

Introduction

Few words are more emotionally charged than ‘terrorism’ and ‘terrorist’. They are used to denote conduct that is not only criminal but also – worse – action that strikes at the heart of the people or the fundament of the nation State. On occasion, condemnation in such egregious terms can disclose more about the user than it does about the target of their denunciation. Sometimes those designated as terrorists may bask in the descriptor, wearing it as a badge of honour. But far more often, the recipients reject their label on the basis that either their *raison d’être* or their tactics, or both, are dedicated to the achievement of lofty goals: freedom, religious purity, the quest for social justice, or the defence of the oppressed or the economically vulnerable. As Adam Roberts, an expert on political violence, says, the word terrorism is confusing and dangerous but also ‘indispensable’.¹

While the etymology of the root of the word to terrorize is found in ancient Greek, and terror tactics have been employed throughout human history,² we have the French of the late eighteenth century of the current era (CE) to thank for the transmission into English of contemporary understandings of terrorism. Along with his Revolutionary colleagues, Maximilien Robespierre – a lawyer by profession – espoused and vaunted ‘*La Terreur*’ as a crucial mechanism in the sustenance of the French Revolution against the constant threats of its reversal by monarchists. Republican France thus employed brutality during the Reign of Terror not just as an incidental stratagem of governance but also as wilful, even *existential* State policy.³

Since then, whether in any given society it has been predominantly States or non-State armed groups that have engaged in terrorism has waxed and waned, at least in popular perception, at variance depending on the epoch and the regime. For instance, in the lead up to and throughout the Second World War, the Nazis used terror to maintain their control over Germany and the territories they forcibly occupied. This they did with relentless fervour right until the regime’s bloody denouement in May 1945. In contrast, the 9/11 attacks have done much to imprint non-State Islamist terrorism as the predominant threat to Western civilization in the twenty-first century. First al-Qaeda, and then more recently the Islamic State that it spawned, have sought to replace democratic institutions with religious diktat and dedicated cruelty, moving from war crimes to crimes against humanity to genocide. Most frequently, however, the two types of

¹ A. Roberts, ‘Countering Terrorism: A Historical Perspective’, in A. Bianchi and A. Keller (eds.), *Counterterrorism: Democracy’s Challenge*, Hart, Oxford, 2008, 3–41, at p. 5.

² M. Cherif Bassiouni, ‘Legal Control of International Terrorism’, *Harvard International Law Journal*, Vol. 43 (2001), 83–103, at p. 83.

³ See, e.g., T. Tackett, *The Coming of the Terror in the French Revolution*, Harvard University Press, Cambridge, MA, 2017.

armed entity – State and non-State – terrorize in ever-expanding lockstep: action provoking reaction and counteraction until the spiralling brutality wrought by each is almost symbiotic.

THE CONTEXT AND THE AIM OF THE BOOK

The aim of this book is to describe the content of a relatively new branch of international law. While, as discussed here, Member States of the League of Nations elaborated a treaty against terrorism in the second half of the 1930s, it never entered into force. Thereafter, it was not until the early 1970s that efforts were renewed with a view to defining and suppressing terrorism. Piecemeal and sporadic efforts at global and regional levels have generated a myriad of conventions but no unitary definition. International counterterrorism law is thus an amalgam of instruments and legal provisions, a complex set of sectoral treaties informed and influenced by international human rights law, international humanitarian law, and resolutions of the United Nations (UN) Security Council.⁴

Under the umbrella term of international counterterrorism law, terrorism itself can potentially be a targeted killing or an act of indiscriminate violence. In theory, any weapon can be used to commit an act of terrorism. It can be perpetrated by an insurgent, a traitor, the member of a drug cartel, or a lone wolf, as well as by an agent of a State. Indeed, even an act ostensibly of counterterrorism can itself be a terrorist act. What distinguishes a homicide from a terrorist murder under international law is a confluence of the status of the victim, the circumstances of the killing, and the intent of the killer.

Particular opprobrium is heaped on anyone deemed to be a terrorist, even though across national legal regimes such a person – man or woman, boy or girl – is defined in starkly different terms. But, howsoever any national jurisdiction prohibits terrorism in its domestic law, international law will still be relevant to that determination. It may sometimes deny the legitimacy of the label. It certainly regulates the treatment of anyone suspected of terrorist acts or inclinations, including their surveillance, the restriction of their rights, their detention and interrogation, their prosecution, and, upon conviction, their incarceration. International law will further determine the heavily constrained circumstances of if, when, and how a convicted terrorist may lawfully be executed.

Accordingly, this book describes the regulation of both terrorism and counterterrorism under international law. The legality of acts and measures to confront terrorism is to be assessed by reference to international human rights law and the law of law enforcement, as well as, when those acts and measures are directly related to armed conflict, international humanitarian law. Certain acts of terrorism rise to the level of international crimes, necessitating consideration of the personal responsibility of individuals under international criminal law. Especially (but not only) when force is used extraterritorially, *jus ad bellum* – the law on inter-State use of force – will also apply. In all cases where a State organ or agent has committed an internationally wrongful act, it will attract that State's responsibility under international law.

Counterterrorism overlaps substantially and substantively with counterinsurgency, counterpiracy, as well as efforts to tackle arms, drug, and human trafficking. Nonetheless, a relatively

⁴ The first Security Council resolution to employ the term 'terrorism' was Resolution 579 of 1985. See B. Saul, 'Definition of "Terrorism" in the UN Security Council', *Chinese Journal of International Law*, Vol. 4, No. 1 (2005), 141–66, at p. 144. The resolution followed a Presidential Statement in the Council of 9 October 1985 that 'resolutely' condemned 'all acts of terrorism, including hostage-taking'. It urged 'further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism'. UN Security Council Resolution 579, adopted on 18 December 1985 by unanimous vote in favour, operative para. 5.

coherent (albeit fragmented) corpus of international law details the repression of terrorism and terrorist acts in criminal law and regulates the response of States in both law and practice. Articulating the contours and content of international counterterrorism law is the aim of this book. In so doing, however, the book is not a legal commentary on the ‘Global War on Terror’, for such a work has already been largely written.⁵ That said, analysis of the lawfulness of actions taken by the United States and its allies does by necessity feature prominently in this book for, since the beginning of the twenty-first century, terrorism has indeed been ‘the number one issue in international politics, security and law’.⁶ But international counterterrorism law did not begin with the attacks against the United States on 11 September 2001, because – for the truism bears repeating – terrorism as a phenomenon did not start with 9/11.

The League of Nations’ Terrorism Convention

Almost 100 years ago, Romania asked the League of Nations to consider drafting a ‘convention to render terrorism universally punishable’. But the request made in 1926 was not acted upon at the time.⁷ Yet only a decade would elapse before events of international significance in France would spur the negotiation by States of the day of a treaty to prevent and punish terrorism. The Convention for the Prevention and Punishment of Terrorism, concluded in 1937 under the auspices of the erstwhile League of Nations, is a landmark in international counterterrorism law, even though it would never become formally binding.⁸ It required the criminalization of terrorism perpetrated against another State (not the territorial State), with terrorism motivation delineated as criminal acts ‘intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’.⁹

Specifically, the text stipulated that each State was obligated under a ‘principle’ of international law to refrain from *encouraging* terrorist activities directed against another State and to prevent and punish such activities and to criminalize offences against the life or bodily integrity of foreign diplomats or the property of a foreign State.¹⁰ The implication was that terrorism was the preserve of non-State actors, even though the Convention did not exclude the possibility that an agent of a State could engage in acts of terrorism. The negotiation of the Convention had been prompted by the 1934 assassination by separatists in Marseilles of the King of Yugoslavia, Alexander I, and the associated, but perhaps not intended, killing¹¹ of the French Minister for Foreign Affairs, Jean Louis Barthou.¹²

⁵ H. Duffy, *The ‘War on Terror’ and the Framework of International Law*, 2nd ed., Cambridge University Press, Cambridge, 2015.

⁶ K. Nuotio, ‘Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law’, *Journal of International Criminal Justice*, Vol. 4 (2006), 998–1016, at p. 998.

⁷ S. Kirsch and A. Oehmichen, ‘Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon’, *Durham Law Review Online*, Vol. 1 (2011), 1–20, at p. 11.

