

## WHAT IS 'TERRORISM'? PROBLEMS OF LEGAL DEFINITION

BEN GOLDER\* AND GEORGE WILLIAMS\*\*

### I INTRODUCTION

Violence aimed at inspiring fear and intimidating populations is not a new phenomenon. Nevertheless, references to 'terrorism' in law and politics can only be found in more recent times. The word 'terror' was first used to describe the Jacobin 'Reign of Terror' that followed the French Revolution in 1789.<sup>1</sup> The first legal responses to terrorism and attempts to define the word can be traced to the 20<sup>th</sup> century. One commentator dates 'the first organized international legal attempt to grapple with the problem of defining terrorism' to the International Conferences for the Unification of Penal Law, a series of events convened in various European capitals throughout the 1920s and 1930s.<sup>2</sup> Since then lawyers, academics, national legislatures, regional organisations and international bodies, such as the United Nations, have produced a bewildering array of definitions. One 1988 study identified a total of 109 different definitions,<sup>3</sup> and the number would be far higher today. Despite decades of effort, with even greater focus after September 11, attempts to develop a generally accepted legal definition of terrorism have failed.

Some have likened 'the search for the legal definition of terrorism ... [to] the quest for the Holy Grail'.<sup>4</sup> Others such as Judge Richard Baxter, formerly of the International Court of Justice, writing in 1974, have questioned the utility of a legal definition, stating: 'We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise; it is ambiguous; and, above all,

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\* Lecturer, Faculty of Law, University of New South Wales; Research Assistant, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales.

\*\* Anthony Mason Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar. The authors thank the anonymous reviewer for their helpful comments.

1 John F Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13, 14.

2 Geoffrey Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 *Ohio Northern University Law Review* 97, 97.

3 Alex P Schmid and Albert J Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories, and Literature* (1988) 5.

4 Levitt, above n 2, 97.

it serves no operative legal purpose'.<sup>5</sup> Today, it is clearly necessary to develop a coherent legal description of terrorism.<sup>6</sup> The events of September 11 and the terrorist attacks in Bali, Madrid and elsewhere, in producing what has been called the 'Age of Terror',<sup>7</sup> have rendered moot the debate about whether we should endeavour to legally define the term.<sup>8</sup> 'Terrorism' is now widely deployed in both political debate and legal discourse, and is referred to in an array of national and international legislative (and executive) regimes. For example, national laws now criminalise 'terrorist acts',<sup>9</sup> give police enhanced powers of investigation and arrest in regard to such offences,<sup>10</sup> establish regimes for the electronic surveillance of people suspected of terrorism,<sup>11</sup> deny visas to people engaged in terrorism,<sup>12</sup> freeze the assets of 'terrorist organisations' and impose trade sanctions on countries that harbour or support terrorists.<sup>13</sup>

These examples demonstrate how terrorism is now pervasive as a legal concept in many domestic legal systems. This includes Australia, which before September 11 had no national laws on the subject. Today, the legal meaning attributed to terrorism – in Australia and elsewhere – is crucial when establishing (and limiting) the scope of serious criminal sanctions as well as the capacity of the State to infringe upon accepted civil liberties, such as the right to privacy. Due to the serious legal, political, social, cultural and economic consequences of

5 Richard R Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974) 7 *Akron Law Review* 380, 380. His scepticism is mirrored in the writings of Judge Rosalyn Higgins, the first female judge elected to the International Court of Justice:

Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both:

Rosalyn Higgins, 'The General International Law of Terrorism' in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (1997) 14, 28.

6 See Christian Walter, 'The Notion of Terrorism in National and International Law' (Paper presented at the Max Planck Society Conference on Terrorism as a Challenge for National and International Law, Heidelberg, 24 January 2003) 3 <<http://edoc.mpil.de/conference-on-terrorism/present/walter.pdf>> at 15 November 2004. Walter states that 'as lawyers we still have to work on an abstract definition of what should legally constitute terrorism'.

7 See, eg, Strobe Talbott and Nayan Chanda (eds), *The Age of Terror: America and the World after September 11* (2002).

8 As Walter has stated:

Therefore, in contrast to some earlier approaches 'terrorism' is more and more used as a legal concept and not only as a means of political stigmatisation. Given these developments I will not discuss the question, whether terrorism should be used as a legal concept, but start from the assumption that this is done and inquire into the content of the definitions given:

Walter, above n 6, 2–3 (original emphasis omitted).

While we do start from the position that it is important to define terrorism as a legal concept, we acknowledge that this assumption is not universally accepted and that many legal scholars believe existing criminal laws adequately address situations to which the legal concept of terrorism is sought to be applied. We accept this academic difference of opinion but do not enter into the debate here.

9 See, eg, *Criminal Code 1983* (NT).

10 See, eg, *Terrorism (Police Powers) Act 2002* (NSW), *Terrorism (Community Protection) Act 2003* (Vic), *Australian Security Intelligence Organisation Act 1979* (Cth).

11 See, eg, *Foreign Intelligence Surveillance Act*, 50 USC § 1801 (1978).

12 See, eg, *Immigration Act*, RSC 1985, c 1–2, s 19.

13 For an example of the former, see *Executive Order on Terrorist Financing* (23 September 2001), s 3(e). For an example of the latter, see *Act to Combat International Terrorism*, 18 USC § 3071 (1984).

describing someone as a terrorist, or an action as terrorism, lawyers must seek to describe the concept with as much precision as possible. One danger is that if terrorism is not so defined, the powers of the State may extend very far indeed.

Our aim in this article is not to determine what is or is not terrorism. We do not add our own definition to an already long list. Instead, we address some of the practical and political problems that lawyers encounter when they attempt to establish a definition.<sup>14</sup> The lack of consensus on what constitutes terrorism points to its inescapably political nature, perhaps best encapsulated in the aphorism (or cliché) that 'one person's terrorist is another person's freedom-fighter'.

We acknowledge that it is important to set out our own normative starting point in writing about such politically sensitive questions. We accept that terrorism does constitute a serious threat to Australia's national security and that criminal and other laws are needed to respond to this threat. However, the capacity of such laws to deter terrorism should not be overstated, and Australia's legal response must not be disproportionate to that threat. It should be consistent with fundamental human rights and the rule of law.

