did it come to apply to the actions of non-state actors.⁷³ Despite disagreements at the U.N. level in the attempt to define terrorism, the idea that states can commit acts of terrorism is implicit in some U.N. resolutions. For example, U.N. Security Council Resolution 748 of March 31, 1992, demanded that Libya "cease all forms of terrorist action and all assistance to terrorist groups."

There is also nothing within the U.K. definition of terrorism that excludes state action. But this has odd implications. It implies that almost any act of war that the United Kingdom undertakes constitutes an act of terrorism, because almost all acts of war involve the use of violence in service of a political goal. Furthermore, as firearms and explosives are used during war, acts of war count as acts of terrorism even if they are not intended to influence the government or intimidate the public or a section of the public. Even if all legitimate acts of war do not amount to acts of terrorism, it is difficult to conceive that all *il*-legitimate acts of war amount to acts of terrorism.

Hence, there is nothing in § 1 of the Terrorism Act 2000 to distinguish between the Lockerbie bombing (if, indeed, this was ordered by the Libyan government) and the United Kingdom's war in Iraq.⁷⁴

73. See B. SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 1-2 (2008).

74. Contrast this with the E.U. Council Framework Decision of 13 June 2002 (2002/475/JHA) on combating terrorism, which aims to approximate the definition of terrorist offenses between Member States. It specifically excludes actions by armed forces in the

Perhaps it might be thought that the solution is to rule out state-authorized action as acts of terrorism. However, if the offenses referred to in the previous paragraph are legitimate at all, they should apply to the Lockerbie bombing regardless of whether it was carried out by an agent of the Libyan state. It follows that glorifying the bombing of Hiroshima and Nagasaki are also to be prohibited by § 1 of the Terrorism Act 2006. But if there is no way to make progress with defining terrorism according to its purpose, target, or methods in a way that excludes acts of war, it seems difficult to achieve this without criminalizing participation in any war. We have already seen that supporting any side in a civil conflict may amount to a terrorist offense in English law. From our discussion here, it appears that this difficulty is not restricted to civil war.

Perhaps it might be argued that it is not states themselves, but rather agents of the state, who commit terrorist acts. The Lockerbie bombing, on this view, was an act of terrorism committed by the person or persons who perpetrated the bombing (perhaps Abdelbaset al-Megrahi) regardless of whether they were following state orders. But this solution would fail to exclude violent acts by combatants in the course of war or those who assassinated Osama bin Laden from the definition of terrorism. They are, after all, agents of the state.

If we can find a way of refining the terrorist purpose and target in a way that excludes legitimate acts of war (by, for example, explicitly excluding acts of war⁷⁵ or by adding it to the definition as the E.U. Framework Decision does), there is less reason to conclude that states cannot be guilty of terrorism in principle. The state should be understood simply as a collection of individuals. If groups such as al Qaida can amount to terrorist organizations, so too can states. Funding states that perpetrate acts of terrorism, we may think, should be treated no differently than funding terrorist organisations.

exercise of their official duties during periods of armed conflict, which are governed by international humanitarian law. § 83.01(t)(b)(ii) of the Canadian Criminal Code excludes from the definition of terrorist activity “an act or omission that is committed during armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict. . . .”

75. Ben Saul recommends this approach in *Civilizing the Exception* on the grounds that illegitimate acts of war, including terrorist acts of war, can be dealt with by international humanitarian law. This, though, is not unproblematic, as it would not capture domestic support for terrorist acts committed during an armed conflict.

However, this does create problems. For example, § 17 of the Terrorism Act 2000 makes it a criminal offense for someone to enter into or become involved in an arrangement as a result of which money or property is available or is to be made available to another when he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism. If prerevolution Libya, for example, were perpetrating systematic acts of terrorism against its population—and this seems likely according to the definition in the 2000 Act—very many U.K. citizens, including members of the government, are guilty of this offense.

There is no obvious solution to this problem. It seems morally abhorrent to exclude states and their agents from the definition of terrorism. The greatest terrorist atrocities in history have been perpetrated by states. And even if states are excluded, the problem that we have referred to does not go away; if, for example, the Libyan state is not guilty of acts of terrorism, individual political leaders in Libya no doubt are. This still renders many people liable for prosecution under § 17 and other parts of terrorism law, at least in principle. At the same time, it surely ought to be a criminal offense to fund al Qaida. Probably the best solution is to permit a person to engage in economic activity with states unless this is expressly prohibited by the state. At present, it is prosecutorial discretion rather than the law that prevents mass prosecution under § 17.

