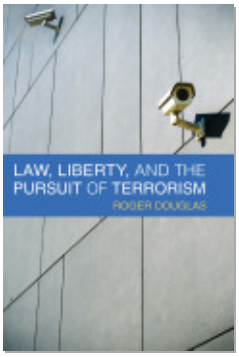
Law, Liberty, and the Pursuit of Terrorism

Douglas, Roger



Published by University of Michigan Press

THREE

What Is Terrorism?

> I know that African tribes yield only to violence. To exercise this violence with crass terrorism and even with gruesomeness was and is my policy.
>
> *Lieutenant General Luther von Trotha, commander of German forces in South West Africa, 1904–5*[1]

The previous chapters assume that there is a degree of agreement as to the meaning of the word *terrorism*. Otherwise, it would have been necessary to justify my implicit assumption that some activities could be classed as terrorism while others (such as a war characterised by "shock and awe") could not. In the absence of agreement about what terrorism entails, little could be gained by reference to the results of polls in which people are asked about the likelihood of terrorist attacks. Moreover, in referring to the "threat" of terrorism, I have assumed that terrorism is reprehensible: otherwise, it would have been better to refer to the "likelihood" or even the "promise" of terrorism.

This chapter addresses these assumptions by analysing the extent to which and the ways in which the national legislatures of the five countries have defined *terrorism* and cognate terms. Legislative definitions are not conclusive, but they and the debates surrounding them are suggestive. Importantly, they suggest that both across and within legislatures, there is a substantial consensus as to what terrorism entails. But there is also a degree of dissensus, stemming partly from ambivalence in relation to the legitimacy of lesser forms of political violence and partly from reluctance to protect "good terrorists" from the moral and legal implications of their falling within the statutory definitions.

An Elusive Term?

Despite the famously tortuous history of attempts to reach international agreement on a definition of terrorism, a degree of consensus has been achieved, helped perhaps by the transformation of successful freedom fighters from potential terrorists into their potential targets.[2] Resolutions of the

United Nations Security Council indicate a consensus that terrorism is evil, but the consensus is partly achieved by fudging the question of what terrorism actually entails. However, something akin to a definition emerges from the International Convention for the Suppression of the Financing of Terrorism (the Terrorist Financing Convention).[3] This convention does not define the term *terrorism*, but it makes it an offence to provide funds for any act "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act" (Art 2(1)(b)). It also applies to acts contrary to a number of specified conventions, thereby implying that such acts constitute forms of terrorism.[4] The specified conventions extend to behaviour regardless of whether it satisfies the "purpose" requirement of the Terrorist Financing Convention, but they also cover virtually all the kinds of activities by which a terrorist might conceivably seek to achieve his or her purposes.

The most recent "terrorism convention" follows the Terrorist Financing Convention in including both harm and purpose elements. The International Convention for the Suppression of Acts of Nuclear Terrorism, adopted at New York on 14 September 2005, applies to the possession and use of nuclear material or devices with intent to cause death or serious injury or substantial damage to property or to the environment, and to their use with the intent of coercing persons, international organisations, or states, as well as to credible threats of such use (Art 2, pars 1–2).

Significantly, the conventions are neutral in relation to the motivation of those who breach their conditions. It is not an excuse that the target of the act is a vicious government or the supporters of a vicious government. This is probably not surprising: conventions owe their existence in part to the willingness of vicious governments to accede to them.

Some scholars have argued that there is now sufficient consensus to warrant the proposition that it is possible to identify forms of terrorism in addition to those proscribed by the "terrorism conventions," which are also unlawful under international law.[5] However, it is difficult to formulate a simple definition of what constitutes terrorism under customary international law. Nonetheless, international law now seems to recognise something in the nature of a definition of terrorism.[6]

National Definitions

Terrorism existed long before legislative attempts to address it as a distinctive phenomenon, and until the turn of the century, the term *terrorism* was usually

either undefined or defined on an ad hoc basis for the purposes of particular pieces of legislation. In the United States, counterterror legislation continues to be based on numerous ad hoc definitions that vary from context to context. Elsewhere, post-2000 legislation has included a comprehensive definition that governs almost all contexts in which legal relevance is attached to terrorism and terrorism-related activity.