In Part II of this article we set out the current legal definitions of terrorism under international law and in Australia, the United States, the United Kingdom, Canada, New Zealand and South Africa. We have selected the latter nations because they have a legal system based upon the common law, as well as similar political, cultural and legal traditions to Australia.<sup>15</sup> These nations encompass a diversity of approaches and we have set out their definitions of terrorism in full (and often elaborate) detail because this is important for our later discussion. In Part III we examine some of the legal and other issues that arise out of these attempts at definition. We focus on the following questions: whether to adopt a *general* or a *specific* approach to defining terrorism; whether an exception should be made in favour of certain activities; and whether to define terrorism through legislative prescription or through judicial development. In Part IV we conclude by outlining principles that may assist in future attempts to define terrorism or in recasting current legal definitions.

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14 See H H A Cooper, 'Terrorism: The Problem of the Problem of Definition' (1978) 26 *Chitty's Law Journal* 105. Cooper states that 'the problem of the definition of terrorism is more than semantic. It really is a cloak for a complexity of problems, psychological, political, legalistic, and practical'.

15 Of course, we acknowledge elements of civil law in Canada (largely in Québec) and the continuing influence of Roman-Dutch law in South Africa. We also acknowledge the steps taken towards legally defining terrorism in civil law countries. For example, see the European Union's *Council Framework Decision (EC) No 475/2002 of 13 June 2002 on Combating Terrorism* [2002] OJ L 164/3. A discussion of the legal definitions of terrorism in these, and other, jurisdictions, is outside the scope of this paper.

## II LEGAL DEFINITIONS OF TERRORISM

### A International Law

As Michael P Scharf has noted, 'the problem of defining "terrorism" has vexed the international community for years'.<sup>16</sup> International legal scholars have wrestled with this problem since at least the 1920s. For the majority of this time, and indeed in contemporary discussions, international consensus on what constitutes terrorism has been frustrated by the divergent (and intractable) political positions of some states on questions such as whether the actions of the States themselves can be characterised as 'terrorist', and whether the violent actions of national liberation movements merit the label.<sup>17</sup> As a result, the approach taken to defining terrorism in the international arena has been to adopt a *specific* (or *inductive*) model.

According to this approach, international legal scholars have not attempted to define terrorism as a general concept per se, but rather have attempted to define (and proscribe) specific actions such as hijacking, the taking of hostages, and so forth. This can be contrasted with the *general* (or *deductive*) model, whereby the definer attempts to articulate a general concept of terrorism by reference to certain overarching criteria (such as, for example, intention or motivation).<sup>18</sup>

In adopting the *specific* approach, international law has adapted itself to the 'predominant form of terrorist action at any given time',<sup>19</sup> and has attempted to sidestep the political sensitivity of the broader definitional question. As a consequence, there are some 12 international conventions, such as the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*,<sup>20</sup> the *International Convention against the Taking of Hostages*,<sup>21</sup> and the *International Convention for the Suppression of Terrorist Bombings*,<sup>22</sup> directed to commonly-acknowledged terrorist *modus operandi*.<sup>23</sup>

16 Michael P Scharf, 'Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?' (2001) 7 *International Law Students Association Journal of International and Comparative Law* 391, 391.

17 See Levitt, above n 2, 97–103.

18 This latter definitional approach has also been called a *classical (definitio per genus et differentiam)* approach. See Krzysztof Skubiszewski, 'Definition of Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 39, 39. In Part III(A), we discuss the relative merits of these approaches.

19 Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight against its Financing' (2003) 14 *European Journal of International Law* 365, 368.

20 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

21 *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

22 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

23 A list of the international treaties or conventions on this subject (both United Nations and non-United Nations instruments) is outside the scope of this article. On this see generally Peter J Van Krieken, *Terrorism and the International Legal Order* (2002).

The utility of this *specific* approach has recently been questioned<sup>24</sup> and criticised<sup>25</sup> by international lawyers. Indeed, the international community has begun to attempt more *general* definitions.<sup>26</sup> The first attempt – in recent times – at drafting a general definition of terrorism was in 1999, in the *International Convention for the Suppression of the Financing of Terrorism*.<sup>27</sup> While the first limb of the definition adopts a *specific* approach to the question by referring to certain acts mentioned in various international conventions,<sup>28</sup> the second limb refers to:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, 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 to abstain from doing any act.<sup>29</sup>

More recently, as part of its response to the events of 11 September 2001, the Sixth Committee of the United Nations General Assembly attempted to formulate a comprehensive general definition of terrorism.<sup>30</sup> Article 2(1) of the *Draft Comprehensive Convention on International Terrorism* provides:

- (1) Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
  - (a) Death or serious bodily injury to any person; or
  - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
  - (c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, 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 an act.

The Convention is still in draft form. Indeed, the United Nations General Assembly Ad Hoc Committee on Terrorism is still debating the definition.

While the international legal community has struggled to formulate a universally-accepted definition, bodies such as the United Nations have exerted a

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24 Walter, above n 6, 12.

25 Sorel, above n 19, 368.

26 It is worth noting that the first of these attempts was in 1937, with the League of Nations' *Convention for the Prevention and Punishment of Terrorism* (League of Nations Doc C.546 M.383 1937 V (1937)). This document never entered into force. The failure of this initial attempt may have been a motivation for the shift to the *specific* approach. With the exception of the United Nations' 1972 *Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism* (UN Doc A/C.6/L.850 (1972)) all recent attempts have been characterised by a *specific* approach to the question.

27 *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 ILM 229 (entered into force 10 April 2002).

28 Ibid art 2(1)(a).

29 Ibid art 2(1)(b).

30 For an account of the drafting process and the problems encountered, see Surya P Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law' (2002) 4 *International Law Forum* 159.

significant influence on the actions of member States in this regard. The United Nations has been a focus of debate and activity in responding to terrorism, and a number of international instruments have provided an impetus for States to respond to terrorism through their domestic legal regimes. One of the most important of these instruments is Resolution 1373 of the United Nations Security Council, made on 28 September 2001, which determines among other things that States shall '[p]revent and suppress the financing of terrorist acts' and '[t]ake the necessary steps to prevent the commission of terrorist acts'.<sup>31</sup> While Resolution 1373 requires States to take action, it does not set out what are 'terrorist acts', the target of that action, leaving this to the States themselves. We turn now to the domestic legal definitions of terrorism. Many of them can be seen as responses to September 11 and Resolution 1373. On the other hand, some jurisdictions, such as the United Kingdom and New Zealand, have had counter-terrorist legislation in place for a longer period.

## B Australian Definitions

The Commonwealth, New South Wales, Victoria, Queensland and the Northern Territory are the only Australian jurisdictions that have made specific reference to terrorism in legislation. After September 11, the Federal Government provided the focus for the Australian legal response.<sup>32</sup> Schedule 1 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) inserted a new definition of 'terrorist act' into the *Criminal Code Act 1995* (Cth)<sup>33</sup> ('*Criminal Code*'). The definition appears in s 100.1 of part 5.3 of the *Code* and provides:

(1) In this Part: ...