⁸ M. D. Dubin, ‘Great Britain and the Anti-terrorist Conventions of 1937’, *Terrorism and Political Violence*, Vol. 5, No. 1 (1993), 1–29. Twenty-three States of the day signed it: Albania, Argentina, Belgium, Bulgaria, Czechoslovakia, the Dominican Republic, Ecuador, Egypt, Estonia, France, Greece, Haiti, India, Monaco, the Netherlands, Norway, Peru, Romania, Spain, the Soviet Union, Turkey, Venezuela, and Yugoslavia. Under Article 26(1) of the Convention, only three ratifications were needed to trigger its entry into force but these were never secured.

⁹ Art. 1(2), Convention for the Prevention and Punishment of Terrorism; signed at Geneva, 16 November 1937; never entered into force.

¹⁰ Arts. 1(1) and 2(1) and (2), 1937 Convention for the Prevention and Punishment of Terrorism.

¹¹ J. de Launay, *Les grandes controverses de l’histoire contemporaine 1914–1945*, Rencontre, Lausanne, 1964, p. 248.

¹² B. Saul, ‘The Legal Response of the League of Nations to Terrorism’, *Journal of International Criminal Justice*, Vol. 4, No. 1 (March 2006), 78–102.

Even though, along with France, Britain had pushed hard for the Convention's successful conclusion, it never signed the fruit of the negotiations. In the event, nor did Germany or the United States – contested provisions on extradition and plans for prosecution of offenders at a proposed international criminal tribunal were the core of their opposition.¹³ The League of Nations is of course no more, its impotence laid bare by the conflagrations of the Second World War it was supposed to prevent. Nevertheless, the articulation of the contours of terrorism and the motivation for terrorism in the 1937 Convention are certainly more than just historical curiosities, and their frequent citation by commentators today pays testament to the text's contemporary relevance.

Terrorism Treaties within the United Nations

The book traces the path of international law on terrorism and counterterrorism in the modern era ever since the abortive efforts of the League of Nations. Following the conclusion of two multilateral treaties under the auspices of the International Civil Aviation Organization¹⁴ governing the hijacking and bombing of aircraft in 1970 and 1971, respectively,¹⁵ the first UN treaty of particular salience to the issue was the 1973 Convention on Crimes against Internationally Protected Persons.¹⁶ The Convention was negotiated in response to a spate of kidnappings and killings of diplomatic agents, including the assassination of Karl von Spreiti, the Federal Republic of Germany's Ambassador to Guatemala, in 1970.¹⁷ Again, therefore, the focus of burgeoning international counterterrorism law was on attacks against a foreign State. But the choice of theme for the first 'sectoral' terrorism treaty¹⁸ was also a reflection of the inability of the international community to agree upon a general definition of international terrorism.

The conclusion of the Internationally Protected Persons Convention was followed in 1979 by another sectoral treaty, this time on hostage-taking, another common terrorist tactic in the 1970s.

¹³ A separate treaty foresaw the establishment of an international criminal court to try terrorists, but this too would never see the light of day. Dubin dismisses the two Conventions as 'products of political theater'. Dubin, 'Great Britain and the Anti-terrorist Conventions of 1937', p. 1.

¹⁴ ICAO was established in April 1947 pursuant to the 1944 Chicago Convention. Art. 43, Convention on International Civil Aviation; adopted at Chicago, 7 December 1944; entered into force, 4 April 1947 (hereafter, Chicago Convention). At the time of writing, 193 States were party to the Chicago Convention. The depositary for the Convention is the United States. Art. 91, Chicago Convention. ICAO is a United Nations (UN) specialized agency but it operates autonomously of the UN. ICAO, 'ICAO and the United Nations', undated but accessed 1 September 2023, at: <https://bit.ly/3YTobA5>.

¹⁵ Convention on the Suppression of Unlawful Seizure of Aircraft; adopted at The Hague, 16 December 1970; entered into force, 14 October 1971 (185 States Parties); and Convention on the Suppression of Unlawful Acts against the Safety of Aviation, adopted at Montreal, 23 September 1971; entered into force, 26 January 1973 (188 States Parties). In both cases, the depositaries of the Convention are the Russian Federation (as successor State to the Soviet Union), the United Kingdom, and the United States.

¹⁶ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; adopted at New York, 14 December 1973; entered into force, 20 February 1977. As of 1 January 2024, 180 of 197 States were party to the Convention. In addition, the Cook Islands is also bound to the Convention through New Zealand's ratification in 1985. Niue has adhered to the Convention in its own right.

¹⁷ M. Wood, 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents', UN Audiovisual Library of International Law, United Nations, 2008, at: <https://bit.ly/3rusjuz>, p. 1.

¹⁸ See, e.g., A. R. Perera, 'The draft United Nations Comprehensive Convention on International Terrorism', chap. 9 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., Edward Elgar, Cheltenham, 2021, p. 122. See also R. Perera, 'Declaration on Measures to Eliminate International Terrorism, 1994, and the 1996 Supplementary Declaration Thereto', UN Audiovisual Library of International Law, New York, 2008, at: <https://bit.ly/3uGDgeA>, p. 1.

The 1979 Hostage-Taking Convention¹⁹ was the ‘first attempt to prescribe an offence with a “terrorist motive”’, that is to say, to seek to compel conduct by others through unlawful action.²⁰ That said, the Convention employs the term ‘terrorism’ only once, and only in the preamble, reflecting the polemic already affecting use of the term.²¹ The putative States Parties thus declared themselves convinced of the ‘urgent necessity’ to improve international cooperation in support of effective measures to prevent, prosecute, and punish all acts of the taking of hostages – ‘*as manifestations of international terrorism*’.²² The distinction drawn between international terrorism and purely ‘domestic’ terrorism, where crime, victims, and offenders are all in the same State, is addressed in more detail in [Chapter 1](#).

In the decades following the adoption of the Hostage-Taking Convention, UN Member States concluded a series of global treaties on different forms of terrorism within the auspices of the United Nations. Of particular note are the 1997 Terrorist Bombings Convention²³ and the 1999 Terrorism Financing Convention,²⁴ the latter being the most widely ratified UN counterterrorism treaty with 190 States Parties among the 197 that could adhere.²⁵ At the time of writing, the most recent global counterterrorism treaty was the Nuclear Terrorism Convention, concluded in 2005.²⁶ Its negotiation had begun in 1998 with a draft proffered by Russia,²⁷ which stated that the proposed convention was particularly significant insofar as it was the first international legal instrument in the domain of counterterrorism that was specially designed as a ‘pre-emptive instrument’.²⁸

What has still not been adopted under UN auspices is a ‘comprehensive’ convention on international terrorism, even though it has already been more than twenty years in the making.²⁹ The principal sticking point between States remains the precise contours of the definition of international terrorism, which continues to elude general agreement, let alone consensus. Consequently, as the International Criminal Tribunal for the former Yugoslavia (ICTY)

¹⁹ International Convention against the Taking of Hostages; adopted at New York, 17 December 1979; entered into force, 3 June 1983 (1979 Hostage-Taking Convention). As of 1 January 2024, 176 of 195 States were party to the 1979 Hostage-Taking Convention. In addition, the Cook Islands and Niue are bound through New Zealand’s ratification prior to their recognition as independent nations by the UN Secretary-General. See the UN Treaty Collection entry at: <https://bit.ly/3KyjBmt>.

²⁰ J. Atwell, ‘Aviation and International Terrorism’, chap. 4 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 51.

²¹ B. Saul, ‘International Convention against the Taking of Hostages’, UN Audiovisual Library of International Law, 2014, at: <https://bit.ly/3ouIvAl>, p. 2.

²² 1979 Hostage-Taking Convention, fifth preambular para. [added emphasis].

²³ International Convention for the Suppression of Terrorist Bombings; adopted at New York, 15 December 1997; entered into force, 23 May 2001. As of 1 January 2024, 170 States were party to the 1997 Terrorist Bombings Convention.

²⁴ International Convention for the Suppression of the Financing of Terrorism; adopted at New York, 9 December 1999; entered into force, 10 April 2002. As of 1 January 2024, 190 States were party to the 1999 Terrorism Financing Convention.

²⁵ As Pierre Klein recalls, however, at the time of the 9/11 attacks, only four States had adhered to the Convention, which was thus a long way from coming into force. P. Klein, ‘International Convention for the Suppression of the Financing of Terrorism’, UN Audiovisual Library of International Law, 2009, at: <https://bit.ly/3uqmeRL>, p. 4. A total of twenty-two contracting States were needed to trigger entry into force. Art. 26, 1999 Terrorism Financing Convention.