Defining Terrorism, 1973–2002: An Overview

The earliest references to terrorism in national legislation are found in legislation giving legal effect to the Geneva Conventions and, incidentally, to the conventions' prohibitions on "terrorism."[7] The conventions did not, however, include a definition of the term *terrorism*, and the earliest statutory definition appears to be the United Kingdom's definition in section 28(1) of the Northern Ireland (Emergency Provisions) Act 1973 (UK, c 53),[8] enacted in response to the upsurge of violence in Northern Ireland. This definition survived in successive emergency acts, until the last of these, the Northern Ireland (Emergency Provisions) Act 1996 (UK, c 22, as amended), was repealed by the Terrorism Act 2000 (UK).[9] This act included a definition of terrorism that applies to virtually every situation in which legal consequences attach to the fact that behaviour constitutes "terrorism."[10]

The earliest reference to terrorism in US federal legislation occurs in the Foreign Intelligence Surveillance Act of 1978 (FISA), permitting surveillance for the purposes of investigations into "international terrorism," for which it offers a definition that has proved resilient.[11] Variants appear in numerous other pieces of US legislation, either reproduced, by reference, or by reference to legislation that defines the terrorism in almost identical terms.[12] Section 1801(c) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (FRAA),[13] included a different definition of terrorism for the limited purpose of determining the content of annual country reports on terrorism. Under the USA Patriot Act of 2001, the definition has acquired considerably greater significance: it is now relevant to whether a body can be listed as a "foreign terrorist organization." Section 212(a)(3)(B)(iii) was added to the Immigration and Nationality Act of 1952 (INA) in 1990 and amended in 2001.[14] The INA definition of "terrorist activity" uses a quite different formula to that found in FISA and the FRAA. It is relevant to whether a person is eligible for entry to the United States and to whether a body may be listed as a "foreign terrorist organization." Other definitions include those of "international terrorism" in the Federal Courts Administration Act of 1992,[15] the "federal crime of terrorism" in section 702(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[16] "domestic terrorism" in section 802 of the USA Patriot Act

of 2001,[17] and "act of terrorism" in section 102(1) of the Terrorism Risk Insurance Act of 2002 (TRIA).[18]

Legislation clarifying the powers of the Australian Security Intelligence Organization (ASIO) defined "security" to include protection from "terrorism" and included a definition of terrorism;[19] and an overhaul of censorship legislation replaced relatively open-ended political censorship powers with more-limited powers, which included the power to exclude materials that advocated terrorism (which was not defined).[20] After a brief life, these two references to terrorism were removed from the legislation. In the ASIO legislation, the concept of "terrorism" was largely subsumed by a related concept, "politically motivated violence" (which included terrorism offences but not terrorism).[21] In the customs regulations, it was subsumed by a prohibition on material that promoted, incited, or instructed in matters of crime and violence.[22] When references to terrorism were reintroduced to the ASIO legislation, the term was defined by reference to a general definition adopted in the aftermath of 9/11.

In 2002, Australia enacted a series of counterterror measures. These were dependent on the existence of a "terrorist act," which was defined in an amendment to the Criminal Code 1995 (Commonwealth),[23] in terms similar to those used in UK legislation. The definition is the only extant definition of terrorism under Australian commonwealth law.

New Zealand's International Terrorism (Emergency Powers) Act 1987 attached consequences to and included a very broad definition of an "international terrorist emergency."[24] The Immigration Act 1987 (NZ) operated in relation to "acts of terrorism," which were defined somewhat differently. (The term is not defined in the Immigration Act 2009 (NZ).) The two 1987 definitions were left intact by the post-9/11 Suppression of Terrorism Act 2002 (NZ), which included yet another definition, based on the UK and Canadian definitions.