*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:

31 SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/Res/1373 (2001).

32 While the Federal Parliament has taken the initiative, it was thought necessary for the Australian States to refer power to the Commonwealth under s 51(xxxvii) of the *Constitution* in order for it to do so: *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA); *Terrorism (Commonwealth Powers) Act 2002* (Tas). As stated by Nathan Hancock, in 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Commonwealth Parliament, 2001–02) pt 1.4.1: '[Commonwealth] legislative power to deal with terrorism may be derived from a mosaic of various direct and indirect sources'. These sources include, inter alia, the defence power, the external affairs power, the aliens power, the corporations power, the banking power, and the power over interstate and overseas trade and commerce.

33 An almost identical definition of 'terrorist act' is used in s 5 of the *Terrorism Insurance Act 2003* (Cth), while the definition of 'terrorist act' contained in s 10 of the *Maritime Transport Security Act 2003* (Cth) refers to the definition used in the *Criminal Code Act 1995* (Cth). See also the reference to 'terrorism offence' in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

- (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
  - (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.
- (4) In this Division:
- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
  - (b) a reference to the public includes a reference to the public of a country other than Australia.

Where the States have legislated with respect to terrorism, they have largely followed the definitional approach of the Commonwealth by enacting their own 'anti-terrorist' provisions that mirror s 100.1. For example, the definition of a 'terrorist act' in s 4 of the *Terrorism (Community Protection) Act 2003* (Vic) is in exactly the same terms as the Commonwealth definition; while the New South Wales definition of a 'terrorist act', contained in s 3 of the *Terrorism (Police Powers) Act 2002* (NSW), differs only in that it excludes threats of a terrorist act. Finally, the definition of a 'terrorist act' in s 22A of the *Crime and Misconduct*

*Act 2001* (Qld) reflects the substance of the Commonwealth definition but is drafted slightly differently.<sup>34</sup>

The Northern Territory Legislative Assembly has also legislated with regard to terrorism. However, while the Commonwealth, New South Wales, Victorian and Queensland laws all post-date September 11, the Northern Territory provisions have been in place since 1984, and were modelled on the United Kingdom's *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK). The Northern Territory *Criminal Code 1983* (NT) creates a specific offence of terrorism punishable by life imprisonment.<sup>35</sup> The definition of 'act of terrorism' that forms the basis of the offence is set out in s 50:

In this Division –

'act of terrorism' means the use or threatened use of violence –

(a) to procure or attempt to procure –

- (i) the alteration of;
- (ii) the cessation of; or
- (iii) the doing of,

any matter or thing established by a law of, or within the competence or power of, a legally constituted government or other political body (whether or not legally constituted) in the Territory, the Commonwealth or any other place;

(b) for the purpose of putting the public or a section of the public in fear; or

(c) for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out;

'organization' means an association, society or confederacy;

'unlawful organization' means an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends;

'violence' means violence of a kind that causes, or is likely to cause, the death of, or grievous harm to, a person.

## C Other Common Law Countries

### 1 *United States of America*

Twelve days after 11 September 2001, President George W Bush made an Executive Order on Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.<sup>36</sup> Section 3(d) defined 'terrorism' as:

an activity that –

- (i) involves a violent act or an act dangerous to human life, property or infrastructure; and
- (ii) appears to be intended –
  - (A) to intimidate or coerce a civilian population;

<sup>34</sup> The definition was inserted by s 4 of the *Terrorism (Community Safety) Amendment Act 2004* (Qld).

<sup>35</sup> *Criminal Code Act 1983* (NT) sch 1, s 54.

<sup>36</sup> Exec Order No 13,224, 66 Fed Reg 49 079 (Sept 23, 2001).

- (B) to influence the policy of a government by intimidation or coercion; or
- (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

The United States Congress then followed, on 25 October 2001, by enacting its own legislative definition; one that Ronald Dworkin has described as a ‘new, breathtakingly vague and broad definition of terrorism’.<sup>37</sup> With only one dissenting vote in the Senate and 66 dissenting votes in the House of Representatives, Congress passed the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (*USA PATRIOT Act*),<sup>38</sup> s 802 of which amended the definition of ‘domestic terrorism’ within Title 18 of the *United States Code*. Section 2331 of Title 18 now provides:

- (2) 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;
  - (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.

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37 Ronald Dworkin, ‘The Threat to Patriotism’ (2002) 49(3) *New York Review of Books* 44.

38 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 18 USC.

## 2 United Kingdom

The United Kingdom has had counter-terrorism measures in place for decades. The *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK)<sup>39</sup> was a response to the mainland bombing campaign of the Irish Republican Army conducted throughout the 1970s, '80s and '90s.<sup>40</sup> In 2000, the United Kingdom Parliament consolidated its counter-terrorism laws, many of which were temporary, into a single Act. The resulting piece of legislation, the *Terrorism Act 2000* (UK), contains a definition of terrorism, the 'vague contours' of which, according to Sir David Williams, repose a significant amount of trust in the 'good sense of the police and security services, prosecutors, judges and jurors to maintain a sense of proportion when acts of terrorism are alleged'.<sup>41</sup> The definition states:

1.
  - (1) In this Act 'terrorism' means the use or threat of action where –
    - (a) the action falls within subsection (2);
    - (b) the use or threat is designed to influence the government 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 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;

39 The definition of terrorism contained within s 9(1) of the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) was very broad. Relevantly, it provided that: "terrorism" means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'.

40 For a discussion of the historical context of the enactment of the *Terrorism Act 2000* (UK), the *Anti-terrorism, Crime and Security Act 2001* (UK) and its legislative precursors, see Sir David Williams, 'Terrorism and the Law in the United Kingdom' (2003) 26 *University of New South Wales Law Journal* 179, 179–83.

