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Leading the World Requires a New Approach to Terrorism, Based on a Moral Principle

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1 Introduction

September 2021 marks the twentieth anniversary of the horrendous terrorist attacks of September 11, as well as of the mobilization and response by the international community, including through UN Security Council Resolution 1373 (2001), which is a cornerstone of global action against terrorism.¹ When serving in 2005–2011 as the first UN special rapporteur on human rights and counterterrorism, I often reviewed the application of various definitions of terrorism by the international community and individual states. In other expert capacities, I have been involved in the same exercise throughout these two decades since 9/11, seeing how efforts to combat terrorism are greatly harmed by inconsistent, inappropriate, and illegitimate legal texts through which terrorism, terrorists, or acts of terrorism are defined. The problem is not merely in who exercises the power to determine what constitutes terrorism but also that the definitions have failed to capture the essence of terrorism, and thereby failed to establish and communicate an underlying moral principle that justifies and necessitates action against it, including through criminalization, prosecution, and punishment.

¹ UN Security Council, Resolution 1373 (2001).

This essay builds on my chapter in a book put together by a group of academics that takes stock of lessons learned over these two decades. Under the leadership of the two editors, professors Arianna Vidaschi of Bocconi (Italy) and Kim Lane Scheppele of Princeton (United States), the authors address a number of specific topics ranging from citizenship stripping to removal of terrorist online content and from intelligence cooperation to procedural fairness while also contributing to the general theme of the volume, the contours of global counterterrorism law and how—or whether—the UN Security Council has become a legislator for the world.²

2 The Essence of Terrorism and the Need for a New Definition

What, then, is the “essence” of terrorism? It is *not* crime against the state, or any crime committed because of a political, ideological, or religious motivation, or crimes by members of particular religious, ideological, or political movements. But acts of terrorism *are* crimes, and specifically grave forms of violence against human beings, usually with lethal consequences or an intent to kill. What distinguishes acts of terrorism from other lethally violent crime is the reduction of the victim to mere means, the instrumentalization of a human being. Here, the question of a political, religious, or ideological motivation comes back into the picture: even if its presence is not a defining element of terrorism, it can explain and demonstrate that the victims were instrumentalized as mere means to serve the perpetrator’s ends.

The world needs a better understanding of terrorism, based on a moral principle. In a short, nontechnical formulation, the new definition of *terrorism* could read as follows:

Terrorism is deadly or otherwise serious physical violence against members of the general population or segments of it (bystanders) that amounts to their instrumentalization; that is, their reduction to mere means in the commission of the crime.

This short version is suitable for journalistic, political, or educational discourse.³ What the proposed definition, which I name “Kantian,” does is to drop the standard requirement of a specific terrorist purpose. Typically, the best

² Vidaschi and Scheppele 2021.

³ A longer, legal-technical version intended for an international treaty or resolution is presented in Scheinin 2021, 26–27.

international definitions of *terrorism* refer to two alternative aims of acts of terrorism; namely, creating fear (or terror) among the population, or compelling the government to do something or to refrain from doing something. These two alternative qualifying aims of terrorism can be found, for instance, in many conventions or protocols against terrorism,⁴ in Security Council resolutions,⁵ and also in the model definition proposed in 2011 by the UN special rapporteur on human rights and counter-terrorism.⁶ Now, after another ten years have passed since 9/11, I am ready to admit that the standard approach of defining terrorism through two alternative qualifying aims, seeking to constrain the use of open-ended language toward opportunistic widening of the notion of terrorism, is a part of the problem rather than a solution.

While the UN Security Council has been at center stage in directing responses to twenty-first century international terrorism, including through its questionable expansion of its own legislative powers,⁷ its role in *defining terrorism* has remained limited. This primarily passive approach has not been without problems. By requiring states to take decisive action against “terrorism” while not making clear what terrorism is, the Security Council has in fact encouraged policies that are abusive or hostile to human rights, whereby individual states choose to go after political opposition, trade unions, or religious, ethnic, separatist, or indigenous minorities, by stigmatizing them as terrorists. These abusive policies have thereby been shielded by the authority of the Security Council. Fifteen years ago, this was a central tenet in my very first substantive report as the first UN special rapporteur.⁸

In an effort to promote approaches based on the rule of law and compliance with human rights, the three consecutive holders of the mandate of UN special rapporteur on human rights and counter-terrorism have systematically assessed the counterterrorism law and practice of individual states through their definitions of terrorism, judged against the *requirement of legality* in criminal law, as enshrined in the nonderogable provision of Article 15 of the International Covenant on Civil and Political Rights.⁹ The special rapporteur has promoted narrow and precise definitions and built scrutiny of national laws on the best existing definitions or elements of definitions in international law,

4 International Convention for the Suppression of the Financing of Terrorism 1999, 197. For definitional elements, see Article 2.

