WHAT IS “TERRORISM”? ASSESSING DOMESTIC LEGAL DEFINITIONS

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ABSTRACT

Anti-terrorism powers were largely enacted as an emergency response to September 11 and later terrorist attacks, and yet they now appear to be a permanent feature of domestic law. How governments apply these anti-terrorism powers depends upon the scope of statutory definitions of terrorism. This article develops three key criteria for assessing the appropriateness of definitions of terrorism in domestic legislation. The first two criteria relate to the principle of legality. They require definitions of terrorism to be drafted in language which (1) gives reasonable notice of the prohibited conduct, (2) confines the operation of legislation to its intended purposes, and (3) is drafted consistently in comparable jurisdictions. The article then tests seven definitions of terrorism against these three criteria. It focuses on legal definitions of terrorism in the United Kingdom, Canada, Australia, South Africa, New Zealand, India, and the United States. The article not only examines the statutory language used to define terrorism in

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each jurisdiction, but also examines how these definitions have been applied and interpreted since their enactment. This testing process suggests that much remains to be done to improve the clarity, scope and consistency of definitions of terrorism in domestic legislation.

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INTRODUCTION

Although many democratic nations enacted anti-terrorism legislation as a reactive, emergency response to September 11 and later terrorist attacks,¹

much of this legislation remains on the statute books a decade later. How governments apply this legislation domestically depends on the scope of statutory definitions of terrorism. Terms such as “terrorism,” “terrorist act,” and “terrorist activity” define which violent and indiscriminate acts are worthy of severe criminal sanctions. They also trigger a range of preemptive criminal offenses and extraordinary governmental powers. Clearly, definitions of terrorism in domestic legislation have wide-ranging consequences for individuals. They also have important implications for the scope of state power now and in the future, because they determine whether governments can interfere with the rights of citizens when national security considerations intervene. For all these reasons, arriving at appropriate statutory definitions of terrorism is of great long-term importance.

There has been a wealth of legal scholarship that critiques statutory definitions of terrorism. Much of this research lacks the benefit of perspective, because it was written at the same time when nations grappled with the problems of enacting and applying new anti-terror laws. This article makes a number of new contributions. First, we focus not only on what
Statutory definitions have been enacted in domestic jurisdictions, but also on how democratic governments, judiciaries, and review bodies have applied and interpreted these definitions in the years since their enactment. Second, we take a practical, normative stance on what definitions of terrorism should look like in domestic legislation. Instead of expressing a view on what elements should or should not be included in a definition of terrorism⁴ or focusing on the political contestability of such a definition,⁵ we examine the ways in which domestic legislatures can best draft definitions of terrorism in line with sound legal policy. Above all, we argue that legislatures should avoid drafting imprecise and overbroad definitions of terrorism, and that definitions of terrorism should be drafted consistently across comparable jurisdictions.

In Part I, we set out three non-exhaustive criteria for assessing the appropriateness of definitions of terrorism in domestic legislation. We do not assess definitions against the constitutional rules of any particular nation, such as for compliance with a Bill of Rights or other public law restriction. Instead, we rely upon generic legal criteria that can be applied across comparable jurisdictions. The first two criteria relate to the appropriateness of a definition of terrorism within the domestic sphere. They rely on the “principle of legality,” which is also referred to by the Latin maxims nullum crimen sine lege (“no crime without a law”) and nulla poena sine lege (“no punishment without a law”). The principle of legality is a widely accepted framework for protecting individuals from unjustified state interference in liberal-democratic societies. It comprises a number of interlocking strands, each implying that penal legislation should be drafted in language that is unambiguous and properly describes the conduct it intends to prohibit. This suggests two important criteria for assessing the appropriateness of a

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⁴ See, e.g., Kent 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 (Andrew Lynch, Edwina MacDonald & George Williams eds., 2007); Ben Saul, The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought? in LAW AND LIBERTY IN THE WAR ON TERROR 28 (Andrew Lynch, Edwina MacDonald & George Williams eds., 2007). In those chapters, both authors present opposing policy arguments about whether or not a “political, religious, or ideological” motive requirement should be included within a statutory definition of terrorism.

domestic definition of terrorism: (1) a legal definition of terrorism should be sufficiently clear and precise to give reasonable notice of the kinds of conduct it prohibits; and (2) a legal definition of terrorism should not encompass conduct which allows legislation to operate outside its intended purposes.

Our third criterion relates to the appropriateness of a domestic definition of terrorism within the international sphere. Soon after the September 11 attacks, the United Nations Security Council called for concerted state action against terrorism by issuing Resolution 1373. Resolution 1373 required Member States to take cooperative legislative action against terrorism, but failed to provide a universal definition of terrorism for states to follow when enacting terrorism offenses in domestic criminal legislation. As a result, legislatures across the world have created a plethora of diverse definitions of terrorism. This is an undesirable result, because such a variety of differing legal definitions may undermine cooperation between states when countering and prosecuting terrorist acts across national borders. Inconsistency between definitions of terrorism may also undermine the normative force of the post-9/11 global legal response. This can occur because inconsistency creates moral uncertainty as to the kinds of conduct that should be criminalized as terrorism. This suggests a third criterion: (3) A legal definition of terrorism should be consistent with legal definitions of terrorism in comparable domestic jurisdictions.

In Part II, we test a range of domestic definitions of terrorism against these criteria. We focus on the United Kingdom, Canada, Australia, South Africa, New Zealand, India, and the United States. Definitions of terrorism enacted in these jurisdictions are amenable to close comparison because they have similar wording and structure. Additionally, each jurisdiction is a liberal democracy with a similar legal system, which allows for an effective comparison of how these definitions have been applied and interpreted since their enactment. This testing process enables us to draw both specific and broad conclusions about the appropriateness of current definitions of terrorism.

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I. CRITERIA FOR ASSESSING DOMESTIC DEFINITIONS

A. The Principle of Legality

Our first two criteria relate to the appropriateness of a legal definition of terrorism within the domestic sphere and are based on the “principle of legality.” This principle can be described in a variety of ways. The first way in which it is described relates to the Latin maxims nullum crimen sine lege (“no crime without a law”) and nulla poena sine lege (“no punishment without a law”). These maxims are generally attributed to Paul Johann Anselm Ritter von Feuerbach in the early 19th century at the peak of classical liberalism. Feuerbach outlined three fundamental principles to be adopted in modern criminal law: nulla poena sine lege, nulla poena sine crimen, nullum crime sine poena legali (“no punishment without a law,” “no punishment without a crime,” “no crime without a criminal law”). These principles relied on the prevailing social contract view of liberal democracy: citizens who violate the express conditions of the social contract commit a crime, but are otherwise free to do as they please. More specifically, these phrases imply normative rules for drafting and interpreting criminal legislation, such as the prohibition against retroactive punishment, the requirement that courts interpret criminal laws narrowly, and the requirement that legislatures draft criminal offenses in sufficiently specific language.

The second sense in which the principle of legality is described relates to a series of human rights treaty obligations. These treaty obligations are closely related to the Latin maxims because they require states to give citizens reasonable notice of any conduct that will attract criminal punishment. As treaty obligations, however, they can have more bite than the normative force of the Latin maxims. Article 15(1) of the “International Covenant on Civil and Political Rights (ICCPRs),” for example, provides

7 Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 169 (1937) (referring to German legal scholar Paul Johann Anselm Ritter von Feuerbach and not his son, German philosopher and anthropologist, Ludwig Andreas von Feuerbach). See also KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL & COMPARATIVE LAW 12 (2009).
8 GALLANT, supra note 7, at 12; Hall, supra note 7, at 169-70.
9 Hall, supra note 7, at 170. See also GALLANT, supra note 7, at 21 (discussing the “liberty-favoring maxim that everything not forbidden is permitted”).
10 See Peter Westen, Two Rules of Legality in Criminal Law, 26 LAW & PHIL. 229, 231-2 (2007) (collection of these and other rules implied by the Latin maxims).
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that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time when it was committed.” Under Article 4(2), Article 15 is one of the “non-derogable” provisions of the ICCPRs. This means that states cannot relieve themselves of the obligation even in times of public emergency. Article 15 has been referred to as embodying the “principle of legality” by the International Commission of Jurists, the “Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism (Special Rapporteur on Counter-Terrorism)” Martin Scheinin, and the United Nations Office of the High Commissioner for Human Rights.

There are near-identical provisions to Article 15 in Article 7 of the European Convention on Human Rights and in Article 9 of the “American Convention on Human Rights (ACHRs).” The “Inter-American Court of Human Rights (Inter-American Court)” explained the meaning of Article 9 of the ACHRs in the Castillo Petruzzi case. In this case, the Inter-American Court held that the crimes of treason and terrorism under Peruvian law infringed Article 9 because they were not strictly defined, and allowed the Ministry of the Interior and the Peruvian Police to prosecute a range of conduct as either terrorism or treason, depending on their view at the time:

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The court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense... This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power... Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of nullum crimen nulla poena sine lege praevia recognized in Article 9 of the American Convention.18

Thus, the “principle of legality” can refer to a state’s legal obligation to specify crimes in advance by using language that is sufficiently precise, unambiguous, and narrowly focused on the prohibited conduct.19 The extent to which the principle of legality is enforceable will depend on whether a convention such as the ICCPRs or ACHRs is part of a state’s domestic law.20 Nonetheless, the requirement of “advance notice” underlying the principle of legality is so fundamental that the prohibition against retroactive criminal punishment has become a customary norm of international law.21 While international law does not currently require that the “absolute narrowest definition of crimes... be adopted,”22 or that a crime be drafted more precisely than could ordinarily be expected of the written word,23 it does require that domestic legislation be sufficiently precise for citizens to

18 Id. ¶ 121.
19 See also HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 95 (2005) (“The nullum crimen rule also requires that criminal conduct must be defined according to clear, accessible and unambiguous law. The definition of the crime must in turn ‘be strictly construed and shall not be extended by analogy.’ Any ambiguity should be interpreted in favour of the person being investigated, prosecuted or convicted.”).
20 The principle of legality may also play out differently in different individual states, even when these states have enacted the same human rights treaty. See JONATHAN COOPER, ORG. FOR SEC. AND CO-OPERATION IN EUR. [OSCE], COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL 60 (2007) [hereinafter OSCE MANUAL] (“Within the OSCE region there are a variety of different legal systems, which means different jurisdictions may have different approaches to the notion of legality.”). See also GALLANT, supra note 7, at ch. 5, (a comparative study of the principle of legality in the national laws of different jurisdictions).
21 GALLANT, supra note 7, at 358.
22 Id. at 359.
23 See id. at 31-33.
reasonably foresee that their actions will attract criminal punishment.\textsuperscript{24}

The third sense in which the principle of legality is described has relatively recent origins in late twentieth century United Kingdom case law. In \textit{R v. Secretary of State for the Home Department; Ex parte Pierson,}\textsuperscript{25} Lord Steyn used the phrase to refer to a narrower version of the “rule of law” than might otherwise be employed today; namely, that parliaments may only displace the principles and traditions of the common law by clear and specific words.\textsuperscript{26} By 2002, this version of the principle of legality had been established as a “unifying principle in English law,” according to Lord Hoffman in \textit{R v. Secretary of State for the Home Department; Ex parte Simms.}\textsuperscript{27}

Such comments have since filtered into methods of judicial interpretation employed by the judges of other nations. In a number of Australian High Court cases, for example, the phrase “principle of legality” has been employed as a versatile tool of judicial interpretation to support a public law “presumption against a parliamentary intention to infringe upon . . . rights and freedoms.”\textsuperscript{28} One Australian judge, Chief Justice J.J. Spigelman of the New South Wales Supreme Court, has also listed a number of specific rebuttable presumptions underlying this interpretative tool, including that Parliament did not intend to: invade fundamental rights and freedoms; restrict access to the courts; abrogate the protection provided by legal professional privilege; deny procedural fairness; grant wide immunities to governmental bodies; interfere with vested property rights; alienate property without compensation; or interfere with the right to freedom of religion.\textsuperscript{29}

The fourth sense in which the principle of legality is described relates to a broader conception of the “rule of law” which suggests that crimes and

\textsuperscript{24} \textit{Id.} at 359-63. \textit{See also OSCE MANUAL, supra note 20, at 61 (“The Human Rights Committee, as the main institution with responsibility for ensuring the implementation of the ICCPR, has confirmed that law should not be so vague as to permit too much discretion and unpredictability in its implementation. This principle should also be recognized as forming a key element of customary international law.”).}

\textsuperscript{25} \textit{Regina v. Sec’y of State for the Home Department; Ex parte Pierson, [1998] A.C. 539.}

\textsuperscript{26} \textit{Id.} at 587, \textit{cited in J.J. Spigelman, Principle of Legality and the Clear Statement Principle, 79 AUSTL. L.J. 769, 774, n. 34 (2005).}

\textsuperscript{27} \textit{Regina v. Sec’y of State for the Home Dep’t; Ex parte Simms [2002] 2 A.C. 115, 131, cited in Spigelman, supra note 26, at 774.}


\textsuperscript{29} \textit{See Spigelman, supra note 26, at 775.}
punishments should be validly established as part of a legal system according to certain criteria. Kenneth Gallant, for example, explains, “the name legality shows a deep connection with the rule of law,” because it requires “that the specific crimes, punishments, and courts be established legally – within the prevailing legal system.” In similar terms, John Jeffries has explained, “the most important concern underlying nulla poena sine lege . . . is the so-called ‘rule of law.’” For Jeffries, the rule of law in the context of domestic criminal law “means that the agencies of official coercion should, to the extent feasible, be guided by rules – that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct.” On this point, Jeffries is echoing a classic account of the rule of law given by Lon Fuller, who in The Morality of Law tells a parable about an unhappy monarch named Rex in order to outline eight “principles of legality.” Fuller frames these principles of legality as eight failures that legislators must avoid if they are to establish a valid system of law:

(1) a failure to achieve rules at all
(2) a failure to publicize rules
(3) the abuse of retroactive legislation
(4) a failure to make rules understandable
(5) the enactment of contradictory rules
(6) the enactment of rules that require conduct beyond the powers of the affected party
(7) introducing such frequent changes in the rules that subjects cannot adjust their conduct accordingly
(8) inconsistency between the rules as announced and their application.

According to W. Wesley Pue, “few could argue against the virtue” of Fuller’s eight principles of legality, which are “widely considered to embody the essence of the rule of law.” The principle of legality can therefore be

30 GALLANT, supra note 7, at 15.
32 Id.
33 LON FULLER, THE MORALITY OF LAW 33-38, 41, 197–200 (1969). Fuller refers to these as his “principles of legality.”
34 Id. at 38–39. See also OSCE MANUAL, supra note 20, at 62.
35 W. Wesley Pue, Protecting Constitutionalism in Treacherous Times: Why “Rights”
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used as shorthand for the underlying belief in liberal-democratic states that domestic legislatures should establish crimes and punishments validly according to certain criteria of lawmaker. The criteria in question resemble the first two versions of the principle of legality set out above—such as specifying and publicizing understandable rules in advance—but the focus in this version of the principle of legality is on the validity and legitimacy that those criteria provide, as opposed to the criteria themselves. This focus on the validity of legal rules and systems can be traced as far back as classic Diceyan statements of the rule of law, and more recently to decisions of the United States Supreme Court which invalidated the use of military commissions by the Bush administration in the wake of the 9/11 attacks.

These four versions of the principle of legality have much in common, although each is subtly different. The first version refers to a series of normative maxims for drafting criminal legislation that are based on classical liberal principles. The second refers to a state’s legal obligation to specify crimes and punishments in advance by using language that is sufficiently clear, precise, and narrowly focused for citizens to reasonably foresee that their actions will attract criminal punishment. The third refers to a public law presumption against a parliamentary intention to infringe upon rights and freedoms. The fourth refers to the validity and legitimacy required of crimes and punishments by the rule of law.

To capture the essence of these four limbs together in one authoritative statement, we would summarize the principle of legality as follows:

It is presumed that governments do not intend to interfere with the fundamental rights and freedoms of their citizens. That presumption can be displaced if a government specifies in legislation that a particular type of conduct will attract criminal punishment. In order for that criminal legislation to be valid and legitimate, it must specify a crime in advance by using language that is sufficiently clear, precise, and narrowly focused on the prohibited conduct such that individuals can reasonably foresee whether their actions will attract criminal punishment.

This statement of the principle of legality provides an authoritative

Don’t Matter, in Fresh Perspectives on the “War on Terror” 45, 49 (Miriam Gani & Penelope Mathew eds., 2008) [hereinafter Protecting Constitutionalism].


normative framework for drafting, critiquing and amending domestic criminal legislation. It is not a legal test that can be used to declare domestic legislation invalid (although constitutional law in many jurisdictions applies tests with a similar logic, such as the overbreadth and “void for vagueness” doctrines implied by the First, Fifth and Fourteenth Amendments of the United States Constitution). It can, however, be used as a guide for drafting and amending definitions of terrorism because of its strong normative roots in classical liberalism, international law, and public and criminal law in liberal-democratic states.

B. Problems in Assessing Whether Definitions of Terrorism Breach the Principle of Legality

Since 2001, several human rights bodies have reported that imprecise and overbroad definitions of terrorism in domestic legislation breach the principle of legality. Most recently, for example, the Eminent Jurists Panel of the International Commission of Jurists delivered its final report on state responses to the terrorist threat and their conformity with human rights. One of the main conclusions from the Panel’s extensive research was that new counter-terrorist laws “often contain overbroad definitions of terrorism or terrorist acts.” The panel stated that imprecise and overbroad definitions were a near universal problem in domestic legislation:

In virtually all of the Hearings, witnesses commented on the vague and over-broad definitions surrounding the concept of terrorism or terrorist acts in domestic law. The panel heard of controversies in


39 INT’L COMM’N OF JURISTS, ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS (2009) [hereinafter EMINENT JURISTS PANEL REPORT]. This report was the culmination of three years of research and 16 hearings held in different countries across the world. The Panel comprised eight distinguished judges, lawyers, and academics representing a range of nations, who received written submissions and held interviews with members of the public, government and the legal and academic communities. Hearings were held by the Eminent Jurists Panel in Australia, Canada, Colombia, East Africa, Europe, the Middle East, North Africa, Northern Ireland, Russia, South America, South Asia, South-East Asia, the United Kingdom and America.