41 Ibid 179.

- (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.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

This definition has been carried over without amendment into the *Anti-terrorism, Crime and Security Act 2001* (UK), which is the United Kingdom’s legislative response to the September 11 terrorist attacks.<sup>42</sup>

### 3 Canada

Section 19(1) of the now repealed<sup>43</sup> Canadian *Immigration Act* provided that people involved in ‘terrorism’ or ‘terrorist organizations’ were to be refused entry into Canada. However, the Act did not define ‘terrorism’. In 2003, in *Suresh v Canada (Minister of Citizenship and Immigration)*<sup>44</sup> (‘Suresh’), the Supreme Court of Canada was called upon to determine the meaning of the word as used in s 19. While the Court admitted that there was no universally accepted definition, it held that the term ‘provides a sufficient basis for adjudication and hence is not unconstitutionally vague’.<sup>45</sup> If the section had been so, it may have been ‘void for vagueness’.<sup>46</sup> The Court acknowledged the difficulty of attempting to define the concept, but relied upon the *International Convention for the Suppression of the Financing of Terrorism* in holding that, at least in regard to s 19 of the *Immigration Act*, terrorism refers to any:

act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>47</sup>

Shortly before this judicial definition of ‘terrorism’ in *Suresh* was delivered, the Canadian Parliament enacted its own legislative definition. Section 4 of the *Anti-terrorism Act*, RSC 2001, c 41 inserted a new definition of ‘terrorist activity’ into the federal *Criminal Code*, RSC 1985, c 46. Section 83.01 of the Canadian *Criminal Code* defines ‘terrorist activity’ in two parts.

42 See cl 19(1) of sch 1 to the *Anti-terrorism, Crime and Security Act 2001* (UK) c 24 (‘ATCSA’). The ATCSA deals with a wide range of matters, such as immigration, weapons of mass destruction and incitement of racial hatred. For a useful recent discussion of both pieces of legislation, see Clive Walker, ‘Terrorism and Criminal Justice: Past, Present and Future’ [2004] *Criminal Law Review* 311.

43 See *Immigration and Refugee Protection Act*, RSC 2001, c 27, ss 34, 35.

44 [2002] 1 SCR 3. This was a unanimous decision of the Court, constituted by McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

45 Ibid [93].

46 See Peter Hogg, *Constitutional Law of Canada* (4<sup>th</sup> ed, 1997) 1106–10.

47 *Suresh* [2002] 1 SCR 3, [98]. *Suresh* has subsequently been followed in *Fuentes v Canada (Minister of Citizenship and Immigration)* [2003] 4 FC 249.

The first part, in para (a), adopts a *specific* approach to the problem, stating that 'terrorist activity' means 'an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences'. Paragraph (a) then lists a number of offences in sub-ss 7(2) and 7(3) of the Canadian *Criminal Code*, which implement various international instruments that are directed towards well-known terrorist *modus operandi*, such as hijacking. Paragraph (b) of the definition adopts a *general* approach in providing that 'terrorist activity' means:

- (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
  - (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),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, 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.

An act is a terrorist activity if it falls within either para (a) or (b) of the definition of 'terrorist activity' in s 83.01 of the Canadian *Criminal Code*.

#### 4 New Zealand

New Zealand had anti-terrorism laws in operation prior to 11 September 2001. These included the *International Terrorism (Emergency Powers) Act 1987* (NZ),

enacted, in part, in response to the 1985 bombing of the 'Rainbow Warrior'. The Act confers 'emergency powers' upon the police and armed forces after an 'international terrorist emergency' has been declared. Section 2 provides that such an emergency can only arise in regard to terrorist acts undertaken 'for the purpose of furthering, outside New Zealand, any political aim'. The Act defines an 'international terrorist emergency' in s 2, but not terrorism more generally.

Prior to September 11, New Zealand had passed legislation implementing eight of the major international conventions on terrorism.<sup>48</sup> A further Bill that sought to implement two more of the conventions, the Terrorism (Bombings and Financing) Bill 2001 (NZ), was before the New Zealand Parliament on 11 September 2001. After the attack, it became a 'convenient vehicle'<sup>49</sup> to respond to the requirement imposed on nations to combat terrorism by Resolution 1373. Indeed, a focal point of the debate became how the Bill could be redrafted to comply with the Resolution, and the Resolution was added as a Schedule to the Bill. The Bill was renamed and was ultimately enacted in October 2002, with overwhelming cross-party support,<sup>50</sup> as the *Terrorism Suppression Act 2002* (NZ).<sup>51</sup>

'Terrorist act' is defined by s 5 of the *Terrorism Suppression Act* in three alternate ways.<sup>52</sup> First, under s 5(1)(a), an act is a 'terrorist act' if it 'falls within subsection (2)'. Section 5(2) then provides:

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.

Subsection (3) further states:

The outcomes referred to in subsection (2) are –

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

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48 See generally Alex Conte, 'A Clash of Wills: Counter-Terrorism and Human Rights' (2003) 20 *New Zealand Universities Law Review* 338, 340 fn 7.

49 Matthew Palmer, 'Counter-Terrorism Law' [2002] *New Zealand Law Journal* 456, 456.

50 The Bill was passed with a margin of 106 to 9 votes, with only the Greens voting against it: see John E Smith, *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities* (2003) 30 <<http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf>> at 15 November 2004.

51 As amended by the *Terrorism Suppression Amendment Act 2003* (NZ).

52 Under *Terrorism Suppression Act 2002* (NZ) s 25(1), 'planning or other preparations to carry out the act, whether it is actually carried out or not', a 'credible threat to carry out the act, whether it is actually carried out or not' or an 'attempt to carry out the act' also constitute a terrorist act.

- (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.

Subsection (4) exempts acts of war made during situations of armed conflict and made in accordance with applicable international law from sub-s (2), while sub-s (5) states:

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).

Second, under s 5(1)(b) an act qualifies as a 'terrorist act' if it is an act 'against a specified terrorism convention' (the use of 'against' in this context is certainly awkward).<sup>53</sup> Section 4(1) defines a 'specified terrorism convention' as any of the nine treaties listed in sch 3, such as the *Convention for the Suppression of Unlawful Seizure of Aircraft*<sup>54</sup> or the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.<sup>55</sup>

Third, under s 5(1)(c) an act is a 'terrorist act' if it is a 'terrorist act in armed conflict (as defined in section 4(1))'. Section 4(1) defines 'terrorist act in armed conflict' to mean an act:

- (a) that occurs in a situation of armed conflict; and
- (b) the purpose of which, by its nature or context is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and
- (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and
- (d) that is not excluded from the application of the Financing Convention by article 3 of that Convention.