²⁶ International Convention for the Suppression of Acts of Nuclear Terrorism; adopted at New York, 13 April 2005; entered into force, 7 July 2007. As of 1 January 2024, 123 States were party to the 2005 Nuclear Terrorism Convention, the most adherence, at the time of writing, being by the Republic of Congo in November 2023.

²⁷ J. Boulden, ‘The United Nations General Assembly and Terrorism’, chap. 34 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 499.

²⁸ Nuclear Threat Initiative (NTI), ‘International Convention on the Suppression of Acts of Nuclear Terrorism’, last reviewed 29 April 2020, at: <https://bit.ly/3gusq2Y>.

²⁹ See, e.g., J. Cockayne, ‘Challenges in United Nations Counter-Terrorism Coordination’, chap. 41 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 601.

observed in 2003, the offence of international terrorism has ‘never been singly defined under international law’.³⁰ Regrettably, this statement of more than twenty years’ vintage remains true today. A number of generalized counterterrorism treaties have, though, been successfully concluded at regional levels, each with its own particular definition.

Although much – sometimes too much – is made of UN Security Council Resolution 1373, adopted in the aftermath of 9/11,³¹ it nonetheless binds all UN Member States (and purports to bind all States), demanding that they put in place a wide range of regulatory and legislative measures to prevent terrorism.³² This is so despite the ‘far from satisfactory situation’ in which the Council becomes the legislator³³ and albeit without it even clearly defining what terrorism is.³⁴ In 1998, following the terrorist bombings by al-Qaeda in Nairobi and Dar es Salaam in East Africa, the Council had declared that the suppression of acts of international terrorism was ‘essential’ for international peace and security.³⁵ But while primary responsibility for the maintenance of international peace and security is generally delegated to the Security Council,³⁶ the Council has continued to affirm that UN Member States have the primary responsibility for countering terrorist acts.³⁷

The UN General Assembly too continues to be active on the issue. As Boulden observes, this global body adopted more than 110 resolutions on different aspects of terrorism between 1972 and 2020.³⁸ In September 2005, the World Summit Outcome document strongly condemned ‘terrorism in all its forms and manifestations, committed by whomever, wherever, and for whatever purposes’, terming it ‘one of the most serious threats to international peace and security’.³⁹ In December 2021, in the 76th Session of the Assembly, three such resolutions were adopted, on each occasion without a vote, demonstrating a solidarity that is not always replicated in State practice. In 2022, the 77th Session of the Assembly passed a further four resolutions (two of which were contested). The resolutions concerned measures to eliminate international terrorism;⁴⁰ preventing the acquisition of radioactive sources by terrorists;⁴¹ measures to prevent terrorists from acquiring weapons of mass destruction;⁴² and the designation of an International Day for the Prevention of Violent Extremism as and When Conducive to

³⁰ ICTY, *Prosecutor v. Galić*, Judgment (Trial Chamber) (Case No. IT-98-29-T), 5 December 2003, para. 87, note 150.

³¹ See on this issue Saul, ‘Definition of “Terrorism” in the UN Security Council’, p. 155; and N. Quéniévet, ‘You Are the Weakest Link and We Will Help You! The Comprehensive Strategy of the United Nations to Fight Terrorism’, *Journal of Conflict and Security Law*, Vol. 11 (2006), 371–97, at p. 379.

³² UN Security Council Resolution 1373, adopted on 28 September 2001 by unanimous vote in favour. See Boulden, ‘The United Nations General Assembly and Terrorism’, p. 499.

³³ L. M. Hinojosa Martínez, ‘The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits’, *International and Comparative Law Quarterly*, Vol. 57, No. 2 (2008) 333–59, at p. 358.

³⁴ L. M. Hinojosa-Martínez, ‘Security Council Resolution 1373: The Cumbersome Implementation of Legislative Acts’, chap. 39 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 584.

³⁵ UN Security Council Resolution 1189, adopted on 13 August 1998 by unanimous vote in favour, third preambular para.

³⁶ Art. 24(1), Charter of the United Nations; adopted at San Francisco, 26 June 1945; entered into force, 24 October 1945.

³⁷ UN Security Council Resolution 2617, adopted on 30 December 2021 by unanimous vote in favour, ninth preambular para.

³⁸ Boulden, ‘The United Nations General Assembly and Terrorism’, p. 501.

³⁹ UN General Assembly Resolution 60/1: ‘2005 World Summit Outcome’, adopted without a vote on 24 October 2005, para. 81. But as Adam Roberts observed, the document did not attempt to define terrorism. Roberts, ‘Countering Terrorism’, p. 8.

⁴⁰ UN General Assembly Resolution 77/113 (‘Measures to eliminate international terrorism’), adopted on 7 December 2022 without a vote.

⁴¹ UN General Assembly Resolution 77/77 (‘Preventing the acquisition by terrorists of radioactive sources’), adopted on 7 December 2022 by 180 votes to nil with two abstentions (Iran and Syria).

⁴² UN General Assembly Resolution 77/75 (‘Measures to prevent terrorists from acquiring weapons of mass destruction’), adopted on 7 December 2022 without a vote.

Terrorism.⁴³ Over the course of the last fifty years, the General Assembly has also taken overall charge of the elaboration of most of the global treaties on terrorism, mandating committees and working groups to take responsibility for their drafting.

In sum, international counterterrorism law comprises a patchwork of treaties, along with a number of customary rules and a set of general principles of law. These are supplemented by a swathe of international, regional, and domestic caselaw and the doctrinal views of leading jurists, as well as soft law instruments and politically binding resolutions promulgated both within and outside the United Nations. By synthesizing and analysing these rules, norms, and decisions, it is sought to bring a modicum of clarity to a complex branch of international law. Descriptions of acts of terrorism and related judicial decisions serve as illustrations both of the existence of rules and of their breach.

THE LAYOUT OF THE BOOK

Following this Introduction, the book is organized in eight chapters. Chapter 1 is dedicated to the multiple definitions of terrorism that exist in the absence of the adoption of the long-discussed Comprehensive Convention against International Terrorism as well as other definitions outside that Convention's ostensible purview. The key components of international counterterrorism law are then articulated in Chapter 2, starting with a summary of the key UN treaties on terrorism along with an overview of the content and impact of human rights law, humanitarian law, *jus ad bellum*, refugee law, and international criminal law.

Coverage of international terrorism concerns especially the 1973 Internationally Protected Persons Convention, the 1979 Hostage-Taking Convention, the 1997 Terrorist Bombings Convention, the 1999 Terrorism Financing Convention, and the 2005 Nuclear Terrorism Convention, along with relevant aerial and maritime treaties. At the regional level, detailed consideration of relevant instruments includes the 1977 European Convention on the Suppression of Terrorism and the 2005 European Convention on the Prevention of Terrorism; the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism; the 1998 Arab Convention on the Suppression of Terrorism; the 1999 Organisation of Islamic Cooperation (OIC) Convention on Combating International Terrorism; the 1999 Algiers Convention on the Prevention and Combating of Terrorism and its 2004 Protocol; the 2002 Inter-American Convention against Terrorism; and the 2007 Association of Southeast Nations (ASEAN) Convention on Counter Terrorism.

Analysis of national terrorism legislation in Chapter 3 covers the definitions of crimes and available sentences in domestic jurisdictions, drawing on the practice across every one of the 197 States⁴⁴ recognized by the UN Secretary-General in his capacity as treaty depositary. The unique nature and vastly varying breadth of terrorism across States is a remarkable feature of counterterrorism law. Chapter 4 moves on to consider the prosecution of terrorism suspects at national level. The chapter first considers sentences for terrorism in domestic law around the world, including the imposition of the death penalty and maximum sentences of imprisonment for terrorism offences. It then considers the conduct and outcome of selected terrorism cases,

⁴³ UN General Assembly Resolution 77/243 ('International Day for the Prevention of Violent Extremism as and When Conducive to Terrorism'), adopted on 20 December 2022 by 154 votes to nil with four abstentions (Iran, North Korea, Russia, and Syria). The date of 12 February was selected under operative paragraph 1 of the resolution.

⁴⁴ A global repository of terrorism law in each of these States has been established by the Centre for Human Rights and the Institute for International and Comparative Law in Africa (ICLA) at the University of Pretoria. See Laws on Countering Terrorism Worldwide, at: <https://counterterrorlaw.info>.

grouped regionally: in Brazil, Canada, El Salvador, Mexico, and the United States in the Americas; in Australia, China, Iran, Iraq, Lebanon, and Saudi Arabia in Asia and the Middle East; in Algeria, Kenya, Niger, and Somalia in Africa; and in Belgium, France, and the United Kingdom in Europe.