40 Id. at 10.
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this regard with respect to a number of countries, including Algeria, Australia, Chile, Egypt, Germany, India, Jordan, the Maldives, Morocco, Tunisia, the Philippines, the Russian Federation, Sri Lanka, and the UK.\footnote{Id. at 124.}

The Panel emphasized that “[s]tates should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined . . . in conformity with the principle of legality (nullum crimen sine lege).”\footnote{Id. at 169 (recommendation 3).}

Earlier, in 2002, the Inter-American Commission on Human Rights expressed concern that “certain domestic anti-terrorism laws . . . violate the principle of legality because . . . those laws have attempted to prescribe a comprehensive definition of terrorism that is inexorably overbroad and imprecise.”\footnote{Inter-American Comm’n on Human Rights, Report on Terrorism and Human Rights, ¶ 226, OEA/Ser.L/V/II.116 (2002). See also European Comm’n for Democracy through Law, Council of Europe, Report on Counter-Terrorism Measures and Human Rights, 8, CDL-AD(2010)022 (2010); DIGEST OF JURISPRUDENCE, supra note 14, at 63-65.}


Other reports have explained the consequences of failing to abide by the principle of legality when drafting definitions of terrorism. In 2004, for example, the UN High Commissioner for Human Rights Working Group on Arbitrary Detention concluded that broad definitions of terrorism in domestic legislation disproportionately increased the risk that individuals would be arbitrarily detained by the state.\footnote{U.N. Working Group on Arbitrary Detention, Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Working Group on Arbitrary Detention, Commission on Human Rights, ¶ 64, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) [hereinafter Report of the Working Group on Arbitrary Detention].} It expressed concern that the risk of arbitrary detention had increased because the principle of legality had been frequently “abused” by domestic jurisdictions since September 11,
The Special Rapporteur on Counter-Terrorism, Scheinin, made similar comments in 2009. In a report to the UN Human Rights Council, Scheinin argued that it is important for states to abide by the principle of legality because imprecise and overbroad definitions of terrorism give governments the opportunity to target sections of the community with no real connection to terrorism. He gave examples of governments using broadly drafted anti-terror legislation to target homosexuals and women’s human rights defenders, and to suppress indigenous peoples’ claims for economic, social, and cultural rights. A similar logic can also be seen in the Castillo Petruzzi case, where the Inter-American Court explained that “ambiguity in describing crimes creates doubts and the opportunity for abuse of power.”

These reports suggest that two main problems can occur when a domestic legislature drafts a definition of terrorism: (1) imprecision and (2) overbreadth. Drafting a definition of terrorism in domestic criminal legislation in language that is either imprecise or overbroad will result in a definition that will infringe the principle of legality. Breaching the principle of legality increases the risk that a government will target, suppress, detain, or prosecute sections of the population that have no real connection to terrorist activity. Over the last decade states have misused anti-terror legislation in this way in numerous instances. Although not all of these
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incidents could have been avoided by a more precise or narrow definition of terrorism, definitions of terrorism play a vital role in determining the overall scope and application of anti-terror law regimes. Thus, drafting definitions of terrorism in accordance with the principle of legality is of supreme importance in ensuring that anti-terrorism law regimes are consistent with the rule of law—both in their formal, semantic structure and in their substantive operation.

The difficulty with assessing definitions of terrorism according to the principle of legality is determining the point at which those definitions become impermissibly imprecise or overbroad. It is difficult to determine when a definition is imprecise, but it is not outside the realm of legal reasoning. The current standard required in international law is whether or not a criminal offense is sufficiently precise for citizens to reasonably foresee whether their actions are likely to attract criminal punishment.\(^{50}\) This test may still generate much debate among governments, lawyers, and academics because there will always be some scope for differing interpretations of words in criminal legislation. This is so not only because of the imperfect nature of the written word but also because criminal legislation should be drafted to have a general application.

Therefore, to some extent, criminal legislation will need to rely on general descriptions of harm and intent that are further interpreted by the courts. For example, legislation will criminalize the concept of “dangerous driving,” but it will not specify every possible fact scenario that might constitute such conduct (unnecessary swerving, driving with no hands, driving backwards, and so on). However, the “reasonable notice” test is still useful because it sets appropriate limits on the amount of interpretation that general legislation should allow. The test is commonly applied in domestic jurisdictions for a range of different legal issues, and domestic courts have relied on similar reasoning when assessing the validity of definitions of terrorism in recent years.\(^{51}\)

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Haneef, an Indian doctor working in Australia on a temporary work visa, who was arrested by the Australian Federal Police on suspicion of involvement in the 2007 Glasgow airport attack, but was later cleared of all charges and paid an undisclosed sum by the Australian government.


\(^{50}\) GALLANT, supra note 7, at 31-33.

The harder problem is determining whether a definition of terrorism is overbroad. This question is plagued with difficulties because of the contested and inherently political nature of defining terrorism across different jurisdictions. After all, if any kind of conduct is defined as “terrorism” under domestic legislation, then in a strict legal sense, that conduct now is terrorism, regardless of whether a narrower definition could have been enacted. It is possible to argue that a definition should encompass only what can properly be described as terrorism and nothing else. But then how does one decide what can “properly” be described as terrorism, if that definition is the only official source in a domestic jurisdiction that says what “terrorism” does and does not include?

1. International Definitions

One possible solution to the problem of gauging overbreadth is to consider whether a domestic definition of terrorism encompasses a wider range of conduct than is included in definitions from authoritative international sources. The two most authoritative international definitions of terrorism are found in the “International Convention for the Suppression of the Financing of Terrorism (Financing Convention)” and Security Council Resolution 1566.\(^\text{52}\) The Financing Convention was adopted soon after the 1998 bombings of the United States embassies in Kenya and Tanzania. It calls upon states to establish appropriate criminal penalties for any person who “by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” a

\(^{52}\)International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197; S.C. Res. 1566, Concerning Threats to International Peace and Security Caused by Terrorism, U.N. Doc. S/RES/1566 (Oct. 8, 2004). Recently, the U.N. Special Tribunal for Lebanon held that a customary international crime of terrorism exists and offered its own definition for this purpose, but Saul has considered this definition to be “poorly substantiated” because the prosecution and the defence agreed that terrorism was not a customary crime, and because the Tribunal played “fast and loose with custom formation.” See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Appeals Chamber, U.N. Special Tribunal for Lebanon, Feb. 16, 2011); Ben Saul, Legislating from a Radical Hague: The U.N. Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism 24 LEIDEN J. INT’L L. (forthcoming 2011). For this reason, we have decided to focus on the Financing Convention and Resolution 1566 definitions, which have attracted wide support since their enactment.
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terrorist act.\textsuperscript{53} It also calls upon states to take practical measures for the “identification, detection, and freezing or seizure of any funds used or allocated for the purpose of committing” a terrorist act.\textsuperscript{54} Article 2(1) defines a terrorist act as any specific offense under an existing treaty on terrorism,\textsuperscript{55} or as:

\begin{quote}
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 abstain from doing any act.\textsuperscript{56}
\end{quote}

The definition of terrorism offered by the Security Council in Resolution 1566 is strikingly similar to Article 2(1) of the Financing Convention. Adopted by the Security Council in 2004, Resolution 1566 called for increased international cooperation in the fight against terrorism. It called upon states to become parties to the relevant international conventions and protocols, to resolve all obstacles to drafting an international convention on terrorism, and to “intensify their interaction” with the United Nations.\textsuperscript{57} It also called upon states to deny safe haven to any person who supports a terrorist act, facilitates a terrorist act, or harbors a terrorist suspect.\textsuperscript{58} Resolution 1566 was enacted under the Security Council’s Chapter VII mandatory powers, but it did not expressly require that Member States adopt the definition of terrorism that it offered in Article 3. Article 3 referred to acts of terrorism in terms practically indistinguishable from the earlier Financing Convention. It stated:

\begin{quote}
. . . criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act.\textsuperscript{59}
\end{quote}
These are the most authoritative international definitions of terrorism available because they have received express support from several influential international bodies in recent years. In 2004, the Secretary General of the United Nations’s High-Level Panel on Threats, Challenges and Change expressed its support for the Financing Convention and Resolution 1566 definitions by recommending that domestic legislatures refer to both definitions when drafting their own. In 2006, the Special Rapporteur on Counter-Terrorism, Scheinin, expressed his support to the United Nations Commission on Human Rights for the “indispensable” definition of terrorism outlined in Resolution 1566. In 2008, the Office of the United Nations High Commissioner for Human Rights reported that the Resolution 1566 definition remains of “considerable benefit” because it “is based on agreed parameters and is compatible with the principles of legality and precision.” In 2009, the Eminent Jurists Panel argued that both definitions captured a “high degree of political consensus.”

The Canadian Supreme Court and the England and Wales Court of Appeal have also expressed support for the Financing Convention and Resolution 1566 definitions. They have done so in immigration cases concerning terrorism where the judges were not confined by a statutory definition of terrorism. In Suresh, for example, the Canadian government

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60 UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY – REPORT OF THE SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, at 52 [164](c), 104 [44](c), U.N. Sales No. E.05.I.5 (2004) [hereinafter HIGH-LEVEL PANEL REPORT]. At 104 [44](d), the High-Level Panel also recommended that domestic governments enact a definition which is strikingly similar to both the Financing Convention and Resolution 1566 definitions: “any action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”


63 EMINENT JURISTS PANEL REPORT, supra note 39, at 7.

64 Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; Al-Sirri v. Secretary of State for the Home Department, [2009] EWCA (Civ) 222 (‘Al-Sirri’). In Al-Sirri, the England and Wales Court of Appeal relied on the Resolution 1566 definition when determining the scope of section 54 of the Immigration, Asylum and Nationality Act, 2006, c.
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sought to deport a Sri Lankan refugee who had been detained on suspicion of involvement with the “Liberation Tigers of Tamil Eelam (LTTE).” The Canadian Supreme Court stated that the Financing Convention definition “catches the essence of what the world understands by ‘terrorism.’” It held that the Financing Convention definition would allow an applicant suspected of engaging in terrorist activity to be deported under Section 53(1)(b) of the Canadian Immigration Act.

Arguably, a domestic definition of terrorism should not encompass more conduct than the definitions of terrorism contained in the Financing Convention or Resolution 1566, because these represent the best available examples of definitions of terrorism in the international community. But three problems exist with this argument. First, states are not required to use either definition in domestic criminal legislation. Neither the Financing Convention nor the Resolution 1566 definition is a mandatory definition that states must reflect in domestic law. Second, there is no absolute international consensus that these represent the best available definitions of terrorism. A range of authoritative sources have supported both definitions, but states still pursue a number of different approaches to defining terrorism in their own criminal legislation. The remaining disagreement can be seen in the negotiations on a comprehensive international convention on terrorism, which have stalled since 1999 due to political differences over how to define terrorism in the convention. Thus, the Financing Convention and

13. Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, ¶ 98. See also Kent Roach, Defining Terrorism: The Need for a Restrained Definition, in THE HUMAN RIGHTS OF ANTI-TERRORISM, supra note 49, at 126 [hereinafter Defining Terrorism]: “The general definition of terrorism contained in the Financing Convention and endorsed by the Supreme Court in Suresh provides the most restrained and defensible definition of terrorism of which I am aware.”


Resolution 1566 definitions both have strong normative force as examples of how to define terrorism, but they do not provide a definitive standard for assessing whether or not a domestic statutory definition of terrorism is overbroad.

The third problem with relying on the Financing Convention and Resolution 1566 definitions is that, while useful and persuasive, these definitions are not comprehensive. States may look to the Financing Convention and Resolution 1566 for guidance on the appropriate levels of harm and intent to include in a domestic definition of terrorism, but they cannot rely on them to solve a range of other difficult definitional issues. For example, those definitions provide no further guidance to states on whether (or how) to refer to specific types of attacks, such as bio- and cyber-terrorism, whether to criminalize state terrorism through domestic legislation, or whether to draft exemptions for acts of political protest and self-determination. It is possible that a definition of terrorism could include these additional limbs without being overbroad, but the Financing Convention and Resolution 1566 definitions provide no guidance on this issue.

2. Synthesized Definitions

Another possible method for gauging overbreadth is to synthesize multiple definitions of terrorism throughout the international community, and to then compare individual definitions of terrorism with this synthesized definition. Academic commentary generally favors this approach. Scholars
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have distilled the common elements of multiple definitions of terrorism in order to arrive at something like an “implicit consensus” or “lowest common denominator” definition. Reuven Young, for example, has undertaken a detailed study of a range of international instruments containing definitions of terrorism. He argued that there is “striking consistency in the form, themes and philosophy of the various conventional statements on terrorism.” This consistency reveals an implicit international consensus that Young uses to judge the appropriateness of various domestic definitions of terrorism. For a domestic definition of terrorism to be consistent with the implicit international consensus on how to define terrorism, Young argues that it must proscribe:

> [t]he serious harming or killing of non-combatant civilians and the damaging of property with a public use causing economic harm done for the purpose of intimidating a group of people or a population or to coerce a government or international organization.

He argues that “states should draw on this core international definition of terrorism when enacting definitions of terrorism for both legal and pragmatic reasons, even though this minimum definition of terrorism has not attained customary international law status.”

Similarly, Ben Saul has distilled a definition of terrorism that reflects a common international understanding about the underlying wrongfulness of terrorist acts. He examines the various ways in which the international community views the crime of terrorism: as a serious violation of human rights, as an offense against the state and the political process, and as a threat

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68 This approach dates back to ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPT, THEORIES, DATA BASES AND LITERATURE (1984), where Schmid considered the common elements of 109 different definitions of terrorism. See also ALEX P. SCHMID ET AL., POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE (1988); ALEX P. SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM 1 (2nd ed. 2005) (remarking that “[t]he search for an adequate definition of terrorism is still on”). See also BRUCE HOFFMAN, INSIDE TERRORISM 33-34, 40 (2006).


70 Id. at 64.

71 See discussion of the United Kingdom, United States, India, and New Zealand in id. at 72-89, and their comparison with Young’s core international law definition in id. at 89-101.

72 Id. at 64.

73 Id. at 26.
to international security. Saul takes the elements of international and domestic definitions of terrorism that reflect these underlying normative assumptions and arrives at a definition that he believes “embodies the international community’s core normative judgments about the wrongfulness of terrorism.” For a definition of terrorism to be consistent with this implicit consensus, Saul argues that it must proscribe:

(1) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
(2) where committed outside an armed conflict;
(3) for a political, ideological, religious, or ethnic purpose; and
(4) where intended to create extreme fear in a person, group, or the general public, and;
   (a) seriously intimidate a population or part of a population, or
   (b) unduly compel a government or an international organization to do or to abstain from doing any act.

Saul also includes an exception for acts of political protest that only intend to cause property damage:

(5) Advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act.

The analyses offered by Young and Saul suggest that international definitions of terrorism possess key features in common, and that this common ground reflects some agreement between states on how best to define terrorism. Therefore, it is possible to argue that governments should avoid overbreadth by amending their statutory definitions of terrorism to reflect the common ground between them. However, while these synthesized definitions provide useful academic insight into what the international community has decided to criminalize as terrorism, they have limited normative force as model definitions for states to follow when drafting or amending criminal legislation.

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75 Id. at 66.
76 Id. at 65-66.
77 Id.
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Three main reasons make these synthesized definitions difficult to use. First, and most obviously, these definitions only tell us what the international community implicitly agrees should amount to terrorism. They have not been expressly supported by states or other influential bodies as the most appropriate way to define terrorism. In the absence of such support, the normative force of the implicit consensus approach comes only from the fact that definitions of terrorism rely on certain common phrases or are based on common normative ideas. That might provide interesting academic insight into how and why states define terrorism, but it does not of itself establish an authoritative standard for gauging overbreadth.

Second, the kinds of conduct that states agree should qualify as terrorism has not generated a definite academic consensus. The synthesized definitions offered by Young and Saul are similar in a number of respects: both extend to violent acts causing death, serious bodily injury, or damage to property that are intended to intimidate a population or compel a government to act in a particular way. But there are also a number of important differences. For example, Saul’s definition requires that a terrorist act against property be intended to “endanger life,”78 whereas Young’s definition requires that such an act cause “economic harm.”79 Saul’s definition also includes a political motive requirement, a political protest exception, and a requirement that an act of terrorism be designed to “create extreme fear in a person, group, or the general public.”80 It would therefore require another level of synthesis between various academic definitions of terrorism in order to arrive at an authoritative implicit consensus definition. Doing so might reveal a true lowest common denominator, but by that stage the definition would likely be so basic as to be unworkable in a public policy setting.

Third, an implicit consensus or lowest common denominator approach only reflects the core-accepted features of terrorism. It necessarily ignores a range of other nuanced differences concerning how states believe terrorism should be defined. The fact that these nuances exist does not mean that each definition is necessarily overbroad. Indeed, many of them could be sensible and useful inclusions in a definition of terrorism. Imagine, for example, that two states have criminalized the conduct referred to in Young’s definition,

78 Id.
79 Young, supra note 69, at 64.
80 Saul, supra note 74, at 62-63. For Saul, this requirement is essential for acts of terrorism to be distinguished from other violent criminal offenses resulting in death and serious bodily injury.
but the first state’s definition also encompasses the release of lethal toxins, and the second state’s definition encompasses acts that seriously disrupt electronic systems. Why should those definitions be considered overbroad simply because they include references to bio- and cyber-terrorism, which exceed a basic common ground? References to unique forms of harm in a definition of terrorism might be problematic for any number of reasons, including ambiguity (as in criterion 1) and inconsistency with other definitions (as in criterion 3). The simple fact that they exist, however, is not sufficient proof that the definition is overbroad.

To argue that states should amend their definitions of terrorism for the purpose of reflecting the common ground between them would overlook the importance of the very reason for that analysis in the first place: definitions of terrorism throughout the international community do in fact exceed and confuse a basic common ground. A synthesized definition of terrorism provides a weak normative model for gauging overbreadth because it fails to sufficiently recognize the importance of the full scope of individual definitions of terrorism, as well as the differences between them. In other words, asking states to rely on a minimum common ground when drafting and amending definitions of terrorism would be asking them to simply overlook their prior disagreement over how to define terrorism in domestic legislation.

3. Intended Purposes

A third possible solution to assessing whether a domestic definition of terrorism is overbroad, and the one that we believe is the most workable across multiple domestic jurisdictions, is to consider whether a definition of terrorism encompasses conduct which allows legislation to operate outside its intended purposes. Since 2001, anti-terror laws have been enacted for the purpose of preventing another attack similar to September 11. Yet, many of these laws go much further than preventing attacks that relate to the post-9/11 security environment. For example, when introducing the “Anti-Terrorism, Crime and Security Act 2001 (2001 Act),” the United Kingdom’s Home Secretary David Blunkett emphasized that the legislation was designed to “close loopholes” and “set aside anomalies” evident in existing legislation.\(^{81}\) The explanatory notes to the 2001 Act further explained that the Act was designed to “build on legislation” in order to address “the new situation arising from the September 11 terrorist attacks on New York and

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Politically, the 2001 Act was framed by its explanatory notes and by the Home Secretary as something that would make incremental changes to existing legislation so that state authorities would have the power to target a specific kind of post-9/11 security threat. And yet, the United Kingdom definition of terrorism in Section 1 of the earlier Terrorism Act 2000 expands the operation of the 2001 Act to cover any kind of politically, religiously, or ideologically motivated violence which is intended to merely influence a government. This means that state authorities in the United Kingdom could rely on the 2001 Act to target, detain, and prosecute individuals for engaging in conduct with no real connection to the post-9/11 security environment. The Independent Reviewer of Britain’s anti-terror legislation, Lord Carlile of Berriew Q.C., even admitted that the definition could be used to target and prosecute women’s rights and environmental protestors. It is clear that such activities cannot be described as terrorism, and yet they could fall within the scope of the United Kingdom legislation.