## 5 South Africa

In 2003, the South African Government introduced the Anti-Terrorism Bill 2003 (South Africa) into the National Assembly. The Bill purported to create a range of terrorist-related offences, such as committing or threatening to commit a terrorist act,<sup>56</sup> knowingly facilitating the commission of a terrorist act,<sup>57</sup> and being a member of, or supporting, a terrorist organisation.<sup>58</sup> In addition, the Bill

53 Palmer, above n 49, 457.

54 *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

55 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

56 Anti-Terrorism Bill 2003 (South Africa) cl 2(1)(a).

57 Anti-Terrorism Bill 2003 (South Africa) cl 2(2).

58 Anti-Terrorism Bill 2003 (South Africa) cll 2(3), (4).

gave extra investigative and arrest powers to the South African police,<sup>59</sup> and made provision for the suppression of the financing of terrorist organisations.<sup>60</sup> The definition of ‘terrorist act’, used to frame the scope of these provisions, was contained in clause 1 and stated:

- ‘terrorist act’ means an unlawful act, committed in or outside the Republic; which is
- (a) a convention offence; or
  - (b) likely to intimidate the public or a segment of the public.

Clause 1 defined a convention offence to mean an offence listed in sch 1 of the Bill, which in turn listed 10 international conventions to which South Africa was a party (the list included United Nations, Organisation of African Unity and other multilateral treaties). The disjunctive use of the *specific* and *general* approaches in this definition made an ordinary offence against South African criminal law an act of terrorism provided that it was likely to intimidate the public or a segment of the public, and automatically made a convention offence an act of terrorism irrespective of its intimidatory character or purpose.

The Bill was referred to the Portfolio Committee on Justice and Constitutional Affairs of the National Assembly, which held public hearings over several weeks. The Bill was heavily criticised by human rights organisations such as the South African Human Rights Commission for, amongst other things, its extremely broad definition of terrorism.<sup>61</sup> In response, the South African Government replaced the Anti-Terrorism Bill with the Protection of Constitutional Democracy Against Terrorist and Related Activities Bill 2003 (‘2003 South African Anti-Terrorism Bill’). This Bill, like its predecessor, provided for terrorist-related criminal offences, gave certain powers to investigating authorities and provided for financial counter-terrorism measures. However, the definition of ‘terrorist activity’ in clause 1(1)(xxiv) was far more detailed. According to this clause, ‘terrorist activity’ is:

- (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, physical integrity or physical freedom of, or violates the physical freedom of, or causes serious bodily injury to or the death of, any person, or any number or group of persons;

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<sup>59</sup> See Anti-Terrorism Bill 2003 (South Africa) cll 6, 8, 9.

<sup>60</sup> Anti-Terrorism Bill 2003 (South Africa) ch 4.

<sup>61</sup> See Anthony Stoppard, ‘Rights – South Africa: Anti-Terror Bill Draconian’, *Inter Press Service*, 26 June 2003 <<http://www.globalissues.org/Geopolitics/WarOnTerror/SABill.asp>> at 15 November 2004.

- (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 defense services;
  - (vii) causes any major economic loss or extensive destabilisation of an economic system or a substantial devastation of the national economy of a country; or
  - (viii) creates a serious public emergency situation or a general insurrection, 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
- (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to –
- (i) threaten the unity and territorial integrity of a State;
  - (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or
  - (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or international body, organisation or intergovernmental organisation or institution, 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.

Clause 1(3) provides that for the purposes of paras (a)(vi) and (a)(vii) of the above definition, ‘any act which is committed in pursuance of any lawful advocacy, protest, dissent or industrial action and does not involve action resulting in the harm contemplated in paras (a)(i) to (vi)’ will not constitute terrorist activity. Furthermore, clause 1(4) creates an exception in favour of any act committed in the exercise or furtherance of a people’s ‘legitimate right to national liberation, self-determination and independence ... in accordance with the principles of international law’. The Bill has not been passed and lapsed with the 2004 national elections in South Africa.

### III PROBLEMS OF LEGALLY DEFINING TERRORISM

#### A A General or Specific Definition?

The two main drafting methods used to define terrorism are the *general* and the *specific* approaches. The *specific* approach identifies certain activities as terrorism, such as hijacking and taking hostages, without seeking to define a general category of terrorism per se, while the *general* approach seeks to arrive at a general definition of terrorism, by reference to criteria such as intention, motivation, and so forth. The former is essentially an *inductive* approach, while the latter is *deductive*. These approaches can be combined in the one definition.

Of the definitions set out in Part II, most adopt a largely *general* approach. However, some countries’ definitions include *specific* elements, such as s 5(1)(b) of the New Zealand *Terrorism Suppression Act*, and para (a) of the definition of ‘terrorist activity’ in s 83.01 of the Canadian *Criminal Code*, which provide that certain offences constitute terrorist acts. The New Zealand Act also refers to offences against specified international terrorism conventions to which New Zealand is a party, while the Canadian *Code* refers to criminal offences contained elsewhere within the *Code* (offences themselves created to implement some of the same international conventions). In addition, there are *specific* elements in Australian and South African legislation, which refer to certain terrorist activities, such as tampering with electronic systems and introducing biological material.<sup>62</sup>

Before addressing the relative merits of the *specific* approach, it is worth noting that the clarity sought to be achieved by the kind of ‘drafting by incorporation’ method found in the New Zealand Act – whereby s 5(1)(b) defines terrorism by reference to certain acts ‘against’ specified terrorism conventions – is illusory. It is not clear exactly what an act against a specified terrorist convention would look like.<sup>63</sup> International conventions are not usually drafted in a way that permits them to be simply referred to in this way. If certain offences

62 *Criminal Code Act 1995* (Cth) s 101.2(e) and Protection of Constitutional Democracy against Terrorist and Related Activities Bill 2003 (South Africa) cl 1(1)(xxxiv)(a)(ii), respectively. See also the crime of sabotage in the *Criminal Code Act 1899* (Qld) sch 1, s 469A (this was inserted by the *Terrorism (Community Safety) Amendment Act 2004* (Qld)).

63 Palmer, above n 49, 457.

are thought to merit the description of 'terrorist' in and of themselves, then it is preferable to adopt the Canadian expedient of referring to existing domestic criminal offences.