Except for its Geneva Convention legislation, Canadian legislation appears to have made no reference to *terrorism* or cognate terms until 1992, when the term appeared, undefined, in migration legislation.[25] The 2001 amendments to the criminal code attached a variety of consequences to "terrorist activity" and included a definition, based on the UK definition but including a number of innovations, of which many found their way into New Zealand law and some into Australian law.[26]

Comparing Definitions

Broadly, there are three types of definition regime. In the United States, definitions appear to have been devised to deal with particular problems, and while FISA-type definitions predominate, other definitions govern impor-

tant areas of counterterror laws. In the United Kingdom and Australia, there is a general definition of terrorism, which governs virtually all contexts in which it is relevant that "terrorism" is involved. The post-9/11 Canadian and New Zealand definitions have similarly general application. However, there is one important difference. Like the UK and Australian definitions, they include a general definition of terrorism, which resembles those definitions in both structure and content. However, following the precedent set by the Terrorist Financing Convention, Canada also defines terrorist activity to include activities falling within a number of specified offences that implement Canada's obligations under terrorism conventions.[27] New Zealand's definition is similar to Canada's, except that it defines terrorism to include offences against the conventions, rather than by reference to preexisting or concurrently created offences designed to implement New Zealand's obligations under the conventions. There is overlap between the categories, but there will be acts that are terrorist only because they either constitute a convention offence or fall within the general definition. The inclusion of offences against the conventions within the definition is also a feature of several US definitions, including that of the INA (which is predicated on offences against some of the conventions) and the definition of a "federal crime of terrorism" (whose elements include commission of one or more specified federal offences, which include those against laws giving effect to conventions).

Despite these differences, definitions typically include a number of elements. All include a "harm" element, which defines the physical or economic harm that terrorism entails (or, possibly, threatens). Most include an "intended purpose" element (which limits "terrorism" to acts done with the intention that they will produce particular results); and many include a "motivation" element (not generally found in US legislation, but an aspect of the general definitions in the other four jurisdictions).

The Harm Requirement

Broadly, the harm requirement is satisfied if the relevant act involves either serious violence to the person or behaviour that endangers human life. In relation to the level of violence required, several of the US definitions seem relatively relaxed. While "domestic terrorism" (18 USC § 2331) requires violence that is dangerous to human life, the harm elements of "international terrorism" (FISA) and "terrorism" (§ 140 of the FRAA) are satisfied by "violence," and under the Terrorism Risk Insurance Act of 2002 and its successors, a "violent act" suffices.

However, several US definitions include behaviour that does not involve

violence to the person. For example, the category "federal crime of terrorism" (AEDPA) includes attacks on infrastructure, federal government property, and computer systems. The category "act of terrorism" (TRIA) covers acts that endanger property and infrastructure.

The general Canadian, New Zealand, and Australian definitions are based to a considerable extent on the 2000 UK definition.[28] In general, the UK and Australian definitions set a lower harm threshold than do the definitions used in Canada and, a fortiori, New Zealand, especially in relation to behaviour that causes property damage. In relation to behaviour that involves violence to the person, there is a rough consensus. Violence is not enough: all four definitions require that the violence be "serious" or at least involve physical harm or danger to life.[29] All four general definitions accept that creating a serious risk to the health or safety of a population also satisfies the harm element.[30] The inclusion of convention offences means that in Canada and New Zealand, there may be exceptional circumstances where nonserious violence can constitute terrorism.[31]

There is far less agreement in relation to property damage. In the United Kingdom and Australia, the harm requirement is satisfied by "serious damage to property" and by serious interference with or destruction of electronic systems.[32] In Canada and New Zealand,[33] more is needed. Property damage can satisfy the requirement only if it is likely to produce harm that would fall within one of the "violence" categories.[34] In Canada, serious interference with or disruption to an essential service, facility, or system satisfies the harm requirement (subject to a "legitimate protest" qualification). The relevant New Zealand provision requires serious interference with "infrastructure" and applies only if that interference endangers life. Yet New Zealand recognises one form of harm that might not fall within the other definitions: the release of a disease-bearing organism that could devastate the national economy.[35]