Operational surveillance of criminal suspects and individuals ‘of particular concern’ raises significant human rights issues, especially pertaining to the right of privacy and later the right to fair trial. The use of force against terrorist suspects by law enforcement agencies, whether in custody or in an extra-custodial situation, also brings into play the rights to life and to freedom from torture. These issues are tackled in [Chapter 5](#). As two judges of the European Court of Human Rights observed in 2008: ‘States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect.’⁴⁵

Despite the plethora of rules governing terrorism under international law, it would be a mistake to presume that terrorism is, per se, a specific international crime. That said, many terrorist acts are subject to punishment, whether as a war crime, as a crime against humanity, as well as, potentially, as genocide. An act of aggression can involve an act or multiple acts of terror. [Chapter 6](#) thus considers the prosecution of terrorism under international criminal law. Certainly, the victims of terrorism should receive assistance to support their recovery and compensation for their losses, as [Chapter 7](#) considers when looking at the responsibility of States under international law.

Outlook, the [final chapter](#) of the book, looks at terrorist threats that have been emerging in recent years or are on the horizon and the extent to which they are covered by extant international counterterrorism law. These include cyberterrorism and the use of fully autonomous weapons in counterterrorism. The book concludes with an assessment of the potential for the successful conclusion of the UN Comprehensive Convention against International Terrorism in the near future as well as for the – more probable – greater fragmentation of international counterterrorism law in the years to come.

A BRIEF HISTORY OF TERRORISM

Before turning to the consideration of contemporary international counterterrorism law, however, a brief historical perspective of terrorism is offered. Naturally, no history of terrorism could ever hope to be comprehensive; what follows, therefore, is by definition a succinct and partial representation of selected key events and issues. Fear is a form of control and a means to maintain power, as regimes great and small have demonstrated for millennia. Others might legitimately have chosen different events.

Furthermore, one should really begin with the existence of *homo sapiens* as a species, for terror tactics are as old as the animal kingdom, and human history from its earliest moments is replete with examples. But given the etymology of the term terrorism, the classical world is perhaps as good a place as any to start. For the word is first found in ancient Greek and, more directly with regard to its contemporary meaning, in later-age Latin. While the term is often used loosely and with a degree of abandon, what is at the core of terrorism is the employment of certain tactics and/or the choice of a number of targets. This explains the term’s foundation in the Latin word *terrere*, meaning to frighten; to alarm; or to deter by provoking great fear. The Latin, in turn, has a cognate in the Greek *τρέω*, meaning to flee in fear or to be afraid of. Homer, for instance, used

⁴⁵ European Court of Human Rights, *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, p. 52, Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky.

the verb on numerous occasions in *The Iliad*.⁴⁶ Of course, the fact that I may feel terrorized as a result of the actions of a particular person does not mean that the perpetrator of that conduct is, in legal parlance, a terrorist. Indeed, his or her actions may not even be criminal in any objectively rational assessment. Hence, the legal interrelationship between the actions, intent, and perceptions of the subject and object is intricate, or, at the least, rather more nuanced than one might instinctively expect.

The Romans employed crucifixion as a brutal form of capital punishment in part to deter others from rising up against the empire, an early counterinsurgency/counterterrorism mechanism that employed terror as its *modus operandi*.⁴⁷ Jesus was thus crucified on the basis that he had instigated rebellion against Rome.⁴⁸ But the Romans did not invent crucifixion: responsibility is often attributed to the Persians who developed the technique somewhere between 400 and 300 BCE.⁴⁹ Crucifixion is a method of capital punishment in which the victim is tied or nailed to a large wooden cross or beam and left hanging until eventual death from either exhaustion or asphyxiation or a combination of the two. It is described by one commentator as ‘quite possibly the most painful death ever invented by humankind’.⁵⁰ As a consequence, the word ‘excruciating’ in English is derived from crucifixion, reflecting the slow but extreme suffering it engenders.⁵¹

Fourteen centuries later, in medieval Europe, Vlad ‘the Impaler’ was a prince whose blood-thirsty acts would later inspire the fictional creation by Bram Stoker of the world’s most famous vampire, Dracula.⁵² Vlad III, whose epithet was only accorded to him post-mortem, had been held captive by the Turks for a while, a condition that weighed heavily on him. After his father was ousted as ruler of Wallachia, Vlad, now free again, launched a campaign to regain authority over his lands. During his captivity, he had seen how the Ottomans would sometimes impale their enemies.⁵³ He now used the technique to consolidate his power and strike fear into his

⁴⁶ Word Sense Dictionary, ‘τρέω (Ancient Greek)’, at: <https://bit.ly/34t5iGo>.

⁴⁷ Crucifixion as a method of execution was practiced systematically by the Persians in the sixth century BCE but wooden crosses were not used until Roman times. Alexander the Great brought the practice to eastern Mediterranean countries in the fourth century BCE following his invasion of Persia, but Roman officials became aware of the practice only when fighting Carthage during the Punic Wars a hundred years later. They then practised and ‘perfected’ crucifixion until Constantine I abolished it in the fourth century CE. It was used especially for those who rebelled against the authority of Rome. See L. Geggel, ‘Jesus Wasn’t the Only Man to Be Crucified. Here’s the History behind This Brutal Practice’, *Live Science*, 19 April 2019, at: <https://bit.ly/3nNai8i>; and F. P. Retief and L. Cilliers, ‘The History and Pathology of Crucifixion’, *The South African Medical Journal*, Vol. 93, No. 12 (2003), 938–41, at: <https://bit.ly/3rzNb29>.

⁴⁸ Retief and Cilliers, ‘The History and Pathology of Crucifixion’, p. 939, citing Flavius Josephus, *The Jewish War*, Vol. III (Trans. by H. St. J. Thackeray, Harvard University Press, Cambridge, MA, 1957), 321, vv. 362–420.

⁴⁹ Alternatively, Daniel Manix suggested that it was ‘probably’ invented by the Phoenicians, who introduced it to their colony of Carthage. D. P. Mannix, *The History of Torture*, Sutton, Stroud, 1964, p. 35.

⁵⁰ Mannix notes, however, that in certain instances the executioner nailed spikes through the wrists in such a way as to cut the artery in which case death came quickly. *Ibid.*, p. 37.

⁵¹ C. Shrier, ‘The Science of the Crucifixion’, Azusa Pacific University, Azusa, 2002, at: <https://bit.ly/3Yufsp>. The piece describes graphically the suffering that Jesus would have undergone before his physical death.

⁵² M. Lallanilla and C. McKelvie, ‘Vlad the Impaler: The real Dracula’, *Live Science*, 15 December 2021, at: <https://bit.ly/3HtaPEw>. The term comes from the induction by King Sigismund of Hungary of his father, Vlad II, into a knightly order, the Order of the Dragon. Vlad II gained a new name, Dracul, coming from the old Romanian word for dragon, *drac*. His son, Vlad III, would later be known as the ‘son of Dracul’ or, in old Romanian, *Drăculea*.