Therefore, it is possible to argue that the United Kingdom definition of terrorism is overbroad because it allows the United Kingdom’s post-9/11 anti-terror legislation to operate outside its intended purposes. Although we believe that this is the most practical method for applying the principle of legality in the context of domestic anti-terror laws, there are three possible counter-arguments. First, proponents of the legislation could maintain that the definition could not apply to activities that are genuinely non-terrorist in nature. This argument would maintain that the lowest harm threshold in the definition—something like “creating a serious risk to the health or safety of a section of the public”—is sufficiently high to prevent any genuinely non-terrorist activity from being targeted under the legislation. Second, proponents of the legislation could argue that, even if the legislation could be applied to genuinely non-terrorist activities, it would not be applied to such activities. In a special report on the United Kingdom’s definition of terrorism, the Home Secretary Jack Straw argued in respect of the Terrorism Act 2000 definition that “the new definition will not catch the vast majority of so-called domestic activist groups.” The Home Secretary did not accept the suggestion that “the threshold in the Bill is lower than that in existing anti-terrorist legislation,” and argued that “to think that the Bill will restrict the right of peaceful protest, demonstration and campaigning is wholly erroneous.”

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83 See Terrorism Act, 2000, c. 11, ¶ 1 (U.K.).

84 See Lord Carlile of Berriew Q.C., Independent Reviewer of Terrorism Legislation, The Definition of Terrorism, 2007, Cm. 7052, ¶¶ 34, 60 [hereinafter Definition Report] and discussion below.

85 See, e.g., 341 PARL. DEB., H.C. (6th ser.) (1999) 154, 156, 159 (U.K.), where Home Secretary Jack Straw argued in respect of the Terrorism Act 2000 definition that “the new definition will not catch the vast majority of so-called domestic activist groups.” The Home Secretary did not accept the suggestion that “the threshold in the Bill is lower than that in existing anti-terrorist legislation,” and argued that “to think that the Bill will restrict the right of peaceful protest, demonstration and campaigning is wholly erroneous.”
terrorism, for example, Lord Carlile accepted that the definition could be used to target legitimate political protestors. He believed, however, that this was not a problem because sensible use of the discretion to prosecute—and not narrow legislative drafting—was the key to protecting individuals from unjustified state interference.

Third, proponents of the legislation could argue that any rules about overbreadth underlying the principle of legality should be relaxed in the post-9/11 security environment. It could be said that the post-9/11 security environment is an exceptional case that justifies a range of extraordinary measures, including the enactment of sweeping terrorism powers that infringe traditional liberal-democratic principles.

While these arguments are not without their merits, we believe that the principle of legality capably responds to each. First, whether or not a definition could encompass activities that are genuinely non-terrorist in nature is really a question of imprecision rather than overbreadth. According to the standard required by international law, a definition of terrorism should provide reasonable advance notice to individuals of the kinds of conduct that are prohibited under the legislation. If there is sufficient doubt as to whether a definition is broad enough to encompass legitimate political activities (or forms of violent crime which are less serious than terrorism), then the legislation has not been drafted in sufficiently precise language. In this scenario, the debate should really focus on the first and less problematic question of imprecision because the question of overbreadth is not capable of being adequately addressed until the clarity of the definition is improved.

Second, it is poor legal policy to draft definitions of terrorism that

86 CARLILE, DEFINITION REPORT, supra note 84, ¶ 34: “Many examples can and have been cited of individuals who might fall inappropriately within the current definition, if considered solely in strict legal terms. They might include a political protestor such as the suffragette Emily Wilding Davison, who threw herself under a horse at Epsom racecourse on the 13th June 1913; or the eco-protester ‘Swampy.’” See also ¶ 60: “There is no doubt that non-terrorist activities … could fall within the definition as currently drawn.”

87 See LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2004 OF THE TERRORISM ACT 2000, 2005, ¶ 27 (U.K.) [hereinafter 2004 Report]; LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2005 OF THE TERRORISM ACT 2000, 2006, ¶ 30 (U.K.) [hereinafter 2005 Report]; CARLILE, DEFINITION REPORT, supra note 84, ¶¶ 35-36. See also 341 PARL. DEB., H.C. (6th ser.) (1999) 155 (U.K.), where Home Secretary Jack Straw argued with respect to animal liberation protestors that “[s]uch circumstances may well fall within the ambit of clause 1. Having said that, I believe that we must have some confidence in the law enforcement agencies and the courts. If we look back at the past 25 years, we can see that the powers have been used proportionately.”

88 GALLANT, supra note 7, at 31-33.
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undeniably extend to non-terrorist conduct, even if a prosecution service or security organization is capable of applying that legislation responsibly. The purpose of the principle of legality is to protect individuals against the possibility of unjustified state interference, and it is not sufficient for a government to say, “We know these laws go far beyond terrorism, but you can trust that we will only target those who can truly be described as terrorists.” If nothing else, there are countless examples of states misusing anti-terror laws since 2001 that reveal the problems with maintaining such a stance. Patent overbreadth not only creates the opportunity for government abuse, but also creates the possibility that governments acting with the best intentions will misapply the legislation.

Third, it is difficult to maintain that an emergency paradigm still applies one decade after September 11. As far as we know, a significant threat of terrorism still exists in Western states. But the emergency powers argument should not be applied to any form of deviance that is likely to persist for decades to come. This would be corrosive of longstanding liberal-democratic principles and institutions, and would grant terrorist organizations the satisfaction of achieving one of their major tactical goals: tarnishing the reputation and legitimacy of the Western world by provoking a disproportionate and extra-legal response. In any case, the principle of legality—at least as enshrined in international human rights law—is a non-derogable obligation that states cannot forego in times of public emergency. The non-derogable status of the principle of legality in human rights treaties shows how important the principle of legality is to maintaining a minimum of the rule of law. It suggests that the principle of legality is something that states simply must not circumvent in times of public emergency.

Less obviously, the non-derogable status of the principle of legality also suggests that states need not circumvent the principle of legality in times of public emergency. The principle of legality is not designed to unduly restrict a state’s ability to prevent violent crime. It merely aims to ensure that states’ legal responses appropriately match the threats they are trying to counter. Applying the principle of legality to anti-terror laws should neither restrict states from targeting genuine terrorist conduct, nor should it imply that principled arguments take precedence over immediate physical security. The principle of legality simply suggests that a definition of terrorism should be an appropriate fit for the range of conduct to which the legislation is directed. In other words, a definition of terrorism should encompass no more and no less than the range of conduct it intends to prohibit. In practical

89 See text to supra note 51.
terms, states simply do not require the power to target extraneous conduct with no real connection to terrorism in order to prevent genuine terrorist attacks from occurring. To argue that states need to forego the principle of legality in order to prevent acts of terrorism would be flawed on both normative and practical grounds.

C. Criteria 1 and 2: Clarity and Breadth

Based on the above analysis, we propose the first two normative criteria for assessing the appropriateness of definitions of terrorism in domestic legislation. These criteria reflect the two main problems with post-9/11 definitions of terrorism as discussed by authoritative international bodies: imprecision and overbreadth. The first criterion relates to whether a definition of terrorism is imprecise. This criterion is primarily born out of the first two versions of the principle of legality discussed above (those based on classical liberalism and international law). Those versions of the principle of legality suggest that criminal legislation should be drafted in language that is sufficiently clear and precise to give reasonable notice of the kinds of conduct that are prohibited. This may not always be an easy criterion to apply to domestic definitions of terrorism, but similar tests are familiar to both public and private law. This criterion may be stated as follows: A legal definition of terrorism should be sufficiently clear and precise to give reasonable notice of the kinds of conduct it prohibits.

The second criterion relates to the question of overbreadth. It focuses on whether a definition of terrorism enables legislation to operate outside its intended purposes. It is still useful to consider whether domestic definitions of terrorism exceed the Financing Convention and Resolution 1566 definitions and whether they exceed synthesized academic definitions of terrorism. We have chosen, however, to focus on the question of intended purposes for two main reasons. First, the intended purposes test avoids the many problems with the first two approaches, which are set out above. Second, and more importantly, the intended purposes test is not restricted to the narrower question of what should and should not properly be described.


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as terrorism, which is politically problematic when applied across multiple jurisdictions. By contrast, the intended purposes test can be applied consistently across multiple jurisdictions while allowing for some variation in individual definitions of terrorism. This is possible because the test can be guided by broader principles of legislative scrutiny and responsible government. It does not require a single, authoritative definition to be recreated in multiple jurisdictions. This criterion may be stated accordingly: A legal definition of terrorism should not encompass conduct which allows legislation to operate outside its intended purposes.

This second criterion is supported by the above analysis, as well as related commentary on the principle of legality. The recent Ottawa Principles on Anti-Terrorism and Human Rights, for example, were formulated during a colloquium on the human rights of terrorism held at the University of Ottawa in June 2006. That gathering brought together some 35 world experts on human rights and terrorism, including lawyers, academics, and members of United Nations bodies and non-governmental organizations. The commentary to Principle 2.1 of the Ottawa Principles reiterates that the use of anti-terrorism provisions must be drafted in accordance with the principle of legality and “must be confined to the purposes for which they are intended.”

Our first two criteria are also comparable to Peter Westen’s account of the principle of legality. According to Westen, the various limbs of the principle of legality can be simplified down to two key norms: (1) that “[n]o person shall be punished in the absence of a bad mind,” and (2) that “[e]very person is presumed innocent until proven guilty.” Westen relates the first norm to the rules against retroactive legislation and fair notice of criminal punishment, which is similar to our first criterion. Westen relates the second norm to the idea “that a person ought not to be punished in the name of a political community unless it can confidently be said that the community officially regards his conduct as warranting criminal punishment.” This is similar to our second criterion, because both would ask whether a political community officially regards a particular range of

92 See THE HUMAN RIGHTS OF ANTI-TERRORISM (Nicole LaViolette & Craig Forcese eds., 2008).
93 Id. at 24 (emphasis added).
94 Westen, supra note 10, at 303.
95 See id. at 303 (where a person is punished for violating a rule that was either non-existent or unclear at the time, Westen considers that the person “neither knew nor should have known that he was doing something that the state would regard as wrong.”).
96 Id.
conduct as warranting the label and penalties of terrorism.

In the example of the United Kingdom definition of terrorism discussed above, for example, the problem is not that the 2001 Act passed through Parliament on the understanding that state authorities should have the power to target relatively minor political protests as acts of terrorism. That would certainly be a problem, but one of a different kind. The problem is that the legislation passed through Parliament on the basis that it would target serious acts of terrorism, and yet it can nonetheless apply to a much wider range of less serious political activities. It is hard to see how the political community in the United Kingdom would agree that legitimate political protests deserve to be targeted and punished as terrorism, and yet this is effectively what the anti-terror laws allow. For this reason, the United Kingdom’s anti-terror laws would breach our second criterion and Westen’s second norm.

**D. Criterion 3: Consistency**

Consistency between domestic definitions of terrorism has been an important consideration since the United Nations Security Council adopted Security Council Resolution 1373, the first major anti-terrorism instrument enacted at the international level after September 11, 2001.\(^{97}\) Adopted under the mandatory powers of Chapter VII of the United Nations Charter, the Resolution called for a cooperative international response to the threat of extremist terrorism. Its preamble called upon all states “to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant conventions relating to terrorism.”\(^{98}\) The Security Council intended that a key element of this cooperative approach would involve domestic criminal legislation, with Article 2(e) calling upon states to ensure that “terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”\(^{99}\)

Although the Security Council intended Resolution 1373 to generate a cooperative domestic response to the threat of international terrorism, it failed to provide a definition of terrorism for states to use when implementing terrorism offenses in their own legislation.\(^{100}\) Kent Roach has

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98 Id. (pmbl.)
99 Id. ¶ 2.
100 Aside from the Security Council’s effort to define terrorism in Resolution 1566, discussed above, the United Nations has only offered two other non-mandatory definitions of
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rightly described this as “extremely regrettable” because it left 192 Member States “to their own devices” in determining the scope of their own anti-terrorism regimes.\footnote{Roach, Defining Terrorism, supra note 65, at 111, 126.} The Special Rapporteur on Counter-Terrorism argued a similar point. He reported that “repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term,” were of “particular concern.”\footnote{Promotion and Protection of Human Rights, supra note 61, ¶ 27.} He further reported that this lack of guidance left “individual States to define what is meant by the term,” and that this carried “the potential for unintended human rights abuses and even deliberate misuse.”\footnote{Id.}

Having consistent definitions of terrorism throughout domestic jurisdictions is important for two main reasons. The first relates to the criminal law’s instrumental function; the second relates to its moral or normative function. These reasons suggest our third criterion: A legal definition of terrorism should be consistent with legal definitions of terrorism in comparable domestic jurisdictions.

First, inconsistent domestic definitions of terrorism can undermine efforts to prevent and prosecute terrorist attacks that transcend national borders. If an act falls within the definition of terrorism in one state, but outside of it in another, this obviously poses problems for cooperation between those nations. Schmid, for example, has argued that consistent definitions of terrorism are necessary for states to preserve the principle of “dual criminality.” He stated:

It is widely agreed that international terrorism can only be fought by international cooperation. In the field of mutual legal assistance, one

terrorism since 2001. In the Secretary-General’s 2005 Keynote Address to the International Summit on Democracy, Terrorism and Security, Kofi Annan endorsed a similar definition to that in Resolution 1566, which included “acts intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act.” The Secretary-General emphasised that such a definition had “clear moral force”: see Kofi Annan, Sec’y Gen., U.N, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism, and Security: A Glocal Strategy for Fighting Terrorism (Mar. 10, 2005), available at http://www.un.org/apps/sg/sgstats.asp?nid=1345. In 2006, the United Nations General Assembly only made an oblique reference in the preamble of its Global Counter-Terrorism Strategy to “activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments”: see G.A. Res. 60/288, Preamble, A/RES/60/288 (Sep. 20 2006).
of the basic principles for judicial cooperation in general and extradition in particular, is the principle of dual criminality – an act must be a crime in both countries involved. If states disagree about whether or not an act constitutes terrorism, chances of interstate cooperation are clearly diminished.\(^\text{104}\)

Similar points have been made by the Organization for Security and Co-Operation in Europe, which emphasized in its 2007 counter-terrorism manual that defining an act as terrorism has “significant consequences with regard to co-operation between states, such as intelligence sharing, mutual legal assistance, asset freezing and confiscation and extradition.”\(^\text{105}\) In reference to the European Union, Symeonidou-Kastanidou has also emphasized that anti-terrorism laws are not designed to punish acts that “would have otherwise been left unpunished, but . . . to define a group of activities that are punishable anyway, with a view to developing novel measures of police and judicial cooperation.”\(^\text{106}\) The purpose of defining acts of terrorism in domestic legislation, therefore, is not only to proscribe a “new” type of criminal conduct but also to outline the scope of an effective inter-governmental strategy for countering the threat of international terrorism.

Put simply, it will be difficult for states to work together to counter the threat of international terrorism if they cannot agree on the threat that they are trying to counter. Resolution 1373 calls for states to “find ways of intensifying and accelerating the exchange of information,”\(^\text{107}\) to “exchange information . . . and cooperate on administrative and judicial matters to prevent the commission of terrorist acts,”\(^\text{108}\) and to “cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks.”\(^\text{109}\) Without a common reference point for these strategies, can such cooperation be effective?

Imagine, for example, a scenario where one state requests information on a terrorist organization working within the borders of another state, but the second state disagrees that the group is involved in “terrorist activity.” Or, imagine two states that need to work together to prepare for the trial of a terrorist suspect, but the suspect has only committed a terrorist act under one

\(^{104}\) Schmid, supra note 3, at 380.

\(^{105}\) OSCE MANUAL, supra note 20, at 22.

\(^{106}\) Symeonidou-Kastanidou, supra note 3, at 17.

\(^{107}\) S.C. Res 1373, supra note 6, ¶ 3.

\(^{108}\) Id.

\(^{109}\) Id.
What is “Terrorism”? of the states’ definitions. Any definitional inconsistencies in either of these scenarios would create significant practical obstacles for the states involved. Sami Zeidan put the problem most succinctly: “States cannot adequately counteract a phenomenon that they absolutely agree must be eliminated, as long as they fundamentally disagree on its very definition.”

Similarly, Antonio Cassese asked “how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?” As long as states retain definitions of terrorism that differ from each other in important respects, the international community will struggle to maintain an effective practical campaign against the threat of terrorism. This is especially important in the context of terrorism in contrast to other domestic crimes such as theft or murder because of its uniquely political and transnational nature.

The second reason definitions of terrorism should be consistent is because of the criminal law’s moral or normative—rather than instrumental—function. If definitions of terrorism are drafted inconsistently, they may continue to undermine the moral force of the post-9/11 global legal response. The Secretary-General’s High-Level Panel clearly made this point in 2004 when it presented its final report entitled A More Secure World: Our Shared Responsibility. The High-Level Panel expressed concern that the United Nations had failed to achieve the same consistency in state responses to terrorism and non-state conflict as it had with inter-state conflict and the use of military force. It recognized that this lack of consistency not only undermined the practical effectiveness of the international community’s strategies to reduce terrorist activity, but also undermined the normative force of its moral stance against the underlying wrongfulness of terrorism: “The United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image.”

Two years later, the United Nations reiterated its desire for consistent state responses to the international terrorist threat in its 2006 Global

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111 Cassese, supra note 3, at 934.
112 HIGH-LEVEL PANEL REPORT, supra note 60.
113 Id. at 51.
Counter-Terrorism Strategy. That document called for “a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels.” As the High-Level Panel makes clear, such coordination and consistency is not necessary only for the international community to maintain an effective practical campaign against terrorist activity. It is also necessary for the international community to maintain a coherent moral campaign against the underlying wrongfulness of terrorism. The moral coherence of the global response to terrorism is compromised by the laws of some states and not others describing particular conduct as terrorism. This causes confusion and moral uncertainty about the kinds of conduct that amount to terrorism. It undermines the criminal law’s ability to denounce or condemn terrorism as morally unacceptable conduct on both a domestic and global level.

Of course, as negotiations on the draft Comprehensive Convention demonstrate, it will be difficult for all 192 Member States of the United Nations to fully agree on this heavily contested political concept. It would also be erroneous to assume that an identical anti-terrorism strategy must be taken in every jurisdiction or that any grand narrative of global anti-terrorism law can simply diffuse top-down from international bodies into domestic jurisdictions. Different states have different needs, capabilities, and political, legal and ideological contexts. What may work to combat terrorism in one jurisdiction may simply not work in another. At the very least, however, definitions of terrorism should be drafted consistently in jurisdictions with similar legal and parliamentary traditions in order to encourage effective interstate cooperation and to buttress the moral force of the post-9/11 legal response.

114 G.A. Res. 60/288, Preamble, supra note 100. That document followed the 2005 International Summit on Democracy, Terrorism and Security held in Madrid in the wake of the 2004 train bombings: see Annan, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism, and Security: A Glocal Strategy for Fighting Terrorism, supra note 100.
115 G.A. Res. 60/288, Preamble, supra note 100.
116 See supra text accompanying note 67.
118 Id.
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II. DEFINITIONS OF TERRORISM IN DOMESTIC LEGISLATION

We now test domestic definitions of terrorism against the three criteria developed in Part I. We focus on the United Kingdom, Canada, Australia, South Africa, New Zealand, India, and the United States. Each of these jurisdictions has enacted definitions of terrorism with similar wording and structure, and each has a similar tradition of common law reasoning, judicial precedent, and liberal democracy. This allows comparison not only between the statutory definitions themselves, but also between how democratic governments, courts and review bodies have applied and interpreted these definitions.

A. United Kingdom

The “Anti-Terrorism, Crime and Security Act 2001 (ATCSA)”\(^{119}\) was introduced into the UK Parliament less than nine weeks after September 11, 2001, and was passed shortly after.\(^{120}\) It provided for a number of anti-terrorism measures, including the freezing of terrorist assets, the disclosure of information for law enforcement purposes, the regulation of weapons of mass destruction, and the indefinite detention of international terrorist suspects associated with al-Qaeda.\(^{121}\) Despite this range of new measures, ATCSA left the earlier statutory definition of terrorism contained in the “Terrorism Act 2000 (TA 2000)”\(^{122}\) unchanged. The TA 2000, put in place some fourteen months before September 11, defines “terrorism” in Section 1 in the following terms:

(1) the use or threat of action where –
   (a) the action falls within subsection (2);

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\(^{120}\) The Anti-Terrorism, Crime and Security Act was granted royal assent on December 14, 2001. Thomas calculates that the Bill was only debated in the House of Commons for a total of sixteen hours: see Philip A. Thomas, Emergency and Anti-Terrorist Powers: 9/11: USA and UK, 26 FORDHAM INT’L L.J. 1193, 1216-18 (2002).

\(^{121}\) Part IV to the Anti-Terrorism Crime and Security Act, which provided for the indefinite detention of international terrorist suspects associated with al-Qaeda, was later held incompatible with the European Convention on Human Rights, as implemented into U.K. law through the Human Rights Act, 1998, c. 42 (Eng.). See A v. Secretary of State for the Home Department, [2004] UKHL 56 (H.L.).

\(^{122}\) Terrorism Act, 2000, c. 11 (U.K.).
(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public; and
(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it –
(a) involves serious violence against a person;
(b) involves serious damage to property;
(c) endangers a person’s life, other than that of the person committing the action;
(d) creates a serious risk to the health or safety of the public or a section of the public; or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –
(a) “action” includes action outside the United Kingdom;
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated;
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom; and
(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

When the TA 2000 was introduced into the UK Parliament, its purpose was to grant state authorities general powers to prevent acts of domestic terrorism. Previously, the UK government had enacted legislation to address the problem of terrorism in Northern Ireland, and those provisions had been extended to certain categories of international terrorism. However, there were no special laws in place to address the problem of domestic terrorism in the United Kingdom more generally. Home Secretary Jack

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123 Id. § 1.
125 See Explanatory Notes to the Terrorism Act, 2000, c. 11, summary, ¶ 8 (U.K.).
What is “Terrorism”?

Straw gave the example of the Aum Shinrikyo sarin gas attack on a Tokyo subway, which killed 12 and injured some 50 more commuters, as the principal justification for the new legislation. He emphasized that the TA 2000 was directed towards “heinous” acts of premeditated violence which aim to “create a climate of extreme fear” or “undermin[e] the foundations of government.” The TA 2000 repealed the majority of the legislation directed at the problem of terrorism in Northern Ireland and introduced a comprehensive range of terrorism offenses and restrictions based on the scope of the Section 1 definition.

After September 11, ATCSA was introduced to “close loopholes” and “set aside anomalies” in the existing legislation. Home Secretary David Blunkett emphasized that “[c]ircumstances and public opinion demanded urgent and appropriate action after the 11 September attacks on the World Trade Centre and the Pentagon.” He warned that al-Qaeda not only intended to strike once on September 11; it also threatened to continue targeting the civilian populations of the United States and its allies. ATCSA was framed as something that would allow UK state authorities to deal with this new danger, which consisted of “an internal threat and an external, organized terrorist group that could threaten at any time not just our population, but the populations of other friendly countries.” As a result, ATCSA included a range of strategies for updating the United Kingdom anti-terror legislation in accordance with this new threat posed by al-Qaeda after 9/11, such as the regulation of aviation security and nuclear materials.

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127 Id. 152, 156.
131 Id.
133 Id.
Two minor amendments have since been made to the UK definition. The first was made by Section 34 of the Terrorism Act 2006, which amended Subsection (1)(b) to include “government or international governmental organisation.” This was inserted to remove the disparity between the original UK definition and other definitions of terrorism in international instruments, such as the Financing Convention, and to enable the definition to be applied to acts of terrorism against international bodies, such as the United Nations. The second amendment was made by Section 75 of the Counter-Terrorism Act 2008, which amended Subsection (1)(c) to include acts committed for the purpose of advancing a racial cause.

With regard to the first criterion, a decision by the England and Wales High Court suggests that the TA 2000 definition complies with the principle of legality by using language that is sufficiently clear and precise. In Secretary of State for the Home Department v. E, the respondent was a Tunisian national who claimed asylum in the United Kingdom in 1994. After a Tunisian military court convicted E for putting himself at the disposal of a terrorist organization operating abroad, he was arrested in London in 1998 and detained for three days before being released. He was later detained in Belmarsh prison under ATCSA and was one of ten people later subjected to a control order under the “Prevention of Terrorism Act 2005 (POTA 2005),” which relies on the same TA 2000 definition of terrorism. E sought to challenge POTA 2005 on the grounds that the TA 2000 definition conferred power contrary to the principle of “legal certainty” required by Articles 5, 10 and 11 of the ECHR. The Administrative Division of the England and Wales High Court held that the control order regime did not infringe the ECHR by relying on the broad definition of terrorism in the TA

135 Terrorism Act, 2006, c. 11.
136 Id. c. 11, § 34 (emphasis added).
137 Explanatory Notes to the Terrorism Act, 2006, c. 11, ¶ 158.
138 Counter-Terrorism Act, 2008, c. 28.
139 This change was consistent with a recommendation in a 2007 report by Independent Reviewer Lord Carlile: see CARLILE, DEFINITION REPORT, supra note 84, ¶ 48 (Recommendation 12); Explanatory Notes to the Counter-Terrorism Act, 2008, c. 28, ¶ 203.
141 Prevention of Terrorism Act, 2005, c. 2 (U.K.). This control order regime was enacted to replace the repealed Part IV of the Anti-Terrorism, Crime and Security Act, 2001, c. 24 (U.K.).
142 See Prevention of Terrorism Act, 2005, c. 2, §§ 1(9), 15(1). The UK control order regime has recently been replaced by the Terrorism Prevention and Investigation Measures Act, 2011, c. 23.
143 As implemented in the U.K. through the Human Rights Act, 1998, c. 42 (Eng.).
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2000. It reasoned that statute and common law are often framed in broad terms, and that “the width of a provision . . . is not in itself a cause of uncertainty.” In holding that the TA 2000 definition and POTA 2005 did not confer power contrary to the ECHR, the court held that “the provisions in the POTA 2005 as to the circumstances in which a control order may be imposed are both accessible and, notwithstanding their width, are . . . detailed, specific and unambiguous.”

While the UK judiciary may see the semantic properties of the TA 2000 definition as sufficiently specific and unambiguous, the second question remains of whether its language confines the operation of legislation to its intended purposes. In R v. F, the England and Wales Court of Appeal recognized that the TA 2000 definition would extend to acts of dissent against oppressive foreign regimes, which some members of the UK political community would consider morally justifiable. However, it held that this did not give the Court reason to rein in the strikingly broad scope of the legislation.

In that case, the respondent was a Libyan national who fled to the United Kingdom in 2002 and was granted asylum in 2003. His accommodation was raided in October 2005, and in March 2006 he was arrested and charged with possessing documents likely to be useful for preparing a terrorist act. These documents were part of an alleged plan to remove Colonel Qaddafi and his military forces from power in Libya. On appeal, F contended that the phrase “the government” in Section 1(1)(b) of the TA 2000 definition (as explained in Subsection (4)(d)) should only apply to governments with similar democratic or representative principles to the United Kingdom because an act of violence against an oppressive foreign regime would be distinguishable as a justifiable act of self-determination.

The Court of Appeal began by accepting Queen’s Counsel Geoffrey Robertson’s submission that the legislation as a whole created “serious inroads into . . . inalienable freedoms.” It then emphasized that the TA 2000 definition was striking in its breadth, because the legislature had made no attempt to delimit the scope of Subsection (4)(d). It stated:

What is striking about the language of s1, read as a whole, is its breadth . . . There is no list or schedule or statutory instrument which

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145 Id. at [188].
147 Id. at [26], [27], [32].
148 Id. at [14].
identifies the countries whose governments are included within s 1(4)(d) or excluded from the application of the Act... [T]he legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept is foreign to the Act. Terrorism is terrorism, whatever the motives of the perpetrators.\textsuperscript{149}

While the court recognized that the TA 2000 definition would apply to acts intended to influence oppressive foreign regimes, which could be considered morally justifiable, it held that Section 1(1)(b) would apply as drafted because it could not “identify any ambiguity or absurdity in Section 1(4)(d).”\textsuperscript{150} The Court followed the “plain enough”\textsuperscript{151} meaning of the phrase, “a country other than the United Kingdom,” which does not distinguish between different types of political regimes. It held that the definition applies equally to acts intended to influence parliamentary democracies and oppressive foreign regimes, because the UK Parliament had drafted no exemption for “terrorist activities which are . . . said to be morally justified.”\textsuperscript{152}

This suggests three main problems with the drafting of the UK definition. First, R v. F makes clear that Section 1 of the TA 2000 did not simply give state authorities a general power to prevent acts of domestic terrorism. It also extended far beyond this intended purpose by encompassing conduct intended to influence any foreign government, democratic or otherwise. Second, whether or not one believes that acts of dissent against oppressive foreign regimes should be punished as terrorist acts, R v. F makes clear that the Section 1 definition extends into some of the gray areas surrounding an appropriate definition of terrorism. This suggests that the UK government erred on the side of over-inclusion instead of explicitly addressing an important and difficult definitional issue. Now that the British Royal Air Force has played a leading role in the NATO bombing campaign which helped remove Colonel Qaddafi from power,\textsuperscript{153}

\textsuperscript{149} Id. at [27].
\textsuperscript{150} Id. at [26].
\textsuperscript{151} Id.
\textsuperscript{152} Id. at [32]. See also id. at [26].
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the absence of any exemption for acts of political protest or self-determination in the UK definition of terrorism is even more alarming. Third, the Court of Appeal suggests that there is little that UK judges can do to narrow overbroad definitions of terrorism. Despite the Court of Appeal’s outward concern that the TA 2000 definition encompasses acts of morally justifiable political dissent, the Court was unable to rein in the scope of the legislation.

Independent post-enactment review of the TA 2000 definition has confirmed that the Section 1 definition extends beyond what the UK political community would ordinarily describe as terrorism. In his yearly and special reports on the UK anti-terror legislation, 154 Lord Carlile acknowledged that the TA 2000 definition extends into the realm of non-terrorist activity. However, he has argued that there is nothing wrong with a broad definition of terrorism in a country with strong traditions of democratic accountability. In his 2007 report on the definition of terrorism, Lord Carlile began by emphasizing that there was no authoritative reference point for Section 1 of the TA 2000 because “there is no universally accepted definition of terrorism.” 155 He then proceeded to dispel claims that the TA 2000 definition was “too wide to satisfy the clarity required for the criminal law,” 156 although he agreed “[t]here is no doubt that non-terrorist activities . . . could fall within the definition as currently drawn.” 157 He gave several examples of activities which might “fall inappropriately within the

154 Lord Carlile of Berriew Q.C. was appointed Independent Reviewer of the U.K.’s anti-terrorism legislation under under § 126 of the Terrorism Act, 2000, c. 11, which provides that the Home Secretary shall deliver a report to both Houses of Parliament at least once every twelve months on the working of the Act. From 2002 to 2007, Lord Carlile only made two minor recommendations to amend the Terrorism Act 2000 definition itself. One of these—to amend subsection (1)(c) to include acts committed for the purpose of advancing a “racial” clause—was later adopted by the U.K. Government in § 75 of the Counter-Terrorism Act, 2008, c. 28, and this acted to expand the definition. The other substantive recommendation—to raise the threshold of subsection (1)(b) from “influence” to “intimidate”—was not adopted. Other than these two recommendations, Lord Carlile has otherwise recommended that the definition does not need to be amended. In his first report of 2002, Lord Carlile concluded that the definition “is practical and effective, and that there is little evidence that a change would be appropriate or is necessary.” See CARLILE, DEFINITION REPORT, supra note 84, at 48 (conclusion (12)), ¶ 59; Explanatory Notes to the Counter-Terrorism Act, 2008, c. 28, ¶ 203; Lord Carlile of Berriew Q.C., REPORT ON THE OPERATION IN 2001 OF THE TERRORISM ACT OF 2000, 2002, ¶ 1.3 (U.K.).

155 CARLILE, DEFINITION REPORT, supra note 84, ¶ 6.

156 Id. ¶ 26.

157 Id. ¶ 60.
current definition, if considered solely in strict legal terms,\textsuperscript{158} including protestors who support women's rights and environmental causes.\textsuperscript{159} For Lord Carlile, it was not a problem that such activities could fall within the TA 2000 definition because he believed that sensible use of the discretion to prosecute and not narrow legislative drafting would protect individuals from unjustified state interference.\textsuperscript{160} He expressed his ongoing trust in this regard, stating that he knew of “no case in modern times in which the decision to permit a prosecution has been held to be founded on political bias, bad faith, or dishonesty.”\textsuperscript{161}

The United Kingdom Parliament’s Joint Committee on Human Rights, on the other hand, has advised in no uncertain terms that the broad definition of terrorism in the TA 2000 needs to be amended or there will remain a “high risk”\textsuperscript{162} of breaching key human rights principles, such as the freedom of expression found in Article 10 of the European Convention on Human Rights. It has cited a wide range of secondary consequences stemming from the Section 1 definition, such as the resulting breadth of the offense of “encouraging” terrorism,\textsuperscript{163} which would now extend to “speech or actions concerning resistance to an oppressive regime overseas.”\textsuperscript{164} Thus, similar to the approach of the England and Wales Court of Appeal, the Joint Committee has been outwardly concerned with the striking breadth of the UK definition and its possible application to legitimate forms of dissent. The dangers of this are apparent in the case of Walter Wolfgang, an eighty-two year-old Jewish refugee who was detained under the TA 2000 after being forcibly ejected from the 2005 annual Labour Party conference. Wolfgang was ejected from the audience for shouting “nonsense” in response to Foreign Secretary Jack Straw’s promise to rebuild Iraq as a stable, democratic nation.\textsuperscript{165} While he was not formally arrested or charged, and the

\begin{itemize}
  \item \textsuperscript{158} Id. \textsection\textsuperscript{34}.
  \item \textsuperscript{159} Id. \textsection\textsuperscript{34}.
  \item \textsuperscript{160} See 2005 Report, supra note 87, \textsection\textsuperscript{30}; CARLILE, DEFINITION REPORT, supra note 84, at 34; 2004 Report, supra note 87, \textsection\textsuperscript{27}: “[W]e are entitled to assume that in a democratically accountable system there will be a sensible use of the discretion to prosecute.”
  \item \textsuperscript{161} CARLILE, DEFINITION REPORT, supra note 84, \textsection\textsuperscript{61}. See also 341 PARL. DEB., H.C. (6th ser.) (1999) 155, 163 (U.K.).
  \item \textsuperscript{162} JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS; TERRORISM BILL AND RELATED MATTERS – THIRD REPORT OF SESSION 2005-06, 2005, ¶ 13 (U.K.) [hereinafter Third Report 2005-06].
  \item \textsuperscript{163} See Terrorism Act, 2006, c. 11, \textsection\textsuperscript{1}.
  \item \textsuperscript{164} Third Report 2005-06, supra note 162, ¶ 12.
  \item \textsuperscript{165} EMINENT JURISTS PANEL REPORT, supra note 39, at 126; Labour Issues Apology to Heckler, BBC NEWS (Sept. 28, 2005), http://news.bbc.co.uk/2/hi/4291388.stm.
\end{itemize}
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Labour Party later apologized for its mishandling of the situation, Wolfgang’s experience reveals the serious consequences that imprecise and overbroad definitions of terrorism can have for the freedom of political expression.

These post-enactment sources all suggest that the UK definition of terrorism encompasses a much wider range of activities than the TA 2000 and ATCSA were originally designed to address. The TA 2000 was designed to target heinous acts of domestic terrorism which aim to create a “climate of extreme fear” or “undermin[e] the foundations of government,” such as the Tokyo subway attack.\footnote{341 Parl. Deb., H.C. (1999) 152, 156 (U.K.).} ATCSA was designed to make incremental changes to that existing legislation so that state authorities would have the power to prevent subsequent attacks threatened by al-Qaeda against the US and its allies.\footnote{375 Parl. Deb., H.C. (2001) 22 (U.K.).} Both pieces of legislation were designed to prevent morally unjustifiable acts from causing serious harm to civilian populations, yet the Court of Appeal’s decision in R v. F and Lord Carlile’s reports suggest that the Section 1 definition encompasses a much wider range of activities. Protests by environmentalists or other domestic activists certainly cannot be placed in the same category as the Tokyo subway and World Trade Center attacks, but there is clear reason to believe that they could be targeted under the United Kingdom’s anti-terrorism legislation. The Section 1 definition could also be used to target speech or actions encouraging resistance to oppressive foreign regimes. The experience of Walter Wolfgang reveals this broad potential scope of the United Kingdom’s anti-terror legislation with respect to the freedom of political expression.

More specifically, the overbreadth of the UK definition can be seen in the low intention and harm standards contained in Subsections (1) and (2). Subsection (1)(b) sets a relatively low standard of intent by extending to acts that are merely designed to “influence” a government.\footnote{Terrorism Act, 2000, § 1(1)(b) (U.K.).} This is a much lower standard than the Home Secretary’s comments would have suggested about terrorist attacks threatening to “undermin[e] the foundations of government.”\footnote{341 Parl. Deb., H.C. (6th ser.) (1999) 152, 156.} Even Lord Carlile, who was otherwise satisfied with the clarity and breadth of the Section 1 definition, recommended that the standard of Subsection (1)(b) be raised from “influence” to “intimidate.”\footnote{Carlile, Definition Report, supra note 84, ¶ 59.} Subsection (2) then lists a long range of harms including acts involving...
“serious violence against a person,” “serious damage to property,” acts that endanger a person’s life or create a “serious risk to the health or safety of . . . a section of the public,” and acts designed to seriously interfere with or disrupt electronic systems. Subsection (3) extends Subsection (2) to any acts involving firearms or explosives, whether or not they are designed to influence a government or intimidate a population.

In combination, these limbs could extend to an enormous range of activities that have little in common with the Aum Shinrikyo attack on the Tokyo subway or the World Trade Center attacks. This is not to say that Britain’s anti-terror legislation should only be capable of preventing terrorism on the scale of those earlier attacks, but there is something to be said for the type of conduct that the government intended to criminalize when it subjected the legislation to democratic scrutiny. Indeed, Subsection (2) does not even list two of the most obvious and serious harms that the Tokyo subway and September 11 attacks caused in civilian populations: death and serious bodily injury. It only lists a range of lesser and more uncertain forms of violence, such as seriously disrupting electronic systems. While the Court of Appeal’s decision in E suggests that these listed harms are not vague or ambiguous, there is a strong argument to be made that many of the provisions—most notably “a serious risk to the . . . safety of . . . a section of the public”—fail to sufficiently identify the kinds of conduct that may be targeted under the legislation.

Together these points suggest that the UK definition of terrorism contains serious flaws with regard to the second proposed normative criterion. Despite the Court of Appeal’s decision in E, there also remains serious doubt as to whether the UK definition satisfies the first criterion. The fact that the Section 1 definition is not vague enough to be held contrary to the ECHR does not necessarily mean that the definition is a good example of clear legislative drafting. With regard to the third criterion, the differences between the TA 2000 definition and definitions in comparable jurisdictions can be seen below in the analysis of the remaining definitions, especially in those countries that relied heavily on the existing UK legislation in enacting their own after September 11.173

172 Terrorism Act 2000, c. 11, § 1(2)(d).
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B. Canada

In response to the September 11 attacks, the Canadian legislature passed the “Anti-Terrorism Act 2001 (ATA).” The ATA received royal assent in the Canadian Parliament on December 18, 2001, two months after the September 11 attacks. The ATA inserted a definition of terrorism into Section 83.01 of the Canadian Criminal Code. This Section defines terrorist activity in two alternative ways. The first, in Subsection (a), states that terrorist activity means any act or omission committed in or outside Canada that falls within a number of international conventions on specific types of terrorist violence (for example, acts of hijacking and hostage-taking). The second, in Subsection (b), is Canada’s general definition of terrorism. Subsection (b) defines terrorist activity as:

(b) an act or omission, in or outside Canada,
   (i) that is committed
      (A) in whole or in part for a political, religious or ideological purpose, objective or cause; and
      (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

175 R.S.C. 1985, c. C-46 (Can.).
176 A general definition of terrorism attempts to define terrorism by reference to certain overarching criteria, as opposed to a specific definition of terrorism, which defines an act of terrorism by reference to a particular kind of conduct, such as hijacking, kidnapping, or the bombing of infrastructure. A general definition of terrorism will include a range of requirements that must be satisfied for an act to fall under the provision. Typically these requirements include: intention, motivation, and one of several enumerated harms, such that all potential acts of terrorism will be caught within the one statutory definition. This enables legislatures to hinge a comprehensive anti-terrorism law regime on one definition, rather than maintaining several different or repeated specific definitions in separate pieces of legislation. See Ben Golder & George Williams, What is “Terrorism”? Problems of Legal Definition, 27(2) U.N.S.W. L.J. 270, 273-74 (2004).
(ii) that intentionally
   (A) causes death or serious bodily harm to a person by the use of
       violence;
   (B) endangers a person’s life;
   (C) causes a serious risk to the health or safety of the public or
       any segment of the public;
   (D) causes substantial property damage, whether to public or
       private property, if causing such damage is likely to result in
       the conduct or harm referred to in any of clauses (A) to (C);
       or
   (E) causes serious interference with or serious disruption of an
       essential service, facility or system, whether public or
       private, other than as a result of advocacy, protest, dissent or
       stoppage of work that is not intended to result in the conduct
       or harm referred to in any of clauses (A) to (C).

It includes a conspiracy, attempt or threat to commit any such act or
omission, or being an accessory after the fact or counseling in relation to any
such act or omission. It does not include an act or omission that is committed
during an 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, or the activities
undertaken by military forces of a state in the exercise of their official duties,
to the extent that those activities are governed by other rules of international
law.177

When the ATA was introduced into the Canadian Parliament, Attorney-
General Anne McLellan emphasized that “[t]he world changed on
September 11 in a way that changed our collective sense of safety and
security.”178 Terrorism became a global threat which required immediate
steps to find, restrict, and punish those who terrorize the innocent.179 The
Leader of the Liberal Government in the Senate, Joyce Fairbairn, similarly
emphasized that the September 11 attack “changed our lives” because it was
“an attack on . . . free people in democracies everywhere.”180 As in the UK,
the events of September 11 signaled to Canada a change in the global

177 Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b) (Can.).
also id. at 1030.
179 Id. at 1015.
180 PARL. DEB., SENATE, (Sept. 16, 2001) 1500 (Can.) [hereinafter Sept. 16 PARL.
DEB.].
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security environment and an “urgent need” for the new ATA measures. Both McLellan and Fairbairn emphasized that the ATA was also designed to ratify Canada’s remaining obligations under the United Nations conventions and protocols relating to terrorism, including the 1999 Financing Convention. McLellan emphasized the importance of enacting domestic legislation in conformity with international law and with the approach taken by other democratic countries after September 11.

With regard to the first criterion, Canadian court decisions interpreting the ATA definition suggest that Section 83.01(b) is sufficiently clear and precise to give reasonable notice of the conduct it prohibits. This line of reasoning first appeared in the Ontario Superior Court decision of R v. Khawaja, in which the applicant was charged with a number of terrorism offenses under the Canadian Criminal Code. Khawaja challenged the legislation on the grounds that the definition of terrorism was unconstitutionally vague and, or alternatively, overbroad. Justice Rutherford was willing to strike down the “political, religious or ideological” motive requirement on the grounds that it could encourage racial profiling, but he was “not persuaded that the provisions in question are vague to the point of being unconstitutional.” He offered his view on how precise a criminal law needs to be for it to be constitutionally valid:

The degree of precision required in our laws is not . . . to lay out a prescription such that one can predict with certainty the outcome of all conceivable factual situations. There are not enough draftspersons to accomplish anything like that; and who could read the volumes that would be required? . . . If a provision clearly identifies and applies to a core of misconduct but its application to peripheral

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181 Id. See also Oct. 16 PARL. DEB., supra note 178, at 1015 (Attorney-Gen. Anne McLellan stating that Canada should work with its allies to find and punish those guilty of terrorist acts “without hesitation”).

182 Oct. 16 PARL. DEB., supra note 178, at 1015 (Anne McLellan); Sept. 16 PARL. DEB., supra note 180, at 1500 (Joyce Fairbairn).

183 Oct. 16 PARL. DEB., supra note 178, at 1015.


185 Id., § 58. “It seems to me that the inevitable impact to flow from the inclusion of the ‘political, religious or ideological purpose’ requirement in the definition of ‘terrorist activity’ 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 ... This in my view amounts to a prima facie infringement or limitation of the freedoms of conscience, religion, thought, belief, expression and association such that would have to be justified with reference to s. 1 of the Charter.”

186 Id., § 18.
conduct is uncertain, that does not mean that the provision is impermissibly vague.187

Similar to the approach taken by the England and Wales Court of Appeal, Justice Rutherford held that the Canadian definition of terrorism “provides notice of what is prohibited and set[s] an intelligible standard for both citizen and law enforcement agencies.”188 Unlike the England and Wales Court of Appeal, however, Justice Rutherford did not seem troubled by the fact that morally justifiable conduct could arguably fall within Subsection (b). Instead, he reasoned that any conduct that was clearly “non-terrorist” would be excluded from the definition through judicial interpretation. He stated:

hypothetical circumstances . . . such as a defence lawyer providing legal services to a client he knows to be part of a terrorist group, or a waitress in a restaurant serving food to persons she knows to be meeting there to plot a terrorist act will . . . be dealt with by judicial determination. A good lawyer can almost always create a hypothetical circumstance that might arguably be caught as coming within the reach of a provision and that arguably should not be caught, but such examples are usually at the periphery, as they were in this case, and far removed from the nature of the allegations in the indictment before me.189

Justice Rutherford’s reasoning was upheld in R v. NY,190 R v. Ahmad191 and USA v. Nadarajah,192 all decided in the same court by different judges in early 2008 and 2009. The Special Senate Committee on the ATA has also supported his reasoning. It similarly recommended severing the motive requirement, but was otherwise “satisfied that the definition of ‘terrorist activity’ in the Criminal Code . . . is sufficiently precise and specifically targets the types of criminal activity the government wishes to prohibit.”193

There are obvious similarities between Justice Rutherford’s reasoning

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187 Id. §§ 17, 19.
188 Id. § 18.
189 Id. § 25.
193 Special Senate Comm. on the Anti-Terrorism Act (Can.), FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES: MAIN REPORT OF THE SPECIAL SENATE COMMITTEE ON THE ANTI-TERRORISM ACT 16 (Feb. 2007) [hereinafter FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES].
What is “Terrorism”? and that of Lord Carlile in the United Kingdom. Both recognized that their respective definitions could extend to a range of legitimate activities unrelated to the post-9/11 security environment, but focused on sensible use of discretion—and not narrow legislative drafting—as the key to an anti-terrorism law regime that does not unduly infringe rights. This suggests that both the Canadian and UK definitions, tested to their limits, breach the second criterion in allowing legislation to be used outside its intended purposes. However, both Justice Rutherford and Lord Carlile emphasized that there are also informal mechanisms—such as an independent judiciary and prosecutorial discretion—designed to protect citizens from arbitrary use of the legislation. They argued that a definition of terrorism may encompass a greater range of conduct than a political community would officially regard as terrorism, so long as it still reflects an appropriate core of misconduct. Beyond that, citizens are expected to trust that their executive and judiciary will not target any “non-terrorist” activity under anti-terror legislation.

Of course, this argument raises significant concerns regarding the principle of legality, which aims to remove any extraneous conduct from the definition of any criminal offense. It also raises fundamental questions about the rule of law and the notion that executive discretion to apply the law should be appropriately constrained. For example, Pue has described Justice Rutherford’s approach as “too dismissive by half,” because it grants ex post facto validation to a law that would otherwise infringe each of Fuller’s eight principles of legality. Pue argues that there are a number of realistic scenarios in which Canada’s anti-terror laws could be misused, such as against organizations providing charitable work in conflict zones. In this way, the law provides little protection if it cannot insist on criminal statutes that are sufficiently precise to exclude these kinds of activities. He argues:

[If the courts cannot, at a minimum, insist that penal statutes . . . be clear enough as to provide real-life guidance, first, to state officials as to who should and who should not come under their scrutiny and, second, to citizens, as to which overseas charities, causes, or liberation groups they are entitled to support, assist, or donate to, the protections of law are rather hollow . . . “Rights” matter little if official discretion buttressed by overbroad legislation case in the vaguest possible terms substitutes for governance in accordance with intelligible legal rules.]

194 W. Wesley Pue, Protecting Constitutionalism, supra note 35, at 61.
195 See id.
196 Id. at 62.
Post-enactment review of the Canadian definition suggests that this additional vagueness and breadth is necessary when drafting domestic definitions of terrorism in order to provide governments with the flexibility to target an evolving terrorist threat. In March 2007, the “Canadian House of Commons Standing Committee on Public Safety and National Security (Public Safety Committee)” recognized that the Criminal Code definition was “wide-ranging,” complex, and “not easily fully understood on even a close reading.” However, it declined to recommend any amendments to restrict or simplify the definition. It argued that the Canadian government needed a definition with this “degree of complexity and flexibility” so that it could combat a constantly changing, contemporary terrorist threat. It considered definitions of terrorism in international law, such as that of the authoritative Financing Convention, but preferred the lengthy Criminal Code drafting because it believed that definitions of terrorism in international law were “too narrow” in only focusing on “activities involving serious violence.”

The Public Safety Committee did not provide any additional explanation as to why definitions of terrorism that only focus on activities involving serious violence are “too narrow,” and why activities that do not involve serious violence should be included within a definition of terrorist activity. Justice Rutherford’s conclusion that the Canadian definition is sufficiently precise also seems weakly supported in light of the Committee’s finding that Section 83.01 is “not easily fully understood.” The explanation for the Committee’s otherwise surprising conclusions seems to be that the Canadian government wanted to enact a definition of terrorism that was broad and flexible enough to allow the police and security services to preempt unanticipated forms of terrorism before they manifested themselves in “concrete ways.” As the Committee noted with regard to the broad Criminal Code definition, “to fully counter terrorism these days, it is often necessary to allow for preventive or preemptive action so as to effectively disrupt any emerging or nascent terrorist activity before it develops.”

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198 Id.
199 Id. at 8.
200 Id. at 7.
201 Id.
202 Id.
What is “Terrorism”? suggests that governments have not drafted definitions of terrorism with a traditional criminal law function in mind. They have instead relied heavily on a preventive or precautionary logic, which may explain the vagueness and overbreadth in domestic definitions of terrorism.

With regard to the third criterion, there are a number of general similarities between the Canadian Criminal Code and the UK’s TA 2000 definitions. These similarities reveal the heavy reliance of the Canadian government on the earlier UK legislation. First, both definitions include a requirement that the act be committed for the purpose of advancing a political, religious, or ideological cause. Second, both definitions include reference to acts directed at governments and international organizations, and acts intended to intimidate a section of the public. Third, both definitions include a list of enumerated harms that extend beyond death or serious bodily injury to property damage, interference with infrastructure, and acts that create a serious risk to the health or safety of a section of the public.

The number of important differences between the Canadian and the UK definitions, however, are more notable. First, Subsection (i)(B) of the Canadian definition imposes a higher standard of fault than its UK counterpart by requiring that an act be intended to “compel” its target to act in a particular way. This is a higher standard than the comparable TA 2000 Subsection (1)(b), which requires that an act be intended to merely “influence” a government or international governmental organization. Second, Subsection (i)(B) of the ATA definition covers a wider range of potential targets than the TA 2000 definition. It extends beyond acts directed at governments, international organizations, and sections of the public to acts directed at domestic organizations and individual persons. That provision also refers to “economic security,” which is not mentioned in the UK definition. Third, Subsection (E) of the Canadian definition contains an exemption for acts of political protest.

There are also several differences between the lists of harms in both definitions. Unlike the UK definition, the list of harms in the Canadian
definition refers to “death” and “serious bodily harm.” The Canadian list does not refer to acts that merely involve “serious violence against a person.” The Canadian list sets a higher threshold for property damage, by requiring that a terrorist act against property result in one of the harms listed in Subsections (A)-(C) (unlike the TA 2000 Subsection (2)(b), which only requires “serious property damage”). Subsection (E) of the Canadian list extends beyond acts that interfere with “systems” to acts that disrupt “facilities” and “services.”

These differences suggest that the Canadian definition sets higher thresholds than its UK counterpart, but includes a wider range of targets at which an act of terrorism may be directed. The Canadian government has also made a genuine attempt to exclude acts of political protest and acts committed according to the laws of armed conflict from the scope of the legislation. This seems consistent with the Special Senate Committee’s report, which recognized “the importance of having a domestic definition of terrorism that reflects Canada’s specific needs, concerns and experiences.”

Canada’s attempt to exclude legitimate acts of political protest from the scope of the legislation is certainly a positive improvement on the possible breadth of the UK definition. The sources discussed above still suggest, however, that the Canadian definition scores poorly with regard to the first and second criteria. First, the Public Safety Committee’s report suggests that the definition fails to provide sufficient guidance as to the kinds of conduct that are prohibited, because the definition is not easily understood even on close reading by Members of Parliament. As in the UK definition, certain phrases such as “causes a serious risk to the health or safety of . . . any segment of the public” mean that a wide range of diverse conduct could be equally described as falling under the legislation. The Public Safety Committee’s report suggests that this additional vagueness and overbreadth is intentional because it gives state authorities sufficient discretion to target a range of unforeseen criminal conduct. Such an approach is fundamentally inconsistent with the principle of legality, which requires criminal conduct to

207  Id. § 83.01(1)(b)(ii)(A).
208  As in the U.K.’s Terrorism Act, 2000, c. 11, § 1(2)(a).
210  Id. § 83.01(1)(b)(ii)(E).
211  FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES, supra note 193, at 15.
212  Public Safety Comm., RIGHTS, LIMITS, SECURITY, supra note 197, at 7.
213  See id.
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be specified in advance in clear language that narrowly defines the punishable offense.

Second, Justice Rutherford’s judgment suggests that the Canadian definition could apply to a range of conduct that is unrelated to the global threat of terrorism, such as defense lawyers providing legal services to terrorist groups.214 Although it is unlikely that the Canadian government would prosecute a defendant’s lawyer under anti-terrorism legislation, this suggests that the ATA extends beyond its original purpose as an urgent response to the post-9/11 security environment. The ATA was also designed to implement Canada’s remaining obligations under international instruments, such as the Financing Convention,215 but the ATA goes beyond this intention by including a much broader definition than that included in that instrument.

Moreover, a number of important differences between the UK and Canadian definitions suggest that both definitions fail to comply with our third criterion. This is possible even when both definitions appear to have the same overall form and structure, because multiple limbs of each definition are susceptible to variation. Even where the semantic differences between corresponding provisions appear quite trivial (for example, the difference between “influence” and “compel”), their possible scope can differ quite dramatically. Thus, despite the Canadian government’s intention to act consistently with international law and with the approach of other democratic nations, substantial room for improvement exists in both these respects.

These issues require ongoing attention, because the United Kingdom’s and Canada’s experiences with anti-terror laws suggest that definitions of terrorism are resistant to amendment and repeal. Only two minor amendments have been made to the United Kingdom’s definition since its enactment,216 and both of these have expanded the scope of the TA 2000 and related legislation. In Canada, the Martin government initially declined to remove the motive requirement in line with Justice Rutherford’s decision in Khawaja, and that aspect of the decision was eventually overturned on appeal.217 Post-enactment review in the United Kingdom has also failed to generate any legislative change, in part because Lord Carlile and the Joint

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215 Oct. 16 PARL. DEB., supra note 178, at 1015 (Anne McLellan); Sept. 16 PARL. DEB., supra note 180, at 1500 (Joyce Fairbairn).
216 Terrorism Act, 2006, c. 11, § 34; Counter-Terrorism Act, 2008, c. 28, § 75.
Committee on Human Rights have taken conflicting views on whether the Section 1 definition unduly infringes rights. Similarly, the Special Senate and Public Safety Committees in Canada have disagreed on the thorny definitional issue of whether or not the controversial motive requirement should be retained and have otherwise not recommended any substantive amendments to Section 83.01.

C. Australia

The Australian definition of a terrorist act was inserted into Part 5.3 of the Australian “Criminal Code Act 1995 (Cth) (Criminal Code)” by Schedule 1 to the “Security Legislation Amendment (Terrorism) Act 2002 (Cth) (SLAT Act).” The SLAT Act was the main piece of legislation in a package of five government bills that formed Australia’s immediate legislative response to the events of September 11. Section 100.1 of the Australian Criminal Code now states:

(1) terrorist act means an action or threat of action where:
   (a) the action falls within subsection (2) and does not fall within subsection (3); and
   (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
   (c) the action is done or the threat is made with the intention of:
      (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

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219 Public Safety Comm., RIGHTS, LIMITS, SECURITY, supra note 197, at 9; FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES, supra note 193, at 13.
220 Public Safety Comm., RIGHTS, LIMITS, SECURITY, supra note 197, at 9. The Special Senate Committee recommended that Canada’s specific and general definitions of terrorism (in Criminal Code, R.S.C. 1985, c. C-46, § 83.01(a) and (b) (Can.)) be combined in one federal definition, but it otherwise made no substantive recommendations regarding the general definition in s 83.01(1)(b): FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES, supra note 193, at 15-17.
221 The other four pieces of legislation enacted under the SLAT Package were the Suppression of the Financing of Terrorism Act 2002 (Cth), the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth), the Border Security Legislation Amendment Act 2002 (Cth), and the Telecommunications Intercept Legislation Amendment Act 2002 (Cth).
What is “Terrorism”? (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:
   (a) causes serious harm that is physical harm to a person; or
   (b) causes serious damage to property; or
   (c) causes a person’s death; or
   (d) endangers a person’s life, other than the life of the person taking the action; or
   (e) creates a serious risk to the health or safety of the public or a section of the public; or
   (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
      (i) an information system; or
      (ii) a telecommunications system; or
      (iii) a financial system; or
      (iv) a system used for the delivery of essential government services; or
      (v) a system used for, or by, an essential public utility; or
      (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:
   (a) is advocacy, protest, dissent or industrial action; and
   (b) is not intended:
      (i) to cause serious harm that is physical harm to a person; or
      (ii) to cause a person’s death; or
      (iii) to endanger the life of a person, other than the person taking the action; or
      (iv) to create a serious risk to the health or safety of the public or a section of the public.

Like the governments of the United Kingdom and Canada, the Australian government emphasized the importance of enacting new legislative measures to respond to the post-9/11 terrorist threat. When introducing the SLAT Package, Attorney-General Daryl Williams emphasized that Australia needed to respond to “the new security environment in terms of our operational capabilities, infrastructure and legislative framework” because Australia was a possible target of terrorism after 9/11.  

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222 Criminal Code Act 1995 (Cth), s 100.1 (Austl.).
223 PARL. DEB., H.R. (Mar. 12, 2002), 1040 (Austl.).
“enhance our ability to meet the challenges of the new terrorist environment.” He emphasized that “terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy.” He listed suicide bombings, chemical or biological attacks, threats of violence, and attacks on infrastructure as examples of possible terrorist acts. He also emphasized that the legislation was designed to comply with international conventions on terrorism. For example, a range of financing offenses in the Suppression of the Financing of Terrorism Act 2002 (Cth) were designed to be drafted “in line with the requirements of the International Convention for the Suppression of the Financing of Terrorism.”

While the Australian definition has not faced any direct constitutional challenges, the Australian High Court’s interpretation of the Australian control order regime in Division 104 of the Criminal Code suggests that Section 100.1 is sufficiently clear and narrow to comply with the first two criteria. In Thomas v. Mowbray, the subject of a control order sought to challenge Division 104 on the grounds that its language was too vague for judicial interpretation and thus incompatible with the exercise of judicial power and contrary to the separation of powers inherent within the structure of the Australian Constitution. Division 104 provides that a member of the Australian Federal Police may apply to an issuing court for an interim control order to be made against an individual if the member “considers on reasonable grounds that the order . . . would substantially assist in preventing a terrorist act.” That interim order may then be issued and later confirmed

224 Id.
225 Id. at 1041.
226 Id.
227 Id. at 1040.
228 Id.
229 The Australian control order regime was based on a similar scheme in the Prevention of Terrorism Act, 2005, c. 2 (U.K.). It allows a number of restrictions to be placed upon an individual for the purpose of protecting the public from a terrorist act. The restrictions that may be imposed on an individual under a control order are severe and wide-ranging. They include: prohibiting the person from being in certain areas or places; requiring the person to remain within a specified premises at specific times of the day; requiring the person to wear a tracking device; and prohibiting the person from communicating or associating with specified individuals. For the full list of possible restrictions, see Criminal Code Act 1995 (Cth), s 104.5(3) (Austl.).
230 Thomas v Mowbray, supra note 51.
231 Id. § 3.
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by the court if it is “satisfied on the balance of probabilities . . . that each of the . . . restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.” Division 104 does not independently define “terrorist act,” so the control order regime relies on the definition outlined above.

The majority in Thomas v. Mowbray rejected the plaintiff’s argument that the language of Division 104 was too vague or broad for judicial application. Chief Justice Gleeson first emphasized that the common law had a long history of determining the content of broadly expressed standards. He discussed examples where phrases such as “reasonably necessary” had been used in legislation and interpreted by courts in the past, and concluded that “it cannot plausibly be suggested that the standard of reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public is inherently too vague for use in judicial decision-making.” In considering the use of “terrorist act” in Section 104.4(1), Justices Gummow and Crennan then acknowledged that the definition was both complex and capable of wide, discretionary interpretation, but they held that these qualities were not incompatible with the exercise of federal judicial power:

It is true that the definition of “terrorist act” is detailed and contains terms which may give an area of choice and discretion in evaluating the weight of the evidence tendered on the application of the interim control order. But . . . that does not foreclose the exercise of strictly judicial techniques of decision-making.

By contrast, Justice Kirby’s dissent displays a marked similarity to the reports of the Eminent Jurists Panel and other international and regional review bodies. Kirby accepted the plaintiff’s argument that Division 104 exceeded the defense power in Section 51(vi) of the Australian Constitution. He emphasized that the definition encompassed a substantial range of activities that could not be described as terrorism:

Numerous examples spring to mind that fall within the statutory definition of a “terrorist act” but which demonstrate the overreach of Div 104 in this respect. Any number of actions that have hitherto been lawful and would be regarded as non-terroristic might be done

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233 Id. at s 104.4(1)(d).
235 Id. § 27.
236 Id. § 98.
with the intention of “intimidating the public or a section of the public”... As drafted, Div 104 is a law with respect to political, religious or ideological violence of whatever kind. Potentially, it is most extensive in its application. Even reading the Division down to confine it to its Australian application, it could arguably operate to enable control orders to be issued for the prevention of some attacks against abortion providers, attacks on controversial building developments, and attacks against members of particular ethnic groups or against the interests of foreign governments in Australia.  

Justice Kirby emphasized that the proper approach to determining the validity of the provision was not to merely consider the obligations, prohibitions and restrictions that had been imposed on the plaintiff in the case at hand, but also to “examine the scope of measures that may be imposed” under the definition. This dissenting approach conflicts with that of Justice Rutherford in the Ontario Superior Court, who declined to test the possible limits of the Canadian definition. It suggests that the Australian legislation could be used to target a much wider range of conduct than the suicide attacks, chemical attacks, and other post-9/11 threats to which the legislation was originally directed. Despite this apparent risk that non-terrorist activities could be prosecuted as terrorist acts, both the Australian and Canadian courts have been satisfied with the semantic properties and overall breadth of their respective definitions.

With regard to the third criterion, the Australian definition of a terrorist act is broadly similar to its UK and Canadian counterparts, but it also includes a number of unique features. Similar to the UK and Canadian definitions, it requires that the act be committed for the purpose of advancing a political, religious or ideological cause. It also extends to acts that endanger life, create a serious risk to the health or safety of the public, cause property damage, or seriously interfere with electronic systems. Like the United Kingdom’s definition, and unlike Canada’s definition, acts causing property or electronic damage do not need to also cause death, endanger the life of any person, or create a serious risk to the health or safety of the public. On the other hand, similar to Canada’s definition, and unlike the

237  Id. §§ 265-66.
238  Id. § 351.
239  Criminal Code Act 1995 (Cth), s 100.1(b) (Austl.).
240  Id. at s 100.1(2)(b),(d),(e),(f).
241  Id. at s 100.1(2)(f).  Cf. Terrorism Act, 2000, c. 11, § 1(2)(e) (U.K.); Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(ii)(D),(E) (Can.).
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United Kingdom’s definition, Section 100.1(3) provides an exemption for acts of political protest that only intend to cause property damage.\textsuperscript{242} In terms of the level of intent required in Subsection (c)(i), the Australian legislation sits somewhere between the UK and Canadian definitions (“influence” and “compel” respectively) by requiring that the act be committed against a government with the intent of “influencing by intimidation.”\textsuperscript{243} Subsection (c)(i) of the Australian definition does not extend to acts committed against international organizations, domestic organizations or individual persons.\textsuperscript{244}

Another similarity between the UK, Canadian, and Australian experiences is that post-enactment review in Australia has failed to produce any substantive amendments to Section 100.1. In June 2006 the Security Legislation Review Committee delivered its final report. Chaired by the Honorable Simon Sheller Q.C., the Committee made two substantive recommendations for amending the definition: (1) that the words “harm that is physical” be removed from paragraphs (2)(a) and (3)(b)(i) so that the provision would extend to acts causing serious psychological harm;\textsuperscript{245} and (2) that the reference to “threat of action” be removed and included as a separate offense.\textsuperscript{246} The Sheller Committee also recommended that the Australian definition retain its political, religious or ideological requirement because it believed that this reflected a “publicly understood quality of terrorism.”\textsuperscript{247} It also argued that the political protest exception in Subsection (3) should remain as a safeguard for legitimate forms of political expression.\textsuperscript{248}

Six months later, the “Parliamentary Joint Committee on Intelligence and Security (PJCIS)” delivered its review of the 2002 package of Australian anti-terror legislation. On the question of whether to include a motive requirement in Section 100.1, the PJCIS followed the Sheller Committee in reasoning that “terrorist violence is seen by the public as something

\begin{itemize}
\item \textsuperscript{242} Criminal Code Act 1995 (Cth), s 100.1(3). Cf. Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(ii)(E) (Can.).
\item \textsuperscript{243} Criminal Code Act 1995 (Cth), s 100.1(c)(i). Cf. Terrorism Act, 2000, c. 11, §1(1)(b); Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(i)(B) (Can.).
\item \textsuperscript{244} As in Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(i)(B) (Can.).
\item \textsuperscript{245} Sec. Legislation Review Comm. (Austl.), REPORT OF THE SECURITY LEGISLATION REVIEW COMMITTEE 50 (June 2006).
\item \textsuperscript{246} See id. at 50-53.
\item \textsuperscript{247} Id. at 57. See also id. at 53-57.
\item \textsuperscript{248} Id. at 57.
\end{itemize}
distinctive from other serious crimes.” The PJCIS also agreed that the political protest exception in Section 100.1(3) should remain, and that the reference to “threat of action” be established as a separate offense. On the question of psychological harm, the PJCIS disagreed with the Sheller Committee. The PJCIS also made two additional recommendations: (1) that Section 100.1 should include reference to international organizations, as in the United Kingdom’s 2006 amendment; and (2) that the definition should include an exemption for conduct regulated by the laws of armed conflict. In short, the Sheller Committee and PJCIS agreed on three points. Two of these—to retain the definition’s motive requirement and political protest exception—were to maintain the status quo, and the other—to establish the “threat” of a terrorist act as a separate offense—has not been adopted.

Comparing the Australian Criminal Code with the UK and Canadian legislation confirms a number of themes surrounding definitions of terrorism in domestic criminal legislation. The Australian definition includes a range of identical phrases to its UK and Canadian counterparts, such as “create[ing] a serious risk to the health or safety of the public or a section of the public” and “seriously interfer[ing] with . . . an electronic system.” As in the case of the United Kingdom, this signals doubts as to whether Section 100.1 complies with the first criterion.

Despite the fact that the Australian legislation was originally directed towards the post-9/11 security environment, it could also apply to a range of unrelated activities, such as attacks against abortion providers and building developments. Like the Canadian government, the Australian government also emphasized that new offenses were drafted in conformity with the Financing Convention, but the Section 100.1 definition goes far beyond the definition contained in that Convention. These points suggest that the Australian definition has serious flaws with regard to the second criterion. Finally, a number of important differences exist between the UK, Canadian,
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and Australian definitions, despite their similar origins, form, and structure. This suggests that the Australian definition also scores poorly on the third criterion.

Despite these problems, Section 100.1 of the Australian Criminal Code has been largely free of criticism from Australian courts and parliamentary bodies conducting post-enactment review. For the Australian High Court, like the Canadian Supreme Court, this was because the semantic properties of the Section 100.1 definition were sufficiently precise to be susceptible to judicial application. For the parliamentary committees, this was largely because Section 100.1(b) reflected publicly held views on terrorism, and little regard was given to the breadth of the enumerated harms. This suggests that courts are unlikely to strike down, and governments unlikely to amend, definitions of terrorism in domestic legislation, even if those definitions could otherwise be improved in line with the principle of legality. This adds weight to the idea that definitions of terrorism tend to become normalized in domestic legislation, to the point that they become resistant to change.

D. South Africa

South Africa’s definition of terrorism is contained in Section 1(1)(xxv) of the “Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 (Protection of Constitutional Democracy Act).” Unlike anti-terror legislation in the United Kingdom, Canada, and Australia, the Protection of Constitutional Democracy Act came into force some years after the September 11 attacks. The legislation was passed by the National Assembly on November 12, 2004 and came into force on May, 20 2005. It defines “terrorist activity” in Section 1(1)(xxv) as:

(a) any act committed in or outside the Republic, which-
(i) involves the systematic, repeated or arbitrary use of violence by any means or method;
(ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to-
(aa) any dangerous, hazardous, radioactive or harmful substance or organism;
(bb) any toxic chemical; or
(cc) any microbial or other biological agent or toxin;
(iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of,
any person, or any number of persons;
(iv) causes serious risk to the health or safety of the public or any segment of the public;
(v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private;
(vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to-
(aa) a system used for, or by, an electronic system, including an information system
(bb) a telecommunication service or system;
(cc) a banking or financial service or financial system;
(dd) a system used for the delivery of essential government services
(ee) a system used for, or by, an essential public utility or transport provider
(ff) an essential infrastructure facility; or
(gg) any essential emergency services, such as police, medical or civil defence services;
(vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or
(viii) creates a serious public emergency situation or a general insurrection in the Republic, whether the harm contemplated in paragraphs (a)(i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (viii) was committed by way of any means or method; and
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public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking;

(3) For the purposes of paragraph (a)(vi) and (vii) of the definition of “terrorist activity”, any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (a)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition.

(4) Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1).

(5) Notwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including purposes of prosecution or extradition, to be a justifiable defense in respect of an offence of which the definition of terrorist activity forms an integral part.  

The Protection of Constitutional Democracy Act is more difficult to fit into the post-9/11 paradigm because it was the result of a long process of

255 Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv) (S. Afr.).
consultation between the South African government, the South African Law Commission, and the South African Policing Service dating back to 1995.\(^{256}\)

Draft bills released in 2000 and 2003 were heavily criticized by human rights organizations for including an extremely broad and subjective definition of terrorism that could extend to legitimate political protests, and for placing limits on bail for those arrested under the legislation.\(^{257}\) The South African Government subsequently replaced those Bills with the Protection of Constitutional Democracy Against Terrorist and Related Activities Bill 2003. This was finally enacted in 2004.\(^{258}\)

The preamble to the Protection of Constitutional Democracy Act emphasizes that one of its main purposes is to implement United Nations conventions and resolutions on terrorism, such as the Financing Convention and Security Council Resolution 1373. It recognizes that terrorism is an international problem that “can only be effectively addressed by means of international co-operation.”\(^{259}\) Unlike legislation in the United Kingdom, Canada, and Australia, the South African Act was also designed to implement the Convention for the Prevention and Combating of Terrorism, as adopted by the “Organization of African Unity (OAU)” in 1999.\(^{260}\)

Much of the scope of the South African definition remains speculative because there have been no reported decisions dealing with a terrorism offense under the Protection of Constitutional Democracy Act.\(^{261}\) In a recent update on the South African legislation, C.H. Powell and Chris Oxtoby remain optimistic that the courts are likely to interpret the legislation narrowly, in line with constitutional rights and values.\(^{262}\) They cite a recent decision of the Western Cape High Court, which did not strictly rely on the anti-terrorism legislation, but nonetheless set aside an overly broad search warrant used to raid the home of two men suspected of terrorist activities.\(^{263}\)

\(^{256}\) See Roach, supra note 3, at 130.


\(^{258}\) See Golder & Williams, supra note 176, at 284; Roach, supra note 3, at 130.

\(^{259}\) Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 Pmbl.

\(^{260}\) Id. See Org. of African Unity [OAU], OAU Convention on the Prevention and Combating of Terrorism (June 14, 1999).


\(^{262}\) Id.

\(^{263}\) Id.
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This follows Powell’s earlier predictions that the South African anti-terror legislation is likely to survive constitutional review because of the threat that terrorism poses to the international community, and that the courts are “fairly certain to interpret the anti-terrorism legislation restrictively.” 264

However, sufficient reason still exists to suspect that the South African definition fails to sufficiently comply with the first two criteria. In considering the possible scope of the South African legislation, Roach has argued that it “defines[s] terrorism in a much broader manner that goes well beyond the essence of terrorism.” 265 Likewise, Powell has described the South African anti-terror legislation as “the most broadly and vaguely defined in all of South African law.” 266 In particular, she has criticized Subsection (a)(i) for being both “unclear and broad” 267 by including reference to “the systematic, repeated or arbitrary use of violence by any means or method.” 268 For Powell, “[i]t is difficult to imagine which form of violence could not be qualified by one of those three adjectives.” 269 This means that the only way to distinguish between terrorism and any other form of violence is by reference to the intention and motive requirements in Subsections (b) and (c)—which, as Powell states, are “themselves very broad.” 270 The South African definition also includes a broader range of harms and intentions than any of the definitions discussed above, such as the destruction of natural resources, creation of public emergencies and general insurrections, disruption of the “delivery” of essential public services, 271 and an intention to cause a government, institution or section of the public to “adopt or abandon a particular standpoint” or “act according to certain principles.” 272

South Africa’s reliance on the OAU’s 1999 Convention may explain some of this vagueness and breadth. The OAU definition refers to acts intended to “induce” any government, institution, or section of the public “to

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265 Roach, supra note 3, at 133.
266 C.H. Powell, supra note 264, at 565.
267 Id.
268 Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv)(a)(i) (S. Afr.).
269 C.H. Powell, supra note 264, at 565.
270 Id.
272 Id. at § 1(1)(xxv)(b)(iii).
adopt or abandon a particular standpoint, or to act according to certain principles.”

It also refers to acts that intend to “create general insurrection in a State,” “create a public emergency,” or cause “damage to public or private property, natural resources, environmental or cultural heritage.”

Insofar as the South African definition recreates these phrases, it has been drafted in line with one of its main intended purposes. However, the South African definition does not merely recreate these phrases; it encompasses a much wider range of conduct, including any act which “involves the systematic, repeated, or arbitrary use of violence by any means or method,” acts which cause pure economic loss, acts causing “feelings of insecurity,” and acts which merely “cause” (rather than “induce”) a person to adopt a particular standpoint or act according to certain principles.

This is where the logic underlying our second criterion becomes apparent. The South African definition is not necessarily overbroad because it includes additional references to cultural heritage, general insurrections, the delivery of public services, and acts which intend to induce people to act according to certain principles, as referred to in the OAU Convention. However, it is overbroad to the extent that it lowers and expands these thresholds for harm and intent, thereby allowing the legislation to operate outside its intended purposes.

With regard to the third criterion, the South African definition also differs from, and exceeds, its UK, Canadian, and Australian counterparts in a number of respects. Many of these differences have already been discussed above. First, Subsection (a)(i) extends to the “arbitrary use of violence by any means or method.” This is even wider than the United Kingdom’s reference to “serious violence against a person” in Subsection (2)(a) of the TA 2000.

Second, Subsection (a)(ii) includes a bio-terrorism provision, which does not expressly require any harm to be caused to a population. Third, Subsection (a)(vi) includes not only the disruption of services, facilities, or systems but also the delivery of such services, facilities, or systems. Fourth, Subsection (a)(vii) includes acts of terrorism causing

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274 Id. art. 1(3)(a)(ii)-(iii).
275 Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv)(a)(i), (a)(vii), (b)(ii), (b)(iii).
276 Id. § 1(1)(xxv)(a)(i).
277 Terrorism Act, 2000, c. 11, § 1(2)(a) (U.K.).
278 Protection of Constitutional Democracy Against Terrorist and Related Activities, supra note 275, § 1(1)(xxv)(a)(ii).
279 Id. § 1(1)(xxv)(a)(vi).
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pure economic loss, which is unique among the definitions discussed in this article. 280 Fifth, the fault requirement in Subsection (b) refers to acts that merely intend to “cause feelings of insecurity” within a section of the public. 281 This is not included in any of the other definitions. Sixth, the fault requirement will apply to acts that merely “cause” a person “to adopt or abandon a particular standpoint,” 282 as opposed to the higher Canadian standard of “compelling” a person to “act” in a particular way. 283 Lastly, the motive requirement in Subsection (c) extends beyond the other definitions by referring to “philosophical” as well as religious, political and ideological causes. 284

Nonetheless, one improvement on the definitions already discussed is that Subsection (4) includes an exemption for acts committed during the exercise of a legitimate right to national liberation or self-determination. As Roach notes, this exemption is broader than the Canadian Section 83.01(b), which only excludes acts committed in armed conflict in accordance with customary international law. 285 Until now, this “freedom fighter” exception may have only been necessary in the South African geo-political context with its history of violent resistance to apartheid. 286 However, the tension between the England and Wales Court of Appeal’s decision in R v. F and the United Kingdom’s involvement in the recent Libyan campaign suggests that an exception for acts of national liberation would be a wise inclusion in any domestic definition.

Despite this notable improvement on other domestic definitions of terrorism, the above analysis suggests that the South African definition scores poorly on all three criteria. More so than the other definitions.

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280 Id. at § 1(1)(xxv)(a)(vii). For Roach, this inclusion is particularly problematic as he believes that the “essence of terrorism is the intentional murder and maiming of civilians” and not the causing of major economic harm: see Roach, supra note 3, at 136.

281 Protection of Constitutional Democracy Against Terrorist and Related Activities, supra note 275, § 1(1)(xxv)(b)(ii). Indeed, this would apply to acts without any such intention, so long as it can “reasonably be regarded” that the accused, “indirectly” and “in part,” had such an intention: see C.H. Powell, supra note 264, at 566.

282 Protection of Constitutional Democracy Against Terrorist and Related Activities, supra note 275, § 1(1)(xxv)(b)(iii).

283 Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(i)(B) (Can.).

284 Protection of Constitutional Democracy Against Terrorist and Related Activities, supra note 275, § 1(1)(xxv)(c). Cf. Terrorism Act, 2000, c. 11, § 1(c) (U.K.); Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b) (Can.). § 83.01(1)(b)(i)(A); Criminal Code Act 1995 (Cth), s 100.1(1)(b) (Austl.).

285 Roach, supra note 3, at 139-40.

286 See id. at 131.
discussed above, the South African definition contains a range of uncertain and broad phrases such as “the arbitrary use of violence by any means or method.”\textsuperscript{287} It encompasses not only more conduct than the UK, Canadian, and Australian definitions; it also encompasses more conduct than the Article 1 definition in the OAU Convention, which the South African Government was outwardly dedicated to implementing. This is similar to the Canadian and Australian approach. Both those countries have been concerned with enacting legislation in line with the earlier Financing Convention, but their Parliaments have produced definitions far exceeding the scope of that Convention. By including this range of additional references, the South African definition also differs dramatically from the other definitions discussed above.

E. New Zealand

New Zealand’s definition of terrorism was enacted under the “Terrorism Suppression Act 2002 (TSA).” Section 5 provides that:

(1) An act is a terrorist act for the purposes of this Act if—
(a) the act falls within subsection (2); or
(b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
(a) to induce terror in a civilian population; or
(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.
(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(3) The outcomes referred to in subsection (2) are—

(a) the death of, or other serious bodily injury to, 1 or more persons

\textsuperscript{287} Protection of Constitutional Democracy Against Terrorist and Related Activities Act, \textit{supra} note 275, § 1(1)(xxv)(a)(i).
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(Other than a person carrying out the act);
(b) a serious risk to the health or safety of a population;
(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—
(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or
(b) intends to cause an outcome specified in subsection (3). 288

The TSA was originally introduced in May 2001 as the Terrorism (Bombings and Financing) Bill. After September 11 it was re-labeled as the Terrorism Suppression Bill and received royal assent in October 2002. When introducing the Bill’s post-9/11 amendments, the Minister of Foreign Affairs and Trade, Phil Goff, emphasized that the legislation was designed to implement New Zealand’s obligations under the Financing Convention and the International Convention for the Suppression of Terrorist Bombings. 289 Goff emphasized the importance of New Zealand “play[ing] its part as a member of the international community by taking every step it can to deal with terrorism, which is the greatest contemporary threat to international security and peace today.” 290 He also emphasized that the definition was designed to clearly differentiate acts of terrorism from acts of protest or industrial action, citing the high standards of intention (“to induce terror”),

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damage to infrastructure (must be “likely to endanger life”), the release of disease-bearing organisms (must be “likely to devastate the national economy of a country”), and the exemption for acts of political protest in Subsection (5).\textsuperscript{291}

It is difficult to speculate whether New Zealand courts would be satisfied with the clarity and breadth of the TSA definition because there have been no terrorism prosecutions in New Zealand to date. In one case, charges under the TSA might have been brought (after raids on camps in the Ruatoki Valley and the Uruweara Ranges found stocks of ammunition), but the New Zealand government chose to charge the offenders under the Arms Act 1983 instead.\textsuperscript{292} There have also been no substantive amendments to the New Zealand definition since its enactment. The only related amendment was contained in the Terrorism Suppression Amendment Act 2007,\textsuperscript{293} which corrected the New Zealand government’s earlier oversight of failing to include an actual offense of committing a terrorist act in the original drafting.

Of all the definitions discussed so far, the New Zealand TSA definition appears to be the most restrained. Section 5(2) similarly requires that the act be motivated by a political, religious or ideological cause, but the fault requirements in Subsections (2)(a) and (b) set significantly higher standards than the other jurisdictions.\textsuperscript{294} Instead of requiring intent to “intimidate” a section of the population (as in the UK, Canadian, and Australian definitions) Subsection (2)(a) requires intent to “induce terror.”\textsuperscript{295} This seems to indicate that the act must generate a feeling of intense fear or dread in the population, as opposed to the less emotive “intimidate,” which would likely be satisfied by “the use of threats or violence to force to or to restrain from some action.”\textsuperscript{296} Similarly, Subsection (2)(b) sets a higher threshold by not merely requiring that the act be designed to “influence,” “influence by intimidation,” or even “compel” a government or international organization.\textsuperscript{297} Instead, it requires that an act “unduly compel or force” a

\textsuperscript{291} Id.
\textsuperscript{293} Terrorism Suppression Amendment Act 2007, § 6A (N.Z.).
\textsuperscript{294} Terrorism Suppression Act 2002, § 5(2) (N.Z.).
\textsuperscript{295} Id. § 5(2)(a).
\textsuperscript{296} See Thomas v Mowbray, supra note 51, § 421 (Austl.), where Hayne J. considers that the standard of “intimidation” would likely be applied in its ordinary sense; that is, “the use or threat of violence to force to or to restrain from some action.”
\textsuperscript{297} As in the U.K., Australian, and Canadian definitions respectively: Terrorism Act, 2000,
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government or international organization to do or to abstain from doing any act. This is even higher than the standard of “compel” that is required in both the Financing Convention and the Resolution 1566 definitions. Moreover, the list of enumerated harms in Section 5(3) sets higher standards than comparable provisions in the other jurisdictions discussed. Unlike the UK, Australian, Canadian, and South African definitions, Section 5 does not extend to acts that merely “endanger life.” Any property damage must be likely to result in death, serious bodily injury, or a serious risk to health or safety. Any interference with infrastructure must be likely to endanger life. In contrast to the South African bio-terrorism provision, Subsection (3)(e) requires that the release of a disease-bearing organism be likely to “devastate the national economy.”

New Zealand’s definition scores poorly on the third criterion because it is sufficiently different from other domestic definitions discussed above. Indeed, the lack of coherence and consistency between domestic definitions necessarily means that each scores poorly on this ground. On the other hand, the differences in the New Zealand definition provide better guidance on the kinds of conduct prohibited under the legislation. Most notably, the list of harms in Subsection (3) suggests a genuine attempt to set clear and high harm thresholds. For example, it makes clear that an attack against an infrastructure facility must also be “likely to endanger life.” This is both more precise and less broad than comparable provisions in the other definitions discussed so far, which means that the New Zealand definition does the best with regard to criteria one and two. In this case, the New Zealand government has made a genuine attempt to draft Section 5 in line with its intended purpose of clearly differentiating acts of terrorism from acts of political protest. However, Subsection (3)(b) of the New Zealand definition still includes an alternate reference to “a serious risk to the health

301 Id. § 5(3)(d); Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv)(a)(ii) (S. Afr.).
or safety of a population.\textsuperscript{305} This wording appears to be the lowest common denominator between the various definitions. It acts to undermine the other notable improvements by permitting prosecution on this basis without regard to the higher thresholds elsewhere.

\textit{F. India}

Unlike the other jurisdictions discussed above, the Indian definition of terrorism is the result of a complicated legislative history involving a number of re-enactments and amendments of earlier anti-terrorism and broader security legislation. The “Unlawful Activities (Prevention) Act 1967 (1967 UAPA)" was originally made in the context of the Naga Rebellion\textsuperscript{306} under a constitutional provision authorizing reasonable limits on the freedoms of speech and association to protect the territorial sovereignty of the Indian Republic.\textsuperscript{307} In its original form, the legislation did not contemplate terrorist activity as we understand that term today. Instead, it criminalized association with any organization that disclaimed, questioned, disrupted, or intended to disrupt the territorial sovereignty of the Indian Republic, or encouraged others to engage in such activity.\textsuperscript{308}

The first explicit reference to a “terrorist act” in Indian legislation appeared in Section 3(1) of the “Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA).”\textsuperscript{309} TADA is recognized as having facilitated the arbitrary detention of tens of thousands of individuals who were innocent of any serious terrorist activity. A report by the “National Human Rights Commission of India (NHRC)” outlines 77,500 arrests made under TADA in its 10-year operation.\textsuperscript{310} The NHRC statistics indicate that only 725 (less than one percent) of these detainees were ever convicted.\textsuperscript{311}

\textsuperscript{305}Terrorism Suppression Act 2002, § 5(3)(b).

\textsuperscript{306}See Ujjwal Kumar Singh, Mapping Anti-Terror Legal Regimes in India, in GLOBAL ANTI-TERRORISM LAW AND POLICY (forthcoming 2011).


\textsuperscript{309}The Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987, INDIA CODE, § 3(1).


\textsuperscript{311}EMINENT JURISTS PANEL REPORT, supra note 39, at 38.
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and 19,000 (approximately one quarter) of the arrests occurred in Gujarat, a state “without any significant terrorism.” These statistics led the Eminent Jurists Panel to conclude in relation to TADA that “the scope of offences triggering the Act was so broadly created that arbitrariness was almost inevitable.” TADA lapsed in 1995 following a nation-wide protest by human rights organizations.

TADA was replaced seven years later with the “Prevention of Terrorist Act 2002 (POTA 2002).” Section 3(1) defined terrorist acts in a similar manner to TADA, although it omitted the broad inclusion of acts committed with “intent to . . . adversely affect the harmony amongst different sections of the people.” POTA 2002 failed to gain parliamentary approval when it was first introduced in 2000, but it was passed in a rare joint session of the Indian Parliament following September 11 and a range of domestic attacks. In October 2001, 31 people were killed in a bombing attack on the Kashmir Legislative Assembly. In May 2002, at least 30 people were killed in an attack on the army quarters at Kaluchak. In November 2002, 13 people were killed in an attack on the Raghunath and Shiv temples in Jammu. As a result, the Indian Ministry of Home Affairs claimed that the legislation was necessary to counter “an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country.”

The Indian government pointed to the new anti-terrorism laws enacted by the United Kingdom and the United States, which suggested that states needed to move beyond the ordinary criminal law to effectively respond to terrorism. Kalhan et al. have also described how the events of September 11 influenced the Indian government to hurriedly review its existing “hobbled laws” and “dilatory procedures.” Similar to the jurisdictions discussed above, India was concerned with enacting new legislation that

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312 Id. at 126.
313 Id. at 37.
314 Prajapati, supra note 310, at 2.
317 Kalhan et al., supra note 307, at 152; Mohapatra, supra note 316, at 323.
318 Mohapatra, supra note 316, at 333.
319 Id. at 333.
320 Kalhan et al., supra note 307, at 151.
would better equip state authorities “to handle the new threats brought on by terrorism” after September 11.\textsuperscript{321}

The POTA 2002 definition made clear that mere possession of any instrument or substance “capable of causing mass destruction” by members of an unlawful association was included within the definition of a terrorist act, as was the raising of funds “for the purpose of terrorism.”\textsuperscript{322} The remarkable breadth of this provision led Kalhan and others to conclude that POTA 2002’s definition was “vague and overly broad,” and “encompassed many ordinary criminal law offenses with little relationship to terrorist activity,” thereby “creating tremendous potential for arbitrary or selective application.”\textsuperscript{323}

Similar comments were also made by the Eminent Jurists Panel, which noted that the POTA 2002 legislation had been used between 2002 and 2003 to conduct 287 arrests in Gujarat, a State divided in conflict between Hindu and Muslim communities.\textsuperscript{324} Out of the two-hundred and eighty seven individuals arrested, two-hundred and eighty six were Muslim citizens.\textsuperscript{325} At that time, Muslims accounted for only 0.09 percent of the total Gujarati population.\textsuperscript{326} The Panel found that the low conviction rate for terrorism offenses in India revealed that “many individuals arrested... had no real connection with terrorism,” and that the arrests were primarily used to gather information or to intimidate populations, rather than for legitimate criminal law purposes.\textsuperscript{327} POTA 2002 was repealed in 2004 when the more left-leaning United Progressive Alliance formed a Coalition government, but POTA 2002 prosecutions pending at the time of the repeal were not withdrawn.\textsuperscript{328}

The POTA 2002 definition was re-enacted in the Unlawful Activities (Prevention) Amendment Act 2004,\textsuperscript{329} only two years after its repeal. This

\textsuperscript{321} Mohapatra, supra note 316, at 333.
\textsuperscript{323} Kalhan et al., supra note 242, at 156.
\textsuperscript{324} EMINENT JURISTS PANEL REPORT, supra note 39, at 37; Prajapati, supra note 310, at 2-3.
\textsuperscript{325} Prajapati, supra note 310, at 2.
\textsuperscript{327} EMINENT JURISTS PANEL REPORT, supra note 39, at 38.
\textsuperscript{328} Kalhan et al., supra note 307, at 100.
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2004 Amendment Act re-instated Subsection (1)(a) of the POTA 2002 definition by substituting a new Section 15 into the 1967 UAPA.\(^{330}\) By letting Subsection (1)(b) lapse, it removed the possession of firearms and the funding of terrorism from the definition itself, although it retained conspiracy, attempt, association, and support of terrorism as offenses attracting a maximum penalty of life imprisonment.\(^{331}\) These 2004 amendments also gave India’s anti-terrorism legislation extraterritorial scope by including acts intended to “strike terror in the people or any section of the people in India or in any foreign country” and acts designed to “compel the Government in India or the government of a foreign country.”\(^{332}\)

India’s current definition of terrorism was finally inserted as Section 15 of the 1967 UAPA by the “Unlawful Activities (Prevention) Amendment Act 2008 (2008 Amendment Act).” The 2008 Amendment Act was enacted hastily after the terrorist attacks in Mumbai on November 26. Section 15 of the 1967 UAPA now provides that:

> Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-
> (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological, radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-
> (i) death of, or injuries to, any person or persons; or
> (ii) loss of, or damage to, or destruction of, property; or
> (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
> (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or
> (b) overawes by means of criminal force or the show of criminal force.

\(^{330}\) Id.

\(^{331}\) Id. §§ 16-21.

\(^{332}\) Id. § 7 (emphasis added).
or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act. 333

The similarities between the current definition and its earlier iterations suggest that the Indian definition continues to score poorly on the first two criteria. Since 2002, this legislation has ostensibly been directed towards the same post-9/11 security environment that justified new legislation in the United Kingdom and the United States. However, for at least the last fifteen years, India has relied upon definitions of terrorism that refer to uncertain and extraordinarily broad forms of harm such as “injuries,” the “destruction of property,” and the “disruption” of essential services. 334 As reports by the NHRC and Eminent Jurists Panel show, these definitions have resulted in the arbitrary detention and targeting of populations with no real connection to terrorist activity, and only a small percentage of those arrested under the legislation have been successfully prosecuted for terrorism offenses. These worrying statistics confirm Mohapatra’s conclusion that “India’s antiterrorist laws have consistently been used beyond their originally prescribed scope to bypass the normal rules and safeguards afforded to criminal defendants under both the Indian Constitution and the Code of Criminal Procedure.” 335

There are a number of important differences between the current Indian definition and the definitions discussed above. These differences suggest that India’s definition scores poorly on our third criterion. First, the Indian definition does not refer to acts that are intended to influence, intimidate or compel governments or international organizations, 336 but those that are “likely to threaten the unity, integrity, security or sovereignty of India.” 337

335 Mohapatra, supra note 316, at 317.
336 As in the U.K., Australian, and Canadian definitions respectively: Terrorism Act, 2000, c. 11, § 1(1)(b) (U.K.); Criminal Code Act 1995 (Cth), s 100.1(c)(i) (Austl.); Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1)(b)(i)(B) (Can.).
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Second, like the South African and Canadian definitions, the Indian definition includes reference to acts disrupting essential services, although this disruption need not be serious. This broad provision led Young to remark that “[s]imply cutting a telephone line would probably not constitute terrorism at international law, but it would in India.” Third, the Indian definition encompasses mere (as opposed to “serious” or “substantial”) property damage, which is unique among the definitions discussed in this article. The inclusion of acts causing “injuries” to persons, as opposed to the higher and more common threshold of “serious bodily harm,” is also unique to the Indian definition. The current UAPA definition also recognizes specific acts of terrorism such as assassination and kidnapping, which are not included in the other definitions discussed above. Along with the reference to “unity, integrity, security [and] sovereignty,” these inclusions probably reflect India’s more extensive experience with acts of domestic and separatist violence.

The history of the Indian legislation demonstrates many of the problems with defining terrorism in domestic law. It shows how domestic politico-historical contexts can influence what states believe should amount to terrorist activity. In India’s case, this includes a longstanding preoccupation with issues of secession and territorial sovereignty, as well as acts involving firearms, assassination, and kidnapping. The Indian experience also reveals the possible serious consequences of enacting imprecise and overbroad definitions of terrorism. Perhaps above all, it shows that definitions of terrorism display a remarkable resilience to repeal or atrophy, and, if anything, tend to increase in scope over subsequent iterations. The complicated legislative history of the UAPA amendments, TADA, and POTA 2002 demonstrates the tendency of overbroad definitions of terrorism.
to become normalized in domestic jurisdictions to the point where they can even re-appear after significant public opposition, or, as Singh has neatly put it, have a “life after death.”

G. United States

The major piece of US legislation passed in the wake of 9/11 was the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Patriot Act),” which began as an omnibus bill amounting to some 350 pages. The Patriot Act was submitted to the House of Representatives on October 23, 2001, six weeks after the World Trade Center attacks. It was voted through the House the next day by a vote of 357 to 66, and then passed unamended by the Senate the day after that by 98 votes to 1. On October, 26 2001, President George W. Bush signed the Patriot Act into law. In doing so, President Bush emphasized that the Patriot Act was designed to counter “a threat like no other our nation has ever faced.” He referred to the “murder of thousands of innocent, unsuspecting people,” the subsequent anthrax attacks through the US Postal Service, and the possibility of “more atrocities in the hands of the evil ones.” He insisted that the US government would “enforce this law with all the urgency of a nation at war.”

Section 802 of the Patriot Act added a definition of “domestic terrorism” to the existing definition of “international terrorism” in §2331 of Title 18 of the United States Code. The definitions in §2331 of Title 18 now read as follows:

(1) the term “international terrorism” means activities that –
   (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

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345 Singh, supra note 231 (forthcoming 2011).
349 Id.
350 Id.
What is “Terrorism”?  

(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 outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(5) the term “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.  

These definitions display similarities to the other definitions discussed above. First, they refer to acts that intend to “intimidate or coerce a civilian population.” This is closest to the South African definition as it


352 In the first five jurisdictions discussed above, case law and committee reports provided sufficient guidance on whether or not each definition complied with criteria 1 and 2. In the case of India, it was possible to reach similar conclusions by referring to previous definitions of terrorism in Indian legislation, independent reports, and statistics on how those definitions have been applied. In each case we have relied on additional material to avoid drawing conclusions merely on the basis of our opinions. In the absence of comparable United States material, we feel that the most appropriate way to achieve a similar result is to begin in this case with criterion 3. By first comparing the United States definitions to the other definitions discussed above (criterion 3), it is possible to then draw some conclusions with regard to their clarity and scope (criteria 1 and 2).

extends to acts that only “appear” to have such an intention.\(^{354}\) Second, they refer to acts that are intended to “influence the policy of a government by intimidation or coercion.”\(^{355}\) This is closest to the Australian definition, which similarly sits between the UK “influence” and the Canadian “compel.”\(^{356}\)

There are, however, a number of differences between the US definitions and the other definitions of terrorism discussed above. First, and most obviously, §2331 is divided into acts that occur primarily outside and those that occur primarily inside the United States.\(^{357}\) The other definitions discussed above apply singularly to any acts committed inside or outside the territory of a state. Second, §2331 is not directed at acts with only a political, religious, or ideological cause. Instead, Subsections (1)(A) and (5)(A) require that the conduct must be an independent criminal offense which involves violence or is likely to endanger life. Third, Subsections (1)(B)(iii) and (5)(B)(iii) include conduct that merely “affects” the conduct of a government by mass destruction, assassination, or kidnapping.\(^{358}\) Lastly, neither of the definitions in §2331 provides a basis for prosecuting acts of terrorism under federal law. Instead, these definitions were enacted for the limited purpose of seeking court orders and search warrants against individuals suspected of engaging in terrorist activity.\(^{359}\) Section 219 of the Patriot Act, for example, gives federal magistrates in any district the power to issue a nation-wide search warrant for individuals suspected of international or domestic terrorism.\(^{360}\)

Although US definitions differ from those in the other jurisdictions discussed above, they appear to be no more precise or narrow. This suggests that §2331 also scores poorly on all three criteria. With regard to the second criterion in particular, this conclusion seems to be confirmed by a number of cases in which the Patriot Act provisions have been used to target, detain and prosecute individuals with no real connection to terrorism. Many of those

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\(^{354}\) See Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv)(b) (S. Afr.) (stating it “can reasonably be regarded as being intended”).


\(^{356}\) Criminal Code Act 1995 (Cth), s 100.1(c)(i) (Austl.).

\(^{357}\) 18 U.S.C. §§ 2331(1)(C), 2331(5)(C).

\(^{358}\) Id. §§ 2331(1)(B)(iii), 2331(5)(B)(iii).

\(^{359}\) See 147 CONG. REC. 7159-03 (2001).

targeted under the Patriot Act in the wake of September 11 had no real connection to any kind of terrorist activity, let alone the atrocities, biological attacks, and the murder of thousands of unsuspecting innocents to which the legislation was originally directed. Heather Hillary and Nancy Kubasek, for example, have detailed a number of these cases, including the case of Sami Al-Hussayen, a wealthy PhD candidate from Idaho whose phone-lines and e-mails were tapped by the FBI after he donated money to local Muslim organizations. Al-Hussayen endured 18 months in prison and an eight-week criminal trial before being cleared of all terrorism charges.

While the broad definitions of international and domestic terrorism in §2331 have serious implications for the civil liberties of those suspected of engaged terrorist activity, those being prosecuted for acts of terrorism will likely fall under §2332(b) of Title 18, which was amended by §808 of the Patriot Act. Section 2332(b) defines the crime of “acts of terrorism transcending national boundaries.” It lists a range of penalties, ranging from the death penalty or life imprisonment for acts resulting in death, to a maximum of 35 years imprisonment for maiming, 25 years for acts against property, and 10 years for a threat to commit an offense. This is a notable improvement on the other definitions of terrorism discussed above. Rather than being finely calibrated in this way (considering the level of harm caused by an attack), definitions of terrorism in the United Kingdom, Canada, and the other jurisdictions discussed fix a maximum penalty of life imprisonment for any act which qualifies under the provision.

Section 2332(b)(g)(5) sets out an extensive list of 59 criminal offenses, including §2332(b) itself, which are defined as “Federal crimes of terrorism” for the purposes of investigating authorities. If this range of definitions and offenses is not already confusing enough, there is also a separate definition of terrorism to be used in prosecuting “alien unlawful enemy combatants” in US military commissions. That definition was

361 See, e.g., DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 107 (2007) (“Of the 8,000 young men of Arab and Muslim descent sought out for FBI interviews, and the more than 5,000 foreign nationals placed in preventive detention in the first two years after 9/11, virtually all Arab and Muslim, not one stands convicted of a terrorist crime today.”).
364 Id. § 2332b(c).
365 Id. § 2332b(g)(5).
366 Id. § 2332b(f).
originally drafted in §950(v) of the United States Code as amended by the Military Commissions Act of 2006, which gave congressional authorization to the Guantanamo Bay military commissions, held unlawful in the landmark Supreme Court case Hamdan v. Rumsfeld.

With such a wide range of definitions to choose from, it is little wonder that US federal agencies have not been able to agree on what criminal activities should be targeted and prosecuted as acts of terrorism. This confusion is revealed in detailed studies undertaken by the “Transactional Records Access Clearinghouse (TRAC)” at Syracuse University, which has analyzed statistics issued by the courts, federal prosecutors and the “National Security Division of the US Justice Department (NSD).” Recent TRAC reports indicate a range of worrying statistics on the use of the “terrorism” label by these three bodies in the five years and six months preceding May 2010:

- Only 34 percent of defendants (approximately one in three) charged in federal court with a terrorism offense were categorized as having any connection to terrorism by the federal prosecutors
- Twenty-six percent of defendants (approximately one in four) on a list of terrorism matters prepared by the NSD were classified as not having any connection to terrorism by the prosecutors who brought the cases
- In the five years preceding 2010, assistant United States attorneys declined to bring charges against 67 percent (approximately two out of every three) of the thousands of suspects brought to them by the investigative agencies as alleged “terrorists”
- In the three lists of “terrorism cases” (one each prepared by the courts, the prosecutors and the NSD), only four percent of defendants were present on all three lists

371 Who Is a Terrorist? Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk, TRAC REP. (Sept. 28, 2009), http://trac.syr.edu/tracreports/terrorism/215/.
When one adds into the mix the definitions of terrorism from other jurisdictions, it is clear that a substantial amount of confusion and uncertainty exists at the domestic level about what conduct amounts to an act of terrorism. This lack of a consistent approach compromises the ability of states to effectively counter the threat of international terrorism, and it undermines the moral force of the post-9/11 global legal response. Additionally, the US experience suggests that inconsistency is not a problem only at the global level. Inconsistency can also be a significant problem at the domestic level where complicated legislative schemes cause a single jurisdiction to rely on multiple definitions of terrorism. The United States’s experience also confirms that imprecise and overbroad definitions of terrorism can have a real and significant impact on the individuals who are targeted and prosecuted under special anti-terrorism powers.

CONCLUSION

Arriving at appropriate legal definitions of terrorism remains an important task for domestic jurisdictions, especially because the definitions discussed above appear to be a long-term fixture in each nation’s criminal law. By testing these seven definitions against the criteria we set out in Part I, it becomes obvious that much remains to be done to improve the existing clarity, scope, and consistency of domestic anti-terror law regimes.

With regard to our first criterion, the clarity of definitions of terrorism has generally satisfied domestic judiciaries. A strong argument may be made, however, that these laws do not provide sufficient guidance as to the kinds of conduct they prohibit. The England and Wales Court of Appeal, the Ontario Superior Court, and the Australian High Court have all held that their respective definitions are sufficiently clear and unambiguous. However, a number of unclear phrases remain in these definitions that could envelop a wide range of diverse, less serious, and even legitimate activities. The Canadian Public Safety Committee revealed this problem most clearly when it conceded that the ATA definition could not be easily understood by Members of the Canadian Parliament. If those who are voting for it in parliament cannot understand a definition easily, how are potential defendants, untrained in politics and law, supposed to determine the kinds of conduct that may be targeted under the legislation?

With regard to our second criterion, it is clear that each of the definitions discussed above could apply to a range of activities that cannot be described as terrorism and unrelated to the post-9/11 global security environment. Where states have enacted legislation for the purpose of
implementing international conventions on terrorism, they have enacted much broader definitions than the definitions contained in those instruments. Most notably, domestic definitions of terrorism do not only apply to acts causing death or serious bodily injury. They encompass a wide range of less serious and more uncertain harms such as property damage, interference with electronic systems, and the creation of “a serious risk to the health or safety of a section of the public.”\textsuperscript{372} In the United Kingdom, Section 1 of the TA 2000 extends to acts that merely intend to influence a government.\textsuperscript{373} This is a much lower standard than would be expected of legislation designed to target conduct which can “undermin[e] the foundations of government.”\textsuperscript{374} Even if governments are unlikely to target and punish individuals for engaging in conduct with no real connection to terrorism, it is clear that definitions of terrorism in these jurisdictions encompass a much wider range of conduct than the purposes to which they were originally directed.

This overbreadth suggests a failure on behalf of governments after September 11 to explicitly address difficult definitional issues, and a tendency to err on the side of over-inclusion in order to account for all possible future manifestations of terrorist violence. The United Kingdom clearly erred on the side of over-inclusion when drafting the TA 2000 rather than addressing the difficult issue of whether acts of political protest and self-determination should be included within a definition of terrorism. The necessity to resolve these difficult issues is revealed by the inherent conflict between the England and Wales Court of Appeal’s judgment in R v. F and the British Government’s involvement in the Libyan campaign. More broadly, the tendency for legislatures to err on the side of over-inclusion when drafting definitions of terrorism is revealed by the insertion into legislation of broad phrases such as “creating a serious risk to the health or safety of a section of the public.”\textsuperscript{375} The Canadian Public Safety Committee’s report suggests that this level of vagueness and breadth has been included in domestic definitions of terrorism so that domestic security


\textsuperscript{373} Terrorism Act, 2000, c. 11, § 1(1)(b).

\textsuperscript{374} As suggested by the U.K. Home Secretary when introducing the Terrorism Act, 2000, c.11: 341 PARL. DEB., H.C. (1999) 152 (U.K.).

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services have sufficient flexibility to preempt an evolving terrorist threat.\textsuperscript{376} Such an approach is inconsistent with the principle of legality, which requires criminal offenses to be clearly and narrowly specified in advance. On the other hand, Canada, Australia, South Africa, and New Zealand have at least made attempts to exclude acts of political protest, armed conflict in accordance with the laws of war, and/or self-determination from their respective definitions.\textsuperscript{377} These are positive inclusions, although their effectiveness is yet to be tested in the courts.

With regard to our third criterion, a number of major differences remain between definitions of terrorism across comparable jurisdictions. This can be the case even where multiple definitions appear to have the same form and structure because there are multiple limbs of each definition that are susceptible to variation. Important differences still remain in these definitions as to basic matters such as the level of intent required of a terrorist act (to cause, to induce, to influence, to influence by intimidation, to intimidate, to compel, to unduly compel), the psychological impact that a terrorist act must have on the general public (to cause feelings of insecurity, to intimidate, to strike terror), and the range of targets at which an act of terrorism may be directed (governments, international organizations, domestic organizations, individual persons). There are also differences in the range of harms that are required of a terrorist act. For example, differences remain in the definitions as to whether property damage, serious property damage, substantial property damage, or property damage causing death or serious bodily injury is the appropriate threshold. The definitions discussed also differ on the question of whether an act of terrorism against infrastructure is one that intends to interfere with systems, facilities, services, or the delivery of such systems, facilities or services. Finally, the South African definition brings up important and undecided issues, such as whether pure economic loss and environmental damage are capable of being described as terrorist acts.

As demonstrated most clearly by the legislation in the United Kingdom, Canada, Australia, and India, domestic definitions of terrorism also appear to be resistant to amendment or repeal. Where these definitions of terrorism have been subjected to independent and/or parliamentary review, review bodies tend to either disagree on important points, or agree to maintain the

\textsuperscript{376} \textit{RIGHTS, LIMITS, SECURITY, supra} note 197, at 7.

\textsuperscript{377} See Criminal Code, R.S.C. 1985, c. C-46, §§ 83.01(1)(b), 83.01(1)(b)(ii)(E) (Can.); Criminal Code Act 1995 (Cth), s 100.1(3); Terrorism Suppression Act 2002, §§ 5(4)-(5); Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 § 1(1)(xxv)-(3)-(4) (S. Afr.).
status quo. This suggests that definitions of terrorism in domestic legislation, with all their existing problems and inconsistencies, are likely to remain on the statute books for the foreseeable future unless governments make an active and conscious effort to improve their clarity, scope, and consistency.

Lastly, it is clear that imprecise and overbroad definitions of terrorism can have a real and significant impact on individuals’ lives. This is most clearly shown by the Indian TADA, which led to nearly 80,000 arrests in its 10-year operation, with less than one percent of those arrests leading to successful criminal prosecution. In the United States, TRAC records also indicate that federal agencies simply cannot agree on who should or should not be targeted as a terrorist, despite extensive legislative drafting. This suggests that imprecise, overbroad and inconsistent definitions of terrorism not only have an impact on individuals by allowing greater scope for government misuse. They can also be unintentionally misapplied due to confusion and uncertainty about the kinds of conduct that should be targeted and prosecuted as terrorism. Improving the clarity, scope, and consistency of definitions of terrorism to avoid both these possibilities remains an important task.