Acts that are contrary to the terrorism conventions and that involve harm to property generally fall within the harm criteria prescribed by the general definitions. Typically such acts involve conduct that is also likely to endanger life or at least bring harm to infrastructure. This is not the case in New Zealand, however. Attacks on property that threaten infrastructure but not life do not fall within New Zealand's general definition, although they do fall within the Terrorist Bombings Convention, if the incident involves at least one non-New Zealander as perpetrator or victim.[36]

"Terrorism" (UK) and "terrorist acts" (Australia) include threats of such acts.[37] In New Zealand, a threat to produce a relevant outcome would not constitute a "terrorist act." In Canada, "terrorist activity" includes conspiracies, threats, attempts, being an accessory after the fact, and counseling in relation to terrorist activities.[38]

Intended Effect: Impact on Government and Civilians

Virtually all definitions require that the harm be done or threatened with the intention to coerce governments or intimidate populations. The widely used FISA definition requires that the act or acts (1) be such that they would be an offence under American law if committed in the United States and

> (2) appear to be intended—
> (A) to intimidate or coerce a civilian population;
> (B) to influence the policy of a government by intimidation or coercion;
> (C) to affect the conduct of a government by assassination or kidnapping.[39]

There are, however, variants. FISA-like definitions made more recently include affecting the conduct of government through the use of weapons of mass destruction. The FRAA definition of "terrorism" requires that it be "politically motivated," rather than that it be intended to coerce or intimidate. While there are some circumstances in which this difference would be material to whether conduct constituted terrorism,[40] politically motivated violence will normally imply an intention to coerce or intimidate. Like the terrorism conventions on which it is based, the INA definition treats intended impact as largely irrelevant. Intimidation of civilians does not satisfy the "intended effect" requirement for "federal crimes of terrorism," but retaliation against government does.[41]

The UK legislation requires that the action or threatened action be "designed to influence the government or to intimidate the public or a section of the public." "Government" was initially defined to include not only the government of the United Kingdom but also governments of parts of the United Kingdom and of other countries. It was subsequently amended to extend to international organisations.[42] Unlike the Australian, Canadian, and New Zealand definitions, the UK definition provides that if the action satisfying the harm requirement involves the use of firearms or explosives, it is terrorism, regardless of whether the "influence or intimidate" requirement is satisfied (s 1(1B)). This exception has the potential to produce rather odd results. If a religiously motivated person unleashes anthrax bacteria, this is not terrorism unless there is an intent to coerce or intimidate. If the person uses a shotgun, it is terrorism regardless of whether the offender intends to coerce or intimidate (although a political, religious, or ideological requirement is needed).

The Australian "intimidation" requirement is similar to the United Kingdom's but requires an intention to coerce governments and not simply to

influence them.[43] In practice, little is likely to turn on this distinction, but it would mean that a violent attack on the government (which was not intended to intimidate the public) would not constitute terrorism if the actor intended that the attack would persuade the government to have second thoughts about the moral justification for a particular policy. The Canadian and New Zealand definitions do not require an intention to intimidate or coerce, as long as the activity falls within a listed terrorism convention. In relation to acts defined other than by reference to the conventions, they resemble the Australian definition in requiring coercion rather than influence, regardless of whether the offence involves the use of firearms or explosives. The Canadian definition is, however, slightly broader than the Australian and original UK definitions, in that it includes coercion of domestic and international organizations.[44] It also extends to an attempt to intimidate any person, rather than "a section of the public."[45] New Zealand law includes attempts to coerce international organisations,[46] but it also includes a slightly stricter intention requirement: it is not enough that there be an intention to coerce government; there must be an intention to do so "unduly" (s 5(2)(b)). One day, if New Zealand is unlucky, a court will have to decide when coercion is "undue."

On the whole, these definitions resemble the FISA definition. But whereas FISA requires merely that the act appears to be intended to coerce or intimidate, the UK legislation and legislation based on it requires that it be done with the intention that it achieve the particular outcome. This requires the existence, not merely the apparent existence, of the relevant intention.