As the Canadian Arab Federation stated in its *factum* in the Canadian Supreme Court decision of *Suresh*, the concept of terrorism is 'open to politicized manipulation, conjecture and polemical interpretation'.<sup>64</sup> Whether the debate is framed in the almost clichéd terms of the freedom fighter/terrorist dichotomy or in more nuanced distinctions, it is clear that definitional approaches also reflect political choices. In this vein, the Federation argued for a *specific* definition of terrorism, suggesting that this lessened the scope for political manipulation of the general term 'terrorism'.<sup>65</sup> According to this argument:

the disadvantage of not listing specific acts as 'terrorist acts' is that the decision will be left up to policy makers to determine who is and who is not committing 'terrorist acts'. A subjective definition leaves too much room for political bias to affect the decision.<sup>66</sup>

It has been argued that the *specific* approach not only 'avoids political conflict over basic definitional principles' but, perhaps more importantly, possesses the practical benefit of 'permitting textual agreement to be reached'.<sup>67</sup>

However, referring to individual 'acts of terrorism' might not be capable of capturing what we mean by terrorism. A specific offence may not include the elements that distinguish a terrorist act from other criminal acts, and this can be a concern where additional penalties are imposed for terrorism. For example, the definition in clause 1(a) of the original South African Anti-Terrorism Bill provided that a convention offence committed within the Republic of South Africa constituted a terrorist act. The disjunctive drafting of the clause meant that the act of committing the convention offence did not have to be attended by an intention to exert influence over government policy, or to intimidate a civilian population. Thus, it was conceivable that the hijacking of a small plane as part of a student prank or the kidnapping of a person for mercenary reasons would, respectively, constitute terrorist acts by virtue of contravening international conventions against hijacking and the taking of hostages. This would be the case even though the acts were not intended to produce terror in the civilian population or to bring about a political outcome.

Another problem with the specific approach is 'that as new forms of technology are created, new forms of terrorist acts are likely to develop'.<sup>68</sup> A general approach may be needed to 'cover these new modalities'.<sup>69</sup> This problem might be countered by enacting an extensive list of specific crimes of terrorism, which might even anticipate new forms of terrorist activity and involve extra

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64 *Suresh* [2002] 1 SCR 3, [94].

65 *Ibid* [97].

66 Susan Tiefenbrun, 'A Semiotic Approach to a Legal Definition of Terrorism' (2003) 9 *International Law Students Association Journal of International and Comparative Law* 357, 365.

67 Levitt, above n 2, 102.

68 Tiefenbrun, above n 66, 365.

69 *Ibid*.

offences being added over time. However, this would pit the legislative drafter and the usually slow and unwieldy parliamentary process against the ingenuity of terrorists seeking new ways to achieve their goals. Inevitably, legislative definitions of terrorism based upon specific offences will produce longer statutes that cannot cover the ambit of all possible terrorist action.

Where specific offences of terrorism do not sufficiently cover the field, terrorist conduct may still fall within the ordinary criminal law, including offences such as murder and assault. However, such actions might thereby avoid some of the additional sanctions (such as additional times of imprisonment) often associated with terrorist acts, and may not attract the special investigative and detention powers that many nations have provided for only in regard to the commission of terrorist crimes. Others acts such as cyber-terrorism, or even acts not yet dreamed of, may fall entirely outside of the ordinary criminal law. Hence, by itself, a specific approach to defining terrorism is not sufficient. To base a counter-terrorism regime only upon the regulation of specific acts of terrorism would be akin to attempting to proscribe schemes designed to evade tax by specifically legislating against each and every possible method of evasion. As with crimes of terrorism, legislation directed at specific evasion schemes may be important, but a more general definition and prohibition is also necessary.<sup>70</sup>

In any event, the idea of defining terrorism by reference to certain acts begs the question: why define them as terrorism at all? If these disparate acts are to be linked in some way, then they need to be linked by an overarching idea of what we understand by terrorism.

The concept of 'terrorism' has entered public and political discourse and is playing an important role in both these realms. If the law is to keep pace with such discourse then the challenge for lawyers is to formulate a generic definition that reflects our contemporary understanding of terrorism, and seeks to crystallise it in a form consistent with rule of law principles. As Levitt, himself a proponent of the *specific* approach, has recognised:

a multilateral anti-terrorism legal instrument based on a generic definition of terrorism would in effect put the official international seal of disapproval on a whole range of violent political behaviour, with a moral emphasis that the facially apolitical inductive approach lacks.<sup>71</sup>

These arguments demonstrate why it is important to draft a *general* definition of terrorism, even if specific instances of terrorism are also proscribed. However, the difficulty of achieving a general definition that does not encompass actions such as civil protest raises a host of new problems.

## **B A General Definition: Are Exceptions Needed?**

In jurisdictions that have attempted to formulate a *general* definition of terrorism, the basic sense of what is meant by 'terrorism' has not proven to be too elusive. There appears to be agreement across most of the nations examined in

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<sup>70</sup> See, eg, *Income Tax Assessment Act 1936* (Cth) s 260.

<sup>71</sup> Levitt, above n 2, 111.

Part II that the concept refers to political, religious or ideologically-motivated violence that causes harm to people or property, intended either to coerce a civilian population or government, or to instil fear in the population or a certain part of it. However, if a definition is expressed at this level of abstraction, as some of the jurisdictions in Part II have done, it would extend to (and, depending on the purpose of the legislation, potentially criminalise) a range of activities not generally considered to be terrorism. Civil disobedience, public protest and industrial action are among the activities that could fall within the definition.

These types of activities should be excluded from any definition of terrorism. The problem with not excluding such actions is demonstrated by the example of s 1 of the *Terrorism Act 2000* (UK). Unlike the definition in the Australian *Criminal Code* (and its State equivalents), the New Zealand *Terrorism Suppression Act*, the Canadian *Criminal Code* and the 2003 South African Anti-Terrorism Bill, the United Kingdom definition does not contain an exception in favour of advocacy, protest or industrial action. The legislation simply requires the purported terrorist to have committed an act (such as endangering a person's life, or seriously damaging property), and to have committed that act in furtherance of a political, religious or ideological cause with the aim of influencing the government or intimidating the public (or a section thereof). This encompasses groups whose methods are generally non-violent and who do not aim to intimidate or to coerce the government or the public.

For example, a long-running nurse's industrial dispute where staffing levels in public hospitals have been seriously reduced could 'create a serious risk to the health or safety of the public', within the meaning of s 1(2)(d) (as could the industrial actions of other essential services, such as fire officers, police, and so forth). If the strike were directed towards convincing the government to increase pay and conditions in public hospitals then this could also satisfy both the 'political cause' and the 'influencing government' requirements, in s 1.

Similarly, a mass student protest against the deregulation of university fees by the British Government could also fall within the definition of terrorism. If the protest became violent (even if it was for a short period of time and relatively localised), through the intervention of mounted police or police in riot gear, or through the intervention of third parties (perhaps another group of students in favour of the government policy), the 'serious violence' requirement in s 1(2)(a) could be satisfied. The 'serious damage to property' requirement could also be made out if some students let off fireworks or set off flares, given that sub-s 3 obviates the need to satisfy *actual* damage to property if firearms or explosives are used, and s 121 of the Act broadly defines 'explosive' as meaning, inter alia, 'an article or substance manufactured for the purpose of producing a practical effect by explosion'. As with the striking nurses, the example of the protesting students could quite easily fall foul of the motive and political cause requirements in paras (1)(b) and (1)(c) if their aims were to pressure the government to reduce student financial contributions to public university funding, and to provide more public money for education.