5 UN Security Council Resolution 1566 (2004). For the terrorism definition included, see operative para. 3.

6 Scheinin 2010, see para. 28.

7 Ní Aoláin 2021.

8 Scheinin 2005, see para. 27.

9 International Covenant on Civil and Political Rights 1966, 171.

including Security Council Resolution 1566 (2004), which did come close to defining what terrorism is, departing from the Security Council's otherwise passive approach.

Moving forward from the best practice definition I included in a 2011 report to the UN Human Rights Council, I have come to propose the removal of any subjective aim element from definitions of terrorism. It would be replaced by the objectively verifiable element of *instrumentalizing* human beings, who often are innocent bystanders that end up as victims of lethally violent acts of terrorism as a consequence of an intentional choice or pure ignorance by the perpetrators. All too often the Security Council, national governments, or even prosecutors or judges do not appear to care about how international and national law actually defines terrorism, or about proof beyond reasonable doubt for affirming that every element of the applicable legal definition was met. Rather, the word "terrorism" carries a strong stigma of moral and legal condemnation, to the degree that if it is even mentioned, then the law no longer matters. Depicting someone as terrorist suffices to legitimize the denial of their human rights or a departure from the "technicalities" of the law. Journalists and members of the general public tend not to understand what the problem is. What is worse, they probably would not even accept if judges were to care about how the law actually defines terrorism. In the eyes of many members of the public, terrorism is perceived of as political violence for an unjustified cause, or sometimes even as "crimes committed by Muslims."

3 How Existing Terrorism Definitions Keep Failing

As is evidenced by the plethora of existing legal texts, and also was reflected in the special rapporteur's model definition of terrorism mentioned earlier, the actual problem no longer is that international law would not be able to provide a definition of terrorism, or a whole family of mutually compatible definitions. Rather, my argument is that the problem is in the failures of those definitions themselves, both as a matter of principle and as a matter of practice.

Even the best existing international law definitions of terrorism have failed in delivering what they should; namely, a device for prosecuting, trying, and convicting the perpetrators of morally repulsive acts while at the same time respecting the rule of law, the requirement of legality in criminal law, and the right to a fair trial. Some of the main reasons for these failures are mapped as follows.

The casuistic nature of some existing definitions. As efforts toward a comprehensive convention against terrorism have failed, the now existing patchwork of international instruments has emerged through a series of coincidences such as the occurrence of a specific terrorist act in a specific place at a specific time. As a result, the definitions are casuistic in nature, as exemplified by the prominent place of hostage taking and civilian aircraft in them.

The evidentiary problems. As there has been so much focus in defining the aim (or purpose, or qualified intent) of the perpetrators of terrorist acts, the resulting formulations have proven difficult to apply in practice. In practice, the aim to “terrorize” the population or to “compel” a government to do something will have to be inferred, rather than proven. Prosecutors and even judges may rely on their general understanding of the phenomenon of terrorism, or of international terrorism, or of a particular terrorist organization, in satisfying themselves that a proper terrorist aim has been proven to justify a conviction. The problem of lack of proof is particularly grave for anarchistic terrorism and for suicide terrorism, two categories for which actual evidence of the aim will be hard to obtain. Because of the tendency to resort to inferences, defining terrorism through its assumed terrorist aims will end up undermining the requirement of legality.

The legitimacy problem. The typical approach of two alternative aims of terrorism also suffers from a legitimacy problem in the eyes of the general public, the media, and politicians. When a heinous act of murdering innocent bystanders through an extremely violent attack has occurred, it does not strengthen the legitimacy of the law if prosecutors decide not to prosecute, or judges not to convict of terrorist crimes but, instead, of ordinary crimes because of the absence of a proven terrorist aim to create fear or to compel the government. The general public may accept that a lonely young member of the mainstream community murdering a dozen of his schoolmates with a semi-automatic gun acted because of problems in their personal life, but will not accept the same conclusion if the perpetrator of lesser violence fits the public’s (unfounded) perceptions of who might be a terrorist.

Ignoring the perpetrator’s ideology is counterintuitive. Journalists, politicians, and members of the general population associate terrorism with fundamentalist religious, political, or other ideologies. When legal definitions, prosecutors, or courts do not address the ideological inspirations of the crimes in question, this further weakens the legitimacy of the law and of its application in the eyes of the public. The ideological leanings of the alleged perpetrators may also become an opaque aspect of the trial, not addressed openly but referred to through proxies or in code. The fairness of the trial may be at risk. Here, it is worth noting that Security Council Resolution 1566 (2004) is more transpar-

ent on this point, as it includes the phrase that acts meeting the definition of terrorism “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.” The proposed definitional element of instrumentalizing the victims allows for assessing the ideological context in an objective manner.