Purpose/Intention to Advance a Cause

Whether or not relevant actors are intending to advance a cause is largely irrelevant to US definitions, although the FRAA requires acting for a political motive. Motivation is, however, an additional element in the UK, Canadian, New Zealand, and Australian definitions. Not only must the act be done with the intention of causing particular impacts on government and the public, but it must be done to advance particular causes. The UK requirement, which was initially that an act be "for the purpose of advancing a political, religious or ideological cause" (s 1(c)), has been subsequently amended so that "racial" causes are also included.[47] The Canadian, New Zealand. and Australian requirements are similar to the original UK requirement.[48] However, as with the intention requirement, there is no purpose requirement in Canada and New Zealand when the relevant act falls within a listed terrorism convention. The requirement means that the relevant laws do not extend to a hypothetical serial killer who gains satisfaction from causing fear among women but is not ideologically or religiously committed to doing so. Nor would they cover the

case of a person motivated solely by greed who attempted to extort money from a large retail chain by leaving poisoned products on the shelves of its supermarkets, notwithstanding that the offender believed that the threat would cause widespread fear.

Qualifications: Advocacy, Protest, Dissent, and Industrial Action

The Canadian, New Zealand, and Australian definitions include a further limitation: each definition provides that in certain circumstances, behaviour that would otherwise constitute terrorism will not do so if the act constitutes advocacy, protest, dissent, or industrial action. In Canada, an act that falls within one or more of these categories and involves disruption to an essential service does not constitute terrorism unless it is intended to cause serious harm, endanger a life, or endanger the health or safety of the population.[49] It is not terrorism even if it causes substantial property damage that is likely to produce such harm. Australian legislation is similar.[50] In New Zealand, disruption of essential services cannot of itself constitute terrorism, whether engaged in by protesters or otherwise. New Zealand law nonetheless includes limited protection for protesters, by providing that the fact that a person is participating in a protected activity is not, by itself, sufficient evidence that the person is acting for a prohibited purpose or intends to cause a prohibited outcome.[51] Even in the absence of this proviso, it is hard to see how that participation could be considered as such evidence. US and UK law include no such provisions.

Qualifications: Armed Conflict

Read literally, many of the definitions include war within the rubric of terrorism. War, after all, involves the use and threat of violence in order to coerce governments. War is, in a sense, the most extreme form of terrorism, and the costs and casualties of war so vastly exceed those of other forms of violent politics that one could be forgiven for wondering why there should be so much concern about those other forms of violence. If terrorism per se is bad, how can war per se not be much worse? But all five countries maintain military forces and sometimes use them.

National definitions have dealt with this problem in at least three ways. One is to limit terrorism to attacks on civilian populations and to exempt from the definitions attacks that do not fall foul of the law of international armed conflict.[52] This is the approach taken by Canada and New Zealand. Under Canadian law, acts that would otherwise fall within the general definition of terrorism do not do so if they take place in the course of armed conflict and are consistent with the body of international law applicable to the conflict. This

exception also applies to offences under the legislation governing the terrorist bombings convention.[53] New Zealand law includes an international law defence but expressly defines terrorism to include acts that take place in the course of armed conflict and are intended to cause death or serious bodily injury to noncombatants.[54]

These provisions effectively mean that acts in the course of armed conflict do not constitute terrorism as long as they comply with the Geneva Conventions. Acts by national armed forces are protected, but so are acts by enemy armed forces. Acts by guerilla armies may also be protected either under the protocols to the conventions or under Common Article 3. If the Prince Edward Island Liberation Army pursued its objectives by attacks limited to the Canadian armed forces, it could not be proscribed under Canadian counterterrorism legislation. If, contrary to the Geneva Conventions, it murdered civilians, it would lose this protection.