⁵³ As Marc Lallanilla graphically describes, impaling a person while still alive involves inserting a wood or metal pole through the body either front to back, or vertically, through the rectum or vagina. The exit wound could be near the victim’s neck, shoulders, or mouth. In some cases, the pole was rounded, not sharp, to avoid damaging internal organs and thereby prolong the suffering of the victim. The pole was then raised vertically to display the victim’s torment; hours or days could elapse before the impaled person finally died. M. Lallanilla, ‘Vlad the Impaler: The real Dracula was absolutely vicious’, *NBC News*, 31 October 2013, at: <https://nbcnews.to/3AmJKzS>.

enemies.⁵⁴ On one occasion, he invited hundreds of querulous aristocrats – the exact number is uncertain – to a banquet. Knowing his authority would be challenged, he had his guests stabbed and, their bodies still twitching, impaled.⁵⁵ On another occasion, Vlad dined serenely amid an army of defeated warriors who were writhing in agony on impaled poles. At a later time, he had a reported 20,000 people impaled and displayed outside the city of Targoviste. The sight was so horrific that, when confronted with the thousands of decaying bodies being picked apart by crows, the invading Ottoman Sultan, Mehmed II, turned tail and headed back to Constantinople.⁵⁶

Beginning in the late fifteenth century, the Spanish Inquisition used torture to terrify heretics to admit heretical practices. A thousand years earlier, Pope Gregory I had ordered judges not to accept any statement made under torture (although he remained comfortable with burning heretics alive).⁵⁷ But Friar Tomás de Torquemada, the first Inquisitor-General, believed that the devil had to be driven out of the body of heretics by force. He and others of similar persuasion devised a series of the most extreme suffering to be inflicted on the victims of the Inquisition, transmogrifying interrogation of troubled souls into torture ‘as a fine art’. In so doing, ‘he virtually exterminated the Spanish middle class and so crippled Spanish trade that it never completely recovered’. Among many other acts, changing one’s underwear on a Saturday or cutting the fat off meat was clear evidence of heresy.⁵⁸

Sometimes the intent behind terrorism is to retain power, while in other instances it is an attempt to overthrow a regime and seize power, whether on the basis of religious or ideological motivations. The Gunpowder Plot of 1605, the aim of which was to restore a Catholic to the throne of England, is sometimes cast as a planned act of terrorism. Poorly contrived and incompetently executed, it is doubtful the Plot could ever have succeeded. But the amount of decaying explosives hidden under the House of Lords, if actually detonated, could have killed hundreds if not thousands.⁵⁹ In 2005, David Starkey claimed that the ‘parallels between the actions of the plotters and modern-day terrorists are terrifying and the motivation is the same – that religion is the only important thing and that if the Government does not subscribe to the idea that your religion is absolute it must be removed’.⁶⁰ No stranger to controversy,⁶¹ the historian once described the Gunpowder Plot as the Tudor equivalent of 9/11:

Look at what the plotters did. They put one ton of gunpowder in a room underneath the Houses of Parliament. Had it gone off, it would have killed the king, the chancellor, all the important bishops and judges. It was their Twin Towers and the effect would have been immense.⁶²

But the undoubted starting point for discussion of the English term *terrorism* – as opposed to acts of terror – is the French Revolution. For, as noted above, despite its origins in classical languages, we have late-eighteenth-century CE France to thank for the arrival of ‘terrorism’ (and ‘terrorist’) into English. The words derive from the terms the French came to employ during the French

⁵⁴ About 2,000 years earlier, the Assyrians had used impaling of prisoners below the breast bone to terrify besieged populations into surrendering. Mannix, *The History of Torture*, p. 20.

⁵⁵ Lallanilla, ‘Vlad the Impaler: The real Dracula was absolutely vicious’.

⁵⁶ *Ibid.*

⁵⁷ T. O’Connor, ‘Our Legal Heritage: Gregory IX, the cat-killing pope who laid down the law’, *Irish Legal News*, 14 October 2022, at: <https://bit.ly/3VT4xWL>.

⁵⁸ Mannix, *The History of Torture*, pp. 59, 61.

⁵⁹ A. Sherwin, ‘Gunpowder plotters get their wish, 400 years on’, *The Times*, 31 October 2005.

⁶⁰ N. Britten, ‘Gunpowder Plot was England’s 9/11, says historian’, *Daily Telegraph*, 22 April 2005, at: <https://bit.ly/3FRpx6n>.

⁶¹ See, e.g., H. Siddique, ‘David Starkey says sorry for “deplorably inflammatory” remarks’, *The Guardian*, 6 July 2020, at: <https://bit.ly/45t3oZY>.

⁶² Britten, ‘Gunpowder Plot was England’s 9/11, says historian’.

Revolution to describe the newly installed Republican government's elimination of its vanquished monarchist foes and violent repression of its 'counter-revolutionary' enemies. Revolutionary goals were usually pursued through capital punishment at the guillotine.⁶³ On other occasions, revolutionary justice would be meted out on the streets in massacres at the hands of roving mobs.⁶⁴

The Reign of Terror (*le Règne de la Terreur*, or simply '*la Terreur*') traversed two main periods, a first in 1792 and the second – the 'Great Terror'⁶⁵ – in 1793–94.⁶⁶ It was a 'gruesome and protracted' period of State violence, one that 'set the political tone for much of the use of these words ever since'.⁶⁷ Central to the Great Terror – its 'charter' in the words of the historian Simon Schama – was the Law of Suspects, a decree passed on 17 September 1793 by the euphemistically named 'Committee of Public Safety' (as illustrated on the cover of this book).⁶⁸ The Law authorized the creation of revolutionary tribunals to try those suspected of treason against the Republic and to punish the convicted with death.⁶⁹ Even hoarding food staples would be made a capital offence, while the criteria for arrest were so 'elastic' that the prisons would swell to around 7,000 in Paris alone.⁷⁰ The Committee of Public Safety would swiftly become the most concentrated State machine France had ever experienced, with revolutionary leaders engaging in 'unconscionable slaughter'.⁷¹

Indeed, Robespierre and the other revolutionary delegates to the French National Convention elected to draft the new Constitution had adopted terror as overt State policy.⁷² Speaking before the Convention, the young jurist declared: 'Terror is merely justice; prompt, severe, and inflexible. It is therefore an emanation of virtue, and results from the application of democracy to the most pressing needs of the country.'⁷³ But terror was not only cruel by design – it was also arbitrary and vengeful in its application as Hibbert illustrates:

Hundreds of innocent people suffered with those whom the Revolutionary Tribunal had some cause to consider guilty, some of them through clerical and administrative errors, or even

⁶³ The guillotine was a contraption that was 'brought to market' by a French physician (on the basis of the work of another surgeon at the College of Physicians). Ironically, it was intended as an act of relative mercy to its victims. Although personally opposed to capital punishment, Dr Joseph-Ignace Guillotin argued that decapitation by a lightning-quick machine would be more humane and egalitarian than sword and axe beheadings, which were often botched. Indeed, some among the public audiences for executions derided the guillotine as being excessively humane. R. Schurr, *Fatal Purity: Robespierre and the French Revolution*, Vintage Books, London, 2007, pp. 134, 201, 202; and see E. Andrews, '8 Things You May Not Know about the Guillotine', *History*, Last updated 30 August 2018, at: <https://bit.ly/3qSuurC>. More recently, Sophie Wahnich seemingly bemoans the 'limitations of the guillotine's lack of cruelty'. S. Wahnich, *In Defence of the Terror: Liberty or Death in the French Revolution* (Trans. by D. Fernbach), Verso, United Kingdom, 2012, p. 86.

⁶⁴ In her 2012 polemic, Wahnich argues that the Terror was actually a means by which the State sought to restrain the risk of unfettered mob violence, a 'deliberate self-constraint'. In her view, 'vengeance is not a more archaic form of justice than penal justice, but a form of justice corresponding to a different social configuration'. Wahnich, *In Defence of the Terror*, pp. 41 and 97; and cf. also pp. 51, 53, 59, 62, 65, 74, and 97. 'Revolutionary terror is not terrorism' she affirms. She does, though, concede that: 'Classically, it is easier to open a cycle of vengeance than to close it . . .'. *Ibid.*, pp. 102 and 71.

⁶⁵ Wahnich, *In Defence of the Terror*, p. 57.

⁶⁶ Entry for '*la Terreur*', *Larousse*, accessed 1 January 2022, at: <https://bit.ly/3r1wlsW>. See also Schurr, *Fatal Purity*, p. 258.

⁶⁷ 'The History of the Word "Terrorism"', *Merriam-Webster*, accessed 1 January 2022, at: <https://bit.ly/3r5M61Q>.

⁶⁸ S. Schama, *Citizens: A Chronicle of the French Revolution*, Penguin, United Kingdom, 2004, p. 651.

⁶⁹ 'The Law of Suspects', *Liberty, Equality, Fraternity: Exploring the French Revolution*, accessed 30 March 2022 at: <https://bit.ly/3JSPDrf>.

⁷⁰ Schama, *Citizens*, pp. 641, 670.

⁷¹ *Ibid.*, pp. 642–43 and 669.

⁷² In a further irony, Robespierre himself had earlier pleaded for an end to the death penalty, before embracing it wholeheartedly as an essential Revolutionary tool. Schurr, *Fatal Purity*, pp. 134, 234.