Overall, we conclude that there is no easy solution to the problem of the terrorist agent. It is difficult to believe that we should exclude from the definition of terrorism any act authorized by a state—which might rule out the Lockerbie bombing as an act of terrorism. However, once state-authorized action is included within the definition of terrorism, it is not clear how to limit the scope of the definition to exclude all illegitimate acts of war. Furthermore, even if there were a way to distinguish these cases of state-authorized acts of terrorism, the criminal law seems to prohibit all support for that state. But this casts the net of criminal liability extremely wide.

CONCLUSION

We have explored a range of legal and philosophical tensions within the definition of terrorism, but we have not resolved all of them. Nor do we see a clear way to do so. The trilemma concerning the terrorist target and the

dilemma concerning the terrorist agent seem to us especially intractable. We can see no clear way of making progress with these problems.

It is essential that terrorism law is able to distinguish adequately between legitimate freedom fighters and terrorists. It is also essential that not all agents who engage with and support states that commit acts of terrorism, themselves commit criminal offenses. But, as our discussion indicates, this cannot be done without making political judgments.

Unfortunately, these judgments are difficult and contentious. Many considerations are relevant in determining whether violent political resistance is justified. These include the track record of the state that is being struggled against, the level of harm that political resistance might cause, alternative avenues that might be pursued, the quality of the alternative political regime that resisters seek to install, and their prospects of success. Courts are obviously ill-positioned to make these judgments.

Where substantive law is difficult to improve, it is tempting to turn to official discretion for a solution. This can be relied on, it might be argued, to ensure that the operation of the law in practice is not unjust, or at least is ameliorated. However, this is true only to a modest degree. We cannot address this issue in great depth here, but we will indicate our concerns about it.

The criteria used to determine whether conduct counts as terrorism are opaque, and discretion is undoubtedly being exercised on political grounds in some instances. As we can see from the cases that we have discussed in this paper, the application of terrorism law is uneven, and we are not confident that a significant number of those who fall within the law warrant the sanctions meted out to them.⁷⁶ It is imperative that greater expertise is generated to improve the exercise of discretion and to promote publicity and accountability in this crucial area, not only in prosecution but also in policing and immigration policy.

It is also worth noting concerns about the reliability of the information on which these decisions are made. The role of intelligence, although inevitably less visible, is key in providing the information that informs prosecution and immigration decisions. The weight that should be attached to intelligence as information that is not tested before the criminal courts is contentious. On the one hand, it may provide a wider security context within which to understand evidence and so inform the decision to

76. See also, J. Hodgson & V. Tadros, *How to make a terrorist out of nothing*, 72(6) MODERN LAW REVIEW 985 (2009).

prosecute. On the other, as untested intelligence rather than evidence, it would be dangerous to base decisions on material that may be unreliable and that cannot be a basis for conviction.

Until the process for evaluating the scope of terrorism is rendered more robust and transparent, we should strongly suspect that some innocent people are being convicted of terrorist offenses and punished, sometimes with long prison sentences. This situation could be improved. Prosecutors should go ahead with a prosecution only if they have strong evidence that the defendant's actions are unjustified. They should make this criterion for prosecution clear in their guidelines. They should take political advice to help them to determine whether these actions are justified. But they should also allow representations to be made, either by the defendant or by others, to help to establish whether they were justified. Institutional procedures should be developed to allow this to occur.

Even at its best, though, prosecutorial discretion is no substitute for the criminal trial in adequately testing the considerations that determine whether a person is liable to be convicted of a criminal offense. Although prosecutorial discretion can to a limited extent ameliorate the problems outlined earlier in the essay, it has inherent deficiencies, most obviously with respect to the ability of defendants to argue their case and the lower evidential threshold that prosecutors typically rely on.

What we have shown is something that we regret finding: that the standards of criminal justice that we expect in other areas of the law cannot be met in terrorism law. The kinds of political questions that need answering to distinguish terrorists from nonterrorists, and that ought to govern the use of terrorism law in principle, cannot properly be addressed by courts. We must rely on the discretion of other officials to shape and police the boundaries of terrorism law. When we rely on them, we can only expect that they fail to meet high standards in this regard. We should not pretend that relying on official discretion is not highly problematic. Unfortunately, even when we improve the law as far as we can, it is the best that we can hope for.