On the whole, this is a conceptually elegant solution to awkward questions otherwise implicit in counterterrorism legislation, but it requires a deep commitment to international law. The US definitions tend to achieve a similar result, albeit less elegantly. Some definitions (including the FISA definition) confine terrorism to attacks on civilian targets. They do not extend to attacks on armed forces and therefore to attacks by armed forces on other armed forces. However, on their face, they appear to include military attacks on civilians, whether the attack would be permitted under the Geneva Conventions or not.

The FRAA definition limits terrorism to attacks on civilians by subnational groups. It therefore excludes any activities by national armies. The INA definition of "terrorist activity" applies only to acts that are also prohibited under several of the earlier "terrorism conventions." In addition, many definitions (including the FISA and related definitions) require that the act be one that is, in any case, an offence against US law or would be if committed in the United States. The elements of US terrorism offences are such that there are almost no circumstances in which a person can be guilty of a terrorism offence without also being guilty of a nonterrorism offence or of knowing assistance to terrorist organisations (whose listing is constrained by the FRAA and INA definitions). This protects members of the United States and other armed forces, except insofar as their behaviour would be unlawful under nonterrorism legislation.

The UK and Australian definitions do not expressly exclude acts in the course of armed conflict and, on their face, would include acts of war, whether they are engaged in by government forces, allied forces, foreign forces, or enemy forces. In the United Kingdom, that acts by government forces seemed to fall within the definition of terrorism provoked some concern in the Par-

liament, where the government argued, first, that the UK armed forces were protected because the legislation was not expressed to apply to the Crown;[55] second, that, in any case, the definition did not cover any action in armed conflict;[56] and, finally, that even if it did, the director of public prosecutions would not prosecute.[57] The first consideration meant that the activities of members of the UK armed forces were not covered by the legislation but would not protect a member of a foreign force. Immunity protections for the Australian crown are weaker, but it is likely that Australian courts would interpret the legislation in the light of the practicalities of national defence. The second consideration was not developed, but the conclusion appears to be correct. Prosecuting a participant in international armed conflict for behaviour not constituting a breach of international law would constitute a breach of the Geneva Conventions. Given the presumption against a legislative intention to legislate contrary to international law and given the absence of any extrinsic materials to suggest such an intention, it is likely that the court would read the legislation down.

The question arose in the trial of a defendant on charges of disseminating terrorist publications, where his defence was that force against the military was justified. Among questions asked by the jury was whether the use of force by coalition forces in Afghanistan was terrorism. The judge's answer was that

> the use of force by Coalition forces is not terrorism. They do enjoy combatant immunity, they are ordered there by our government and the American government, unless they commit crimes such as torture or war crimes.[58]

The defendant was convicted and appealed, but it was not necessary for the appeal court to decide whether the trial judge's answer was correct.

Even read down, the UK and Australian definitions cover some acts in the course of armed conflict that would not fall within the Canadian and New Zealand definitions. The former definitions catch terrorist acts that are not contrary to international law and that take place in the course of armed conflict not amounting to international armed conflict, or activity falling within Protocol II. Since these acts are not contrary to international law, they do not fall within the Canadian definition, and they fall within the New Zealand definition only insofar as they involve attacks on civilians. It would not be terrorism for a guerilla group to attack a Canadian army base or the New Zealand navy. However, while international law does not forbid such attacks, it does not preclude countries from punishing people who participate in them.[59] There is therefore no international law-based presumption in favour of such guerillas under UK and Australian law, and if their behaviour falls within the natural meaning of the relevant definition, it would constitute terrorism.

Implications

Definitions matter because they have implications for the scope of counterterror laws, but their significance depends on those laws. For this reason, their history provides limited guidance to the extent to which counterterror laws can be understood in terms of the opportunities and pressures generated by terrorist attacks. It suggests several conclusions. First, the timing of legislative definitions indicates that they can scarcely be treated as ill-considered. Second, their history provides some evidence of the conflicting priorities of the executive and legislative arms but little evidence of conflict between the political and judicial arms. Third, there is no evidence to suggest that definitions can be understood as a response to an illiberal public. But there is some evidence to suggest that choice of definitions can be understood in terms of tolerance of unconventional politics.