The example of a nurse's dispute was referred to in debate in the House of Commons, in 2000, on the Terrorism Bill 2000 (UK). Charles Clarke, a Member of the governing Labour Party, asserted that:

To suggest, for instance, that the nurses' dispute could be a terrorist act is wrong. It would not cause a serious risk, nor would it be driven by a 'political, religious or ideological cause'. It would be a trade dispute, which is not a political, religious or ideological cause.<sup>72</sup>

Similarly, Lord Bassam of Brighton, again of the Labour Party, said:

We have also made it clear on many occasions that our definition of terrorism is not intended to catch lawfully organised industrial action in connection with a legitimate trade dispute. It is worth putting that on record. I do not believe it likely that the courts would stretch the definition of a political cause as some have suggested.<sup>73</sup>

However, it is arguable, on the face of the Statute, that the definition in the *Terrorism Act* does cover activities such as industrial disputes and mass public demonstrations. Indeed, if this were not the case, it would have been a simple matter to exclude certain categories of acts, such as advocacy, dissent and industrial action. Given the specific exclusion clauses in the Australian, New Zealand, Canadian and South African legislation, the absence of such a clause might even create an implication that Parliament intended to include these acts within the scope of the definition.

While we have used the United Kingdom definition to highlight the problems of defining terrorism in a *general*, deductive manner without specific exceptions, the United States definition could produce similar results. It also lacks an appropriate exception clause. However, the United States Bill of Rights<sup>74</sup> provides overriding constitutional protection for freedom of 'speech'.<sup>75</sup> This instrument, and the high degree of protection afforded to the concept of freedom of speech in American constitutional jurisprudence, is likely to prevent the application of general definitions of terrorism to civil protest that would not normally be regarded as terrorism. On the other hand, the United Kingdom Bill of Rights, the *Human Rights Act 1998* (UK) c 42, only enables courts to interpret legislation '[s]o far as it is possible to do so' in a way that is compatible with rights such as 'freedom of expression'.<sup>76</sup> Although the *Human Rights Act* also enables a court to make a declaration of incompatibility where it finds that a statute, such as the *Terrorism Act*, is incompatible with a listed right, the making of such a declaration does not affect the operation of the statute.

The most problematic definition is in the Northern Territory *Criminal Code 1983* (NT). It creates an offence of terrorism at a high level of generality without providing an exclusion for advocacy, protest or industrial action. Without a Bill

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72 HC Deb Standing Committee D, 18 January 2000, col 31.

73 HL Deb 4 July 2000, col 1449.

74 *Constitution of the United States of America* amends I–X.

75 *Constitution of the United States of America* amend I.

76 *Human Rights Act 1998* (UK) c 42, s 3, sch 1, art 10(1).

of Rights in the Northern Territory, or a national Bill of Rights in Australia, there are no countervailing constitutional or other instruments to ameliorate its effect. It is not even clear that the implied constitutional protection for political communication in Australia operates in the Northern Territory.<sup>77</sup> The best available protections in that jurisdiction are the common law rules of statutory construction, whereby 'a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right'.<sup>78</sup>

Clearly, any general definition of terrorism ought to provide an exception for protest, dissent and industrial action. The text of such an exception is of obvious importance. For example, in Australia, the Security Legislation Amendment (Terrorism) Bill 2002 (Cth), as originally introduced into the federal Parliament, provided that a 'terrorist act ... does not include ... lawful advocacy, protest or dissent; or ... industrial action'.<sup>79</sup> This exception did not extend to many forms of unlawful civil protest (including where the unlawful element might be as minor as trespass onto land) in which people, property or electronic systems were harmed or damaged. The exception would not have prevented the criminal liability associated with terrorism, with up to life imprisonment, from applying to people such as farmers, unionists, students, environmentalists and online protestors. Any exception based upon excluding forms of protest must exclude both lawful and unlawful protest. Fortunately, this Bill failed to pass in its original form and was substantially amended over a period of months after strong criticism from legal and community groups, and a highly critical unanimous report by the Senate Legal and Constitutional Committee.<sup>80</sup> As enacted and set out in Part II, above, the definition excludes advocacy, protest, dissent or industrial action without reference to the lawfulness of such action.<sup>81</sup>

### C Which Arm of Government Should Define Terrorism?

Which institution is best placed to define 'terrorism'? Is it preferable to attempt to codify a definition in the form of a legislative instrument, or should such an instrument merely refer to the concept of 'terrorism', as did s 19(1) of the Canadian *Immigration Act*, and leave the rest of the task of definition to the courts? Apart from the Supreme Court of Canada's decision in *Suresh*, all of the definitions examined in Part II were developed by the legislature (or by the executive, in one United States definition).

77 George Williams, *Human Rights under the Australian Constitution* (1999) 181–2.

78 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J). See also *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ and Brennan, Gaudron and McHugh JJ).

79 Security Legislation Amendment (Terrorism) Bill 2002 (Cth) s 100.1. See also Protection of Constitutional Democracy against Terrorism and Related Activities Bill 2003 (South Africa), which contains a similar provision.

80 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002) <[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/terrorism/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf)> at 15 November 2004.

81 It does not, however, exclude such action where, amongst other things, it is intended 'to cause serious harm that is physical harm to a person'.

This issue should not be polarised as a choice between definition by Parliament or the courts; the two are not mutually exclusive. Whatever definition is set down by Parliament, it will require interpretation and further definition by judges. Indeed, the longer the statutory definition, the more scope there may be for courts to define individual words. This is the case with each of the legislative and judicial definitions in Part II. Each refers to key concepts that establish terrorism, but fail to define what these concepts mean. For example, s 100.1 of the federal *Criminal Code*, in Australia, defines a ‘terrorist act’ in some detail, but uses undefined phrases that leave enormous scope (and indeed the necessity) for further judicial elaboration. Examples of such phrases include:

- ‘intention of advancing a political, religious or ideological cause’;
- ‘intimidating the public or a section of the public’;
- ‘creates a serious risk to the health or safety of the public or a section of the public’;
- ‘an information system’; and
- ‘advocacy, protest, dissent or industrial action’.