⁷³ Cited by Schurr, *Fatal Purity*, p. 275.

because their accusers chose not to spare them. Others were denounced by jealous or vindictive neighbours. One victim was fetched from prison to face a charge which had been brought against another prisoner with a similar name. Her protests were silenced by the prosecutor who said casually, ‘Since she’s here, we might as well take her’.⁷⁴

With dozens being guillotined daily at certain times – a macabre record was thirty-two severed heads in only twenty-five minutes⁷⁵ – terror was, Robespierre claimed, only a weapon of oppression when in the hands of despots.⁷⁶ In similarly noted language, Saint-Just, the political philosopher and fellow revolutionary leader, declared that the republic ‘consists in the extermination of everything that opposes it’.⁷⁷ By 1794, however, delegates became increasingly fearful that they too would become victims to the orchestrated and seemingly relentless bloodletting from Robespierre and his Jacobin club allies.⁷⁸ As the revolutionary regime lapsed into factionalism, they accused Robespierre of criminal abuse of power (which, without a hint of irony, they called ‘terrorisme’) and sent him to the guillotine.⁷⁹

The term in French entered the *Dictionnaire de l’Académie française*, already in its fifth edition, in 1798 to describe a ‘system, regime of terror’.⁸⁰ But despite its use in English since the French Revolution, only in Noah Webster’s final revision of his famous dictionary (the edition of 1840) would he include a definition of terrorism: ‘TERRORISM, n. A state of being terrified, or a state impressing terror’.

That same edition of 1840 also saw the addition of the word ‘terrorist’, drawing on the definition in the *Dictionnaire de l’Académie française*, with similarly explicit references to the French Revolutionary period: ‘TERRORIST, n. [Fr. terroriste.] (Fr. Hist.) An agent or partisan of the revolutionary tribunal during the reign of terror in France’.⁸¹ More than 130 years later, in 1973, a further meaning connected to terrorism was added to the relevant entry in Merriam-Webster’s dictionary:⁸² ‘violent or destructive acts (such as bombing) committed by groups in order to intimidate a population or government into granting their demands’.⁸³ North American language and culture were thus placing non-State actors front and centre as the architects of terror.

The *Oxford English Dictionary* has retained the original sense of terrorism pertaining to the French Revolution, but likewise offers a second, more general meaning: ‘A policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized’.⁸⁴ More succinct is the corresponding definition in the *Cambridge English Dictionary*: ‘(threats of) violent action for political purposes’.⁸⁵

⁷⁴ C. Hibbert, *The French Revolution*, Penguin, London, 1982, p. 227.

⁷⁵ Schama, *Citizens*, p. 661.

⁷⁶ Cited by Schurr, *Fatal Purity*, p. 275. Saint-Just would declare that opposition to the Terror was one of the three ‘deadly sins’ against the republic. *Ibid.*, p. 276.

⁷⁷ Schama, *Citizens*, p. 665.

⁷⁸ R. Peckham, *Fear*, Profile Books, London, 2023, pp. 84–85. On 31 March 1794, Robespierre declared ominously before the Convention that ‘anyone who trembles at this moment is culpable’.

⁷⁹ See S. Spector, ‘The meaning of “terrorism”’, OUP Blog entry, 18 November 2015, at: <https://bit.ly/3qbmYaN>.

⁸⁰ *Dictionnaire de l’Académie française*, 5th ed., 1798, Vol. I, p. 775, at: <https://bit.ly/3rFAEdw>. As Peckham observes, Denis Diderot’s *Encyclopédie*, published in a series of volumes beginning in 1751, had defined terror as an emotion that heightened other people’s suffering, linking it with compassion and pity. Peckham, *Fear*, p. 81.

⁸¹ Spector, ‘The meaning of “terrorism”’.

⁸² Merriam-Webster is the oldest publisher of American English in the United States.

⁸³ Spector, ‘The meaning of “terrorism”’.

⁸⁴ ‘Terrorism’, in *Oxford English Dictionary*, 2nd ed. (1989), at: <https://bit.ly/33BQzle>.

⁸⁵ Online Cambridge English dictionary, definition taken from *Cambridge Advanced Learner’s Dictionary & Thesaurus*, Cambridge University Press, at: <https://bit.ly/3uqi3FE>.

In the twentieth century, the Nazis engaged in terrorism as State policy on an unparalleled scale across Europe both prior to and during the Second World War. While it may seem inappropriate to engage in comparative analysis, among the many pogroms perpetrated since the French Revolution, the terror inflicted by the Nazis across Europe beginning in the late 1930s and through to their ultimate defeat in April 1945 is totemic.⁸⁶ The Holocaust against the Jews is the greatest single crime of human history. In Eastern Europe, the atrocities perpetrated by the *Einsatzgruppen*, the Schutzstaffel (SS) paramilitary death squads, were based, in Benjamin Ferencz's words, on 'the principles of unmitigated terror and murder'.⁸⁷ In concluding his opening remarks for the prosecution in the trial of a chosen twenty-three of their commanders, which opened in September 1947, he stated:

The judgment of the International Military Tribunal declares that two million Jews were murdered by the Einsatzgruppen and other units of the Security Police.⁸⁸ The defendants in the dock were the cruel executioners, whose terror wrote the blackest page in human history. Death was their tool and life their toy. If these men be immune, then law has lost its meaning and man must live in fear.⁸⁹

Hitler's nemesis, Joseph Stalin, had himself perpetrated massacres on a massive scale in the 1930s. The Great Purge, also known as the 'Great Terror' (a retrospective term which historians have borrowed from the French Revolution),⁹⁰ was Stalin's campaign in 1936–38 to eliminate dissent within the Communist Party and anyone else he deemed a threat to his leadership. Although estimates vary widely, as many as 750,000 people are believed to have been executed and more than a million others were dispatched to gulags (forced labour camps).⁹¹ Stalin signed a decree making families liable for crimes committed by a husband or father, meaning that children as young as twelve could be subject to the death penalty. As many as 81 of the 103 generals and admirals in the Soviet Union were executed, initially rendering the Soviet armed forces unable to resist Operation Barbarossa, the German invasion of Russia in 1941.⁹² Millions of Soviet citizens would die unnecessarily as a result.

A Brief History of Terrorism since the Second World War

Outside the Soviet Union, terrorism persisted – and in many instances flourished – after the end of the Second World War. Sometimes terror has been the work of organs or agents of the State, while in other instances non-State armed groups have been its primary instigators. The targets have been political opponents, ethnic minorities, and adherents of other religions. Since then, however, the perception has become widespread that terrorism is primarily the work of non-State armed groups, a tendency that has been accentuated by prominent attacks in recent decades.

⁸⁶ In perhaps a subconscious throwback to the French Revolution, Hitler made the guillotine a State method of execution in Germany during the Third Reich. According to Nazi records, the guillotine was used to execute some 16,500 people between 1933 and 1945, many of them resistance fighters and political dissidents. Andrews, '8 Things You May Not Know about the Guillotine'.

⁸⁷ B. B. Ferencz, Opening Statement for the Prosecution in *United States of America v. Otto Ohlendorf and others, Trial of the Major War Criminals*, Vol. IV (1947), Nuremberg, at <http://bit.ly/2JUPiLN>, p. 36.

⁸⁸ *Trial of the Major War Criminals*, Vol. I (1947), Nuremberg, p. 292.

⁸⁹ Ferencz, Opening Statement for the Prosecution in *United States of America v. Otto Ohlendorf and others*, p. 53.

⁹⁰ L. Siegelbaum, 'The Great Terror', Seventeen Moments in Soviet History, at: <https://bit.ly/35HSTYx>.

⁹¹ In 1989, with the Cold War over, a Soviet report alleged that twenty million had died as direct victims of Stalin. 'Major Soviet Paper Says 20 Million Died as Victims of Stalin', *The New York Times*, 4 February 1989, at: <https://nyti.ms/3JotbNL>.

⁹² 'Great Purge', History, last updated on 7 July 2020, at: <https://bit.ly/3HuHVUf>.

The 9/11 attacks made al-Qaeda the ‘exemplar’ of global terrorism in the first decade of the twenty-first century; in this it was replaced in the second decade by Islamic State.⁹³ Accordingly, although the origin of the term *terrorism* was State action, it has broadened to encompass any group that uses terror tactics as its *modus operandi*.