A Response to Heightened Fears?

While several of the general definitions were enacted as part of a package of post-9/11 measures, they can scarcely be treated as ill thought through. First, all the definitions can trace their ancestry to prior to the 9/11 attacks, and none of them was adopted in circumstances that suggest it could only have been adopted in the immediate aftermath of the attacks. The widely used FISA definition was a response not to a terrorist attack but to government abuse of surveillance powers. The UK definition of 2000 was included in legislation that had had a four-year gestation period and that had been designed for an era in which it was hoped that Northern Irish terrorism would have largely ceased to be a problem. Moreover, while the Canadian, Australian, and New Zealand definitions were adopted following the 9/11 attacks, they were heavily based on the UK definition, except insofar as they were narrower. The relevant Australian and New Zealand bills were not finally passed until July and November 2002.

Institutional Responses

There is some evidence that governments favoured slightly wider definitions than the legislatures. In the United Kingdom and Australia, governments defended proposed definitions on the grounds that flexibility was desirable and that governments could be trusted with the powers in question. However, despite having a large parliamentary majority, the UK government agreed to an amendment adding a limited "intimidate or influence" element (which subsequently found its way into the other three countries' definitions). The Ca-

nadian government (which also had a large parliamentary majority) agreed to expand its "protest" exception to include unlawful as well as lawful protests. The Australian bill had originally proposed a definition based on an early version of the proposed UK legislation. A Senate committee recommended the addition of a "coerce or intimidate" requirement to deal with what would otherwise be a danger of overbreadth,[60] and the Liberal-National government later agreed to amend the legislation accordingly, by replacing a "lawful protest" exception with one that extended to unlawful but nonviolent protests. It probably had no choice. It needed Labor Party support to secure the passage of the legislation through the Senate.

Definitions have rarely given rise to litigation, and insofar as courts have considered the meaning and validity of definitions, they have generally agreed with the government. The only exception is *R v Khawaja*, a Canadian case where a defendant charged with terrorism offences argued that the motivation requirement represented an unconstitutional interference with freedom of political and religious expression. Justice Rutherford agreed:

> It seems to me that the inevitable impact to flow from the inclusion of [the requirement] will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups, both in Canada and abroad. Equally inevitable will be [a] chilling effect. There will also be an indirect or re-bound effect . . . , as individuals' and authorities' attitudes and conduct reflect the shadow of suspicion and anger falling over all who appear to have any connection with the religious, political or ideological grouping identified with specific terrorist acts.[61]

This heartfelt expression of dissent from post-9/11 politics demonstrates admirable judicial independence and praiseworthy unchillability. But it is also puzzling. It seems to imply that but for the motivational element, police and security agencies would focus considerably less on those with particular beliefs. But their pre-2001 practices suggest otherwise.

While the judgment may have provided symbolic satisfaction to Canadians for whom the motivational element issue has acquired considerable symbolic importance, it did nothing for Khawaja. Rutherford held that the offending clause could be severed from the definition, thereby saving the government from having to prove the motivation element of Mr. Khawaja's alleged offence. Khawaja's application for leave to appeal to the Supreme Court against the interlocutory decision was dismissed.[62] The issue subsequently arose in

United States v Nadarajah (an extradition case)[63] and in R *v Ahmad*,[64] where the court decided not to follow *Khawaja.* Khawaja was subsequently convicted, and he appealed unsuccessfully to the Ontario Court of Appeal, which dismissed the appeal in a judgment that was also highly critical of Rutherford's handling of the "chilling" issue.[65] The parties to the extradition case were also unsuccessful on appeal.[66] The Supreme Court granted leave to appeal on grounds including the motivation requirement ground but subsequently and unanimously concluded that the motivation requirement did not fall foul of the Charter.[67] Otherwise, in relation to definitions, courts seem to have been content to let legislative decisions prevail.