The definitions are not strictly applied in practice. What may result from the above-listed problems in the application of existing terrorism definitions is that some of their elements are simply disregarded by prosecutors or judges, causing a problem of legality. Convictions for terrorism may become crimes of association in the sense that any proven expression of sympathy for a terrorist organization, such as nowadays the Islamic State of Iraq and the Levant (ISIL), becomes a proxy for determining that the perpetrator had the aim of creating fear among the general population or, if the country for instance has military forces in the Middle East, the aim of compelling the government to withdraw its troops. What was intended as a good faith effort to maintain the requirement of legality in criminal law deteriorates into its opposite.

Existing definitions are not based on a proper moral principle. While the failures of the existing definitions of terrorism listed above are many and on their own alarming, they are still secondary in comparison to a more important failure; namely, that even the best international law definitions of terrorism do not spell out the moral principle on which they are founded. Here, we need to turn to Immanuel Kant and the absence from existing definitions of the distinguishing characteristic of acts of terrorism to *instrumentalize* other persons—typically innocent bystanders—*by reducing them to mere means*.

4 The Need for Moral Leadership

The multiple pragmatic reasons why even the best existing definitions of terrorism have failed may not be sufficient to justify that they should be scrapped to give way to a new one. What is more important is the final point in the above list, namely, that the existing definitions do not explicate their underlying broader moral principle. My claim is that the principle is already implied, but has not found a proper expression in the existing formulations. What makes terrorism a particularly morally repulsive subcategory of political violence and of crimes is the instrumentalization of innocent bystanders who are not the actual target of the act but who are reduced to mere means for the perpetrator, for whom the actual aspirations lie elsewhere than in killing or maiming those particular individuals who become victims of terrorism.

Immanuel Kant famously insisted on a strict separation between rational beings (human persons) and all other objects (things). One of his formulations of the categorical imperative reads:

For all rational beings come under the law that each of them must treat itself and all others never merely as means, but in every case at the same time as ends in themselves.¹⁰

By placing the element of instrumentalization center stage in the definition of terrorism the proposed definition captures the essence of terrorism as compared to other forms of crime or political violence. Through this restructuring of terrorism definitions, the proposal acknowledges and restates as law the underlying moral principle for the universal and unconditional condemnation of terrorism as a distinct category of repulsive acts.

Would the proposed definition have any practical consequences, by altering the scope of acts that are regarded as terrorism? I believe that it would greatly reduce the risk of erroneous application of the stigma of terrorism to acts that should be treated as ordinary crimes, even if committed by a person who fits stereotypical perceptions about who the “usual suspects” of terrorism are. It would also make it more clear than existing definitions that atrocious acts committed by members of the mainstream population, either out of hatred for minorities or for peaceful protesters, or simply in the hope of attracting “fifteen minutes of fame” should in some cases be treated as terrorism. One should zoom out from their subjective motivations and refocus on an external assessment of whether the act entailed the instrumentalization of others.

The proposed definition—both its full legal-technical version and the short version presented here—seeks to demonstrate the underlying moral principle for the universal condemnation of terrorism. Such universal condemnation is possible only if terrorism is distinguished from many other forms of political violence or serious crime through a universal moral principle. Unconditional rejection of the instrumentalization of another human being is here claimed to have that moral appeal. By basing the definition of terrorism on it, the international community and states would find a solid moral basis for restoring public trust and the legitimacy of their counterterrorism efforts. Rule of law would also win, as references to specific terrorist aims that often are impossible to prove and will simply be ignored by prosecutors and judges would be deleted. Instead, the definition would refocus on what can be objectively

¹⁰ Kant [1785] 1987, 62.

assessed through a careful demonstration and analysis of the concrete facts in the individual case; namely, that the act entailed the instrumentalization of the immediate victims of the crime to mere means in its commission.

A new approach is needed. Instead of insisting on only the full and proper application of the best existing definitions of terrorism, the international community should search for a new consensus based on a fundamental moral principle that allows for the identification of the essential reason why terrorism is universally morally repulsive. The Kantian definition proposed here is based on the universal moral rejection of the instrumentalization of another human person through their reduction to mere means.

Governing the world requires cosmopolitan moral leadership. Is the UN Security Council prepared to live up to this challenge?

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