Genocide, the term coined by Raphael Lemkin in 1944 to describe the Holocaust against the Jews, was formally outlawed by United Nations treaty four years later.⁹⁴ But this ‘odious scourge’, as the Preamble to the 1948 Genocide Convention terms an attempt by a State or an armed group to destroy a minority group, would not be outlawed in practice. Since 1945, genocide has been perpetrated against, among others, Mayans in Guatemala (in 1982–83); Kurds in Iraq (in February–September 1988); Tutsis in Rwanda (in April–July 1994); Muslims in Bosnia and Herzegovina (in July 1995); Darfurians (belonging to Fur, Masalit and Zaghawa groups) in Sudan (in 2003–08); Yazidis in Iraq (in 2014–16); and Rohingya in Myanmar (in October 2016–January 2017 and subsequently). Wherever genocide has been perpetrated, terror is invariably at its heart.

The genocide in Rwanda in 1994 is perhaps the most notorious example of the second half of the twentieth century of the international ‘crime of crimes’. Based on detailed analysis of data for one province, Verpoorten has estimated that between 600,000 and 800,000 Tutsis were murdered, with only some 30 per cent of the pre-genocide Tutsi population surviving.⁹⁵ Machetes were the weapon of choice for many of the Hutus responsible, particularly the *Interahamwe* militia.

Félicien Kabuga, a Rwandan businessman arrested in Paris in May 2020, had gone on trial before the UN Residual Mechanism that followed the closure of the International Criminal Tribunal for Rwanda (ICTR) accused of assisting and inciting the perpetration of genocide.⁹⁶ It had been widely reported that, in the months leading up to the genocide, 581 tonnes of machetes were imported by supporters of the Habyarimana regime. Mr Kabuga was accused of using his companies to import vast quantities of machetes for supply to the *génocidaires* for the purpose of genocide.⁹⁷ Although the charges relating to the importation of the machetes were later dropped (with the requisite *mens rea* difficult to prove), the prosecution was seeking to sustain in fact and in law that Kabuga was directly responsible for the content of broadcasts on Radio-Télévision des mille collines that incited genocide; that he provided moral, logistical, material, and financial support to the *Interahamwe* in the capital, Kigali, and in the prefectures of Gisenyi and Kibuye; and that he distributed machetes to the *Interahamwe* with complicit genocidal intent.⁹⁸ But in June 2023, Mr Kabuga’s dementia brought the trial to a premature halt. In August, judges in the Appeals Chamber rejected an ‘alternative finding procedure’ whose aim would have been to provide some measure of justice for the victims. The Trial Chamber was instructed to impose an indefinite stay of proceedings ‘in view of Mr Kabuga’s lack of fitness to stand trial’.⁹⁹

⁹³ D. Fidler, ‘Nuclear, biological and chemical terrorism in international law’, chap. 10 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., p. 94.

⁹⁴ Convention on the Prevention and Punishment of the Crime of Genocide; adopted at Paris, 9 December 1948; entered into force, 12 January 1951. As of 1 January 2024, 153 States were party to the Convention, the latest to adhere being Zambia in April 2022.

⁹⁵ M. Verpoorten, ‘The Death Toll of the Rwandan Genocide: A Detailed Analysis for Gikongoro Province’, *Population*, Vol. 60, No. 4 (2005), 331–67, at: <https://bit.ly/35GAzyX>.

⁹⁶ United Nations International Residual Mechanism for Criminal Tribunals, ‘KABUGA, Félicien (MICT-13–38)’, accessed 1 March 2023, at: <https://bit.ly/3AZtEN4>.

⁹⁷ A. Guichaoua, ‘Did machete imports to Rwanda prove that the genocide against the Tutsi was planned?’, *The Conversation*, 2 September 2020, at: <https://bit.ly/34BNO3E>.

⁹⁸ E. Rugiririza and E. S. Ruvugiro, ‘Why Kabuga Is No Longer Accused of Importing Machetes for Genocide’, *Justice Info*, 30 March 2021, at: <https://bit.ly/3orug8U>.

⁹⁹ ‘Rwanda genocide suspect Kabuga should not face trial, UN judges say’, *Aljazeera*, 7 August 2023, at: <https://bit.ly/45qc4jG>.

A far less well-known genocide is the slaughter of indigenous Mayans in Guatemala in the early 1980s. In the 1970s, the Maya had been protesting against the country's repressive government, calling for greater equality and inclusion of the Mayan language and culture. In 1980, the Guatemalan army instituted 'Operation Sophia',¹⁰⁰ which sought to end an insurgency by destroying the civilian base in which the guerrillas hid. The programme specifically targeted the Mayan population.¹⁰¹ Over the next three years, the army destroyed 626 villages, killed or forcibly disappeared more than 200,000 people, and displaced a further 1.5 million internally. The army's scorched-earth policy involved the destruction or burning of buildings and crops, the slaughter of livestock, the fouling of water supplies, and the violation of sacred places and cultural symbols. In addition to the army's special units (known as the 'Kaibiles'), private death squads were employed for the operation. The US government gave significant support to the Guatemalan regimes in furtherance of its anti-Communist campaigns during the Cold War.¹⁰² In February 1999, the UN-supported Commission of Historical Clarification released its report, *Guatemala: Memory of Silence*, which concluded the army had committed genocide against four specific groups: the Ixil Mayas; the Q'anjob'al and Chuj Mayas; the K'iche' Mayas of Joyabaj, Zacualpa, and Chiché; and the Achi Mayas.¹⁰³

Terror has also been a common feature of crimes against humanity, that is to say, crimes committed in the course of a widespread or systematic attack against a civilian population. One of the means by which terror is perpetrated is in the course of indiscriminate bombing, whether that occurs within or outside international armed conflicts. Vietnam is one of the best known examples of a conflict where all sides carried out atrocities. North Vietnamese regular forces and Vietcong guerrillas engaged in widespread and systematic acts of terror across South Vietnam. For most of this period, the US Air Force was bombing North Vietnam as well as neighbouring Cambodia and Laos, cumulatively dropping more bombs than were used in the whole of the Second World War. Millions were killed or seriously injured, the majority civilians. Ground offensives in South Vietnam also killed many women and children. During the Tet offensive in 1968, one US commander is reported to have uttered the memorable phrase (or something akin to it): 'It became necessary to destroy the town in order to save it.'¹⁰⁴ The US bombing of Cambodia would give rise to the Khmer Rouge, whose Kampuchean regime under Pol Pot would see another two million murdered.

Terrorism would also flourish at home in the United States. But as Brian Michael Jenkins remarks, and despite the heavy toll of 9/11, the incidence of terrorism has declined dramatically since the 1970s. In that decade, 1,470 separate acts of terrorism unfolded within the nation's borders and 184 people were killed.¹⁰⁵ As Jenkins further noted:

Terrorists perfected their tactical repertoire in the 1970s. They employed six basic tactics, some of which had been practised for centuries: assassination, bombing, kidnapping, airline hijacking,

¹⁰⁰ See, e.g., 'Operation Sofia: Documenting Genocide in Guatemala', National Security Archive Electronic Briefing Book No. 297, Posted on 2 December 2009, at: <https://bit.ly/3ouUOqs>.

¹⁰¹ Holocaust Museum Houston, 'Genocide in Guatemala', at: <https://bit.ly/35Xek5f>.

¹⁰² Ibid.

¹⁰³ Commission of Historical Clarification, *Guatemala: Memory of Silence*, Report, February 1999: Conclusions and Recommendations, at: <https://bit.ly/3B4trN>.

¹⁰⁴ S. L. Carter, 'Destroying a Quote's History in Order to Save It', *Bloomberg Opinion*, 9 February 2018, at: <https://bloom.bg/3J8GFqx>. Peckham describes the inversion of the 1789 Declaration of the Rights of Man and of the Citizen, just a month after its promulgation by the National Assembly in France, to justify State terror against 'malefactors' who contravened those rights. Peckham, *Fear*, p. 87.

¹⁰⁵ B. M. Jenkins, 'The 1970s and the Birth of Contemporary Terrorism', Blog entry, The RAND Blog, 30 July 2015, at: <https://bit.ly/35OAdqe>.

barricaded hostage situations and armed assaults. Assassination had emerged as a terrorist tactic in the 11th century. With the invention of dynamite in the 19th century, terrorist bombings became increasingly common – and remain the most common terrorist tactic.¹⁰⁶

Palestinian groups and those supportive of the Palestinians engaged in terror attacks around the world from the early 1970s. The killing of Israeli athletes at the Munich Olympic Games in 1972 was only one of a number of incidents that shocked the world.¹⁰⁷ Members of the Black September group stormed the athletes' apartment in the Olympic Village, killing two of the group and taking nine others hostage. In return for the release of the hostages, they demanded that Israel release more than 230 Arab prisoners being held in Israeli jails as well as two German terrorists. In a later shootout at Munich airport, all nine Israeli hostages were killed along with five terrorists and one West German policeman.¹⁰⁸

Carlos 'the Jackal', whose real name is Ilich Ramírez Sánchez, is a Venezuelan national currently serving a life sentence in prison in France for terrorist offences under French law. In September 2021, the life sentence given to the Marxist supporter of the Palestinian cause four years earlier for a deadly grenade attack on a Paris shop in 1974 was confirmed. A member of the Popular Front for the Liberation of Palestine at the time, Carlos denied responsibility for the attack at his trial. Prosecutor Remi Crosson du Cormier declared that democracy had 'two principal enemies – totalitarianism and terrorism', suggesting that Mr Ramírez Sánchez was among those 'who threaten democracy by their actions'. At his trial he told the judge, 'Yes, I have regrets – because I'm kind-hearted – that I did not kill people I should have killed.'¹⁰⁹

Carlos, now in his early seventies, is serving separate life sentences for the murders in 1975 of two French policemen and a police informer, as well as for a series of bombings in Paris and Marseille in 1982 and 1983 that killed eleven people and left dozens more injured.¹¹⁰ Carlos had become one of the world's most wanted fugitives as a result of leading the attack in Vienna in 1975 on a meeting of the OPEC (Organization of the Petroleum Exporting Countries) oil cartel.¹¹¹ The 'Arm of the Arab Revolution' group called for the liberation of Palestine. The targeting of Arab leaders led to their becoming rather more supportive of the development of both counterterrorism efforts and counterterrorism law under UN auspices.¹¹²

In the United States, the Oklahoma City bombing of April 1995 had been perpetrated by a domestic terrorist, Timothy McVeigh.¹¹³ It was the worst act of home-grown terrorism in the nation's history, with 168 people killed, including 19 children, and hundreds more injured.¹¹⁴ Six years later, the attacks on the United States by al-Qaeda changed the world. In the four aircraft

¹⁰⁶ Ibid.

¹⁰⁷ Although, as Ben Saul observes, it was not characterized as terrorism by the UN Security Council and no action was taken of 'Terrorism' in the UN Security Council, *Chinese Journal of International Law*, Vol. 4, No. 1 (2005), 141–66, esp. at p. 143.

¹⁰⁸ 'Massacre begins at Munich Olympics: 5 September 1972', *History*, at: <https://bit.ly/3HmGtmV>.

¹⁰⁹ Associated Press, 'Unrepentant "Carlos the Jackal" sentenced to life for deadly grenade attack on Paris in 1974', *The National Post*, 28 March 2017.

¹¹⁰ France24, 'Paris court upholds life sentence for "Carlos the Jackal" in 1974 grenade attack', 23 September 2021, at: <https://bit.ly/3L7Z1jY>.

¹¹¹ R. Russell, 'Carlos the Jackal seeks reduced sentence for deadly 1974 Paris attack', *Sky News*, 22 September 2021, at: <https://bit.ly/3Gm45ql>.

¹¹² B. Blumenau, *The United Nations and Terrorism: Germany, Multilateralism, and Antiterrorism Efforts in the 1970s*, Palgrave Macmillan, United Kingdom, 2014, p. 123.

¹¹³ McVeigh claimed that the building in Oklahoma City was targeted to avenge the more than seventy deaths (most of whom were burned alive) at the Branch Davidian religious sect in Waco, Texas, in 1993 when it was stormed by the FBI. See, e.g., S. Pruitt, 'How Ruby Ridge and Waco Led to the Oklahoma City Bombing', *History*, Last updated 2 April 2020, at: <https://bit.ly/35Wd4SP>.

¹¹⁴ FBI, 'Oklahoma City Bombing', accessed 1 February 2022 at: <https://bit.ly/3sdFEGb>.

hijacked by the 19 terrorists, in the twin towers of the World Trade Center into which two of the aircraft crashed, and at the Pentagon, a cumulative total of almost 3,000 people from more than ninety nations died and thousands more were injured.¹¹⁵ al-Qaeda, which means ‘the Base’ in Arabic, had already engaged in acts of terror in Africa, with the bombings of the US embassies in Nairobi and Dar es Salam on 7 August 1998. A total of 224 people died in the blasts and more than 4,500 were wounded, the vast majority Africans.¹¹⁶

Islamic State grew out of the unlawful invasion of Iraq in 2003 that was led by the United States with the support of a number of military allies, including the United Kingdom. In the run-up to the invasion, the United States had spoken before the UN Security Council of the significance of Abu Musab al-Zarqawi, a Jordanian national. In making the case for war in Iraq, Secretary of State Colin Powell mistakenly identified him as a crucial link between al-Qaeda and Saddam Hussein’s regime. In fact, he was not even formally a member of al-Qaeda at the time, reportedly being closer to a number of Iranian groups.¹¹⁷ But al-Zarqawi would go on to exploit his new-found prominence on the global stage to create al-Qaeda in Iraq. He was killed by a US drone strike in June 2006, shortly after the group had been rebranded the Islamic State of Iraq.¹¹⁸ His would be a deadly legacy, for the organization he founded would evolve under the intellectual leadership of his number two, Abu Ali al-Anbari, into one that would drive Iraqi security forces out of key cities in Western Iraq, beginning with Fallujah in December 2013.¹¹⁹

In 2014, the group, by then renamed ‘Islamic State’, captured Mosul in Nineveh governorate. Islamic State was now being led by Abu Bakr al-Baghdadi, after the death of Abu Omar al-Baghdadi at the hands of Iraqi and US forces in a joint operation in April 2010.¹²⁰ On 4 July 2014, Abu Bakr al-Baghdadi had declared the establishment of an Islamic caliphate from the pulpit of Mosul’s medieval al-Nuri mosque.¹²¹ A month later, the ‘Sinjar massacre’ marked the beginning of genocide of Yazidis by Islamic State, with the killing and abduction of thousands of Yazidi men, women, and children in Sinjar city and the surrounding Sinjar district in Nineveh.¹²²

Islamic State’s reach penetrated deep into Syria with its nominal headquarters established in Raqqa. At its peak in January 2015, Islamic State controlled an area across Syria and Iraq equivalent to the size of the United Kingdom and had attracted tens of thousands of foreign fighters to its cause.¹²³ Its brutality was legendary. In November 2014, the Independent International Commission of Inquiry on the Syrian Arab Republic established by the UN Human Rights Council issued a report entitled ‘Rule of Terror: Living under ISIS in Syria’, in which it described Islamic State as a terrorist group that had ‘become synonymous with extreme violence directed against civilians and captured fighters’.¹²⁴ It stated:

¹¹⁵ 9/11 Memorial & Museum, ‘9/11 FAQs’, accessed 1 February 2022 at: <https://bit.ly/3gpEaDC>.

¹¹⁶ FBI, ‘East African Embassy Bombings’, accessed 1 February 2022 at: <https://bit.ly/3uqMKdK>.

¹¹⁷ M. A. Weaver, ‘The Short, Violent Life of Abu Musab al-Zarqawi’, *The Atlantic*, July/August 2006, at: <https://bit.ly/3rAulJL>.

¹¹⁸ *Ibid.*

¹¹⁹ H. Hassan, ‘The True Origins of ISIS’, *The Atlantic*, 30 November 2018, at: <https://bit.ly/3L8nkY8>. In March 2016, Anbari was killed near the Syrian city of Shaddadi, along the border with Iraq. American soldiers are said to have tried to capture him in a raid but he blew himself up using a suicide belt.

¹²⁰ W. Ibrahim, ‘Al Qaeda’s two top Iraq leaders killed in raid’, *Reuters*, 19 April 2010, at: <https://reut.rs/3J0itQQ>. Abu Bakr al-Baghdadi had pledged allegiance to al-Zarqawi in 2005.

¹²¹ ‘Who was ISIL’s self-proclaimed leader Abu Bakr al-Baghdadi?’, *Aljazeera*, 27 October 2019, at: <https://bit.ly/3Hw5jRe>.

¹²² International Organization for Migration (IOM), ‘Seven Years on from Sinjar Massacre, VR Film Honours Victims and Advocates for the Yazidi Community’s Recovery’, 3 August 2021, at: <https://bit.ly/3urgMxJ>.

¹²³ *Ibid.*

¹²⁴ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, UN doc. A/HRC/27/