Indeed, the fact that such terms are not themselves defined in the Act means that the legislative definition can only be seen as a starting point. The task of determining the real parameters of defining what constitutes a ‘terrorist act’ will largely fall to the courts. Another good example is the definition in the 2003 South African Anti-Terrorism Bill, which includes an undefined exception in favour of acts committed in the exercise or the furtherance of a people’s ‘legitimate right to national liberation, self-determination, and independence ... in accordance with the principles of international law’.

Whether Parliament or the courts define ‘terrorism’ is really a question about how the task should be shared and, in particular, whether Parliament should define as little as possible so as to leave the maximum scope for judicial development. This is a question of institutional competence, including as to the capacity of common law methodology to respond to new and fast-developing types of terrorism.<sup>82</sup> The advantage of a minimalist statutory definition of terrorism could be adaptability and flexibility. Courts would be able to apply the definition in a way that responded to developments that might not have been foreseen by Parliament, and in a way that reflects common law rights and the rule of law. The courts would be able to develop and refine the concept over time in response to individual cases. Of course, such flexibility may ultimately be stifled by the accumulation of precedent.

The capacity for judicial flexibility does not outweigh the arguments for a greater legislative role. Definition at least of the key features of terrorism by Parliament has several advantages. These operate with particular strength given the severe consequences that can flow from the use of the word terrorism when attached to a person, act or organisation. The most important reason for a significant role for Parliament is that as a representative and democratic forum it

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82 For a useful discussion of this topic, see Lyria Bennett Moses, ‘Adapting Law to Technological Change: A Comparison of Common Law and Legislation’ (2003) 26 *University of New South Wales Law Journal* 394.

can be the best place in which to deliberate over what constitutes terrorism. 'What is terrorism?' is a question of politics as much as law and should be conducted through open public debate and media scrutiny. This deliberative process can lead to a more nuanced and appropriate definition, as the Australian experience suggests in regard to the drafting of the exception for advocacy, protest, dissent or industrial action. Indeed, it is today almost inconceivable that a nation could attach consequences such as life imprisonment and the invasion of privacy to a word so contested as terrorism without a legislature first seeking to define the term.

The form of statutes means that they are most suitable as the primary mode of giving expression to any definition of terrorism. Statutes are accessible and, in most cases, are available free over the internet. While the common law method can produce a nuanced and evolutionary definition of a legal term over a number of cases, a statute aims to encapsulate the essential components of a definition within a single instrument. Statutes may also possess the benefit of greater clarity. Of course, the statute books are littered with examples of complex, difficult to understand, and plainly bad legislative drafting. Some of these concern terrorism. We do not assert that solely because a definition is contained within a statute that it is necessarily easier to understand. However, by its nature there may be less scope for indeterminacy of meaning than in the judicial development and manipulation of precedent.<sup>83</sup>

#### IV CONCLUSION

We have examined some of the problems and questions that arise out of attempts to define terrorism, especially in laws enacted after September 11. We have not formulated our own definition, as indeed there is no lack of definitions from which to choose. However, despite apparent widespread copying and overlap between the definitions we have examined, there is no common acceptance of the criteria by which a definition should be assessed. We have asked: what makes a good definition of 'terrorism'? We have three main conclusions.

First, it is preferable to adopt a *general* approach to defining terrorism. On a practical level, this means that governments will not have to continually revisit the issue of what constitutes terrorism in order to respond to fast-developing instances of bio-terrorism, cyber-terrorism and the like. Investigative and enforcement agencies need to be able to respond quickly and with certainty to terrorist threats in the knowledge that the scenario they are faced with falls within a general category of 'terrorist acts'. This is not to say that *general* definitions of terrorism cannot benefit from *specific* elements. In this regard, the aspects of the 2003 South African Bill and the Australian legislation dealing with technological and biological acts of terrorism are helpful (provided, obviously, that this

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<sup>83</sup> For a classic statement of the various common law arguments, see James Boyle, 'Anatomy of a Torts Class' (1985) 34 *American University Law Review* 1003.

drafting approach is not used to limit the generality of a definition, but rather functions to supplement and extend it). However, a completely *specific* approach to the problem, as has largely been adopted to date in the international legal arena, results in a piecemeal, ad hoc and reactive means of regulation. In any event, the *specific* approach lacks the wider moral-political appeal of the *general* approach, which can lead to a stronger statement about the indiscriminate use of violence to attain political, religious or ideological ends.

Secondly, a definition should make a specific exclusion at least in favour of advocacy, dissent and industrial action. While the *general* approach is preferable in that it represents a more unified and prospective approach to the legal regulation of terrorism, and makes a more compelling political statement, we must be vigilant to ensure that any description of the subject matter does not impinge unduly on democratic rights and freedoms. The breadth of the United Kingdom, United States and, especially, the Northern Territory definitions are dangerous because they may extend to acts of public protest and industrial action. Counter-terrorist legislation can be justified in the offences it creates, and the breadth of the powers that it gives to investigative and enforcement agencies, only to the extent that it actually addresses credible threats to a democratic system. It must not provide a basis for the investigation and persecution of legitimate (even if unlawful) dissent within a society. As the Supreme Court of Canada stated in *Suresh*, in discussing the core values of liberty, the rule of law and principles of fundamental justice, ‘it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values’.<sup>84</sup>

Thirdly, Parliament should set out the core elements of any definition of terrorism. It provides the appropriate forum in which to deliberate upon the issue. Moreover, statutes have significant advantages over judicial decisions in defining such a crucial part of the law. Parliament should define the core elements of what constitutes terrorism, but in doing so must recognise that much of the work of giving meaning to these concepts will fall to the courts. This is inevitable in a common law system and represents an appropriate balance between the capacity of Parliament to set down general rules and the role of the courts in applying those rules in light of individual cases.

These conclusions demonstrate that many of the definitions in Part II are inadequate. This is not surprising given the speed with which many of them were developed after September 11, and, therefore, the lack of genuine public debate that accompanied their enactment. Indeed, the fact that the Australian federal definition stands up so well against its counterparts is due in large part to the legislation taking many months to pass through Parliament because of intense public scrutiny and the work of a parliamentary committee that successfully recommended many changes. This and many of the other national anti-terrorism statutes are now taking on a more permanent character. Indeed, despite the haste with which many were passed after September 11 and Resolution 1373, few have any form of sunset clause attached. In these circumstances it is important to reassess these laws. In several of the statutes, the definition of terrorism should

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84 *Suresh* [2002] 1 SCR 3, [4].

be redrafted. This reflects the fact that legislating against terrorism is an exercise involving constant negotiation and renegotiation of law in a climate where national security is seen as a pressing political imperative.