Political Beliefs

The nature of opposition to the legislation suggests that stances on definitional issues were prompted in part by preexisting attitudes. In the United Kingdom, the "protest" issue aroused a degree of cross-partisan concern, but concerns were particularly likely to be expressed by backbench Labour members of parliament and by Liberal Democrats. Similar concerns were expressed by New Democrats and members of the Bloc Québécois in Canada; by the Labor Party, the Australian Democrats, and the Greens in Australia; and by the Greens in New Zealand. The same groups also expressed concerns about the danger that the legislation could catch "good terrorists."

However, these partisan differences should be kept in perspective. In the United Kingdom, the Labour government made no attempt to accommodate backbench concerns about possible overreach or the impact of the legislation on good terrorists, beyond assurances that the legislation would be used responsibly. In Canada, a proposed amendment to remove the "ideological purpose" element was supported by the Progressive Conservatives and the Canadian Alliance, although their primary concern seems to have been to expand the coverage of the act and ease the task of prosecutors.[68] Once the Australian government agreed to extend the scope of the "protest" exception, the Labor Party voted with the government on definitional issues; and in New Zealand, there was broad support for the definition from the major parties. Moreover, definitions have proved remarkably stable, notwithstanding changes in government. The United Kingdom expanded the "motivation" requirement to include racially motivated terrorism and extended the scope of the definition to cover terrorism against international organisations, but elsewhere there have been no changes, even where incoming governments had opposed the original definitions. On becoming the government, the Canadian Conservative Party did not attempt to eliminate the "ideological motive" requirement.

The Role of the Public

The parliamentary history of the post-9/11 legislation suggests that definitions cannot be readily understood as a response to authoritarian pressures from the public. Insofar as there was public input into the legislation, it came overwhelmingly from civil libertarians and the political left.[69] Moreover, parliamentary opposition to the legislation was overwhelmingly based on the civil libertarian objections, rather than on arguments that the definitions were underinclusive. There were no attempts to amend the definition to relax the "harm" or "intimidate and coerce" requirements. There were also, however, moves to eliminate the "ideological motive" element. Parliamentary critics of this element argued that it should be deleted because attention to motive discriminated against people pursuing collective goals and could encourage discrimination on religious, political, and ideological grounds. Had they got their way, their amendment would have broadened the ambit of counterterror law and eased the task of prosecutors, but on the whole, that does not seem to have been their intention. Rather, the element seems to have acquired symbolic significance, especially in Canada. The paucity of calls to broaden the scope of counterterror laws suggests that opposition parliamentarians did not envisage that there was political capital to be gained from advocating broad definitions or that, if they did, they were not interested in trying to attract it. If, as seems likely, responses to terrorism are influenced by images of massive terrorist attacks, popular ideas of what constitutes terrorism might well be considerably narrower than those embodied in the definitions.

Conclusions

There is considerable agreement as to what constitutes terrorism, but the term *terrorism* is necessarily vague. Acts of terrorism rank along a continuum. At one extreme is the typical attack that causes physical and social harm but poses no serious threat to the social and political order. If the threat of terrorism were limited to such attacks, there would be little need for special terrorism laws. However, even minor attacks may have corrosive effects if they become frequent. Nor is it self-evident that terrorism should be confined to acts against the person. Acts against property can harm people. The destruction of a factory may strip hundreds of their employment. Bombing a metro system may mean that thousands have to spend far more time getting to work. International law recognises the emotional significance of national monuments, artistic treasures, and places of worship. Another consideration is that the low harm threshold makes proof of guilt easier, especially in relation to preparations and conspiracies. Proving an intention to cause at least some serious

physical injury will be easier than proving an intention to cause serious physical injury to more than a specified number of people. If the harm caused or threatened barely crosses the harm threshold, proving the additional intent will be correspondingly harder. Defenders of broader definitions also argued that political good sense would reduce the danger of abuse, thereby highlighting one of the issues that pervades counterterrorism law and practice: whom does one trust to do the right thing, and by what process can they be made accountable? The legislatures' answer has been politicians and politics, but only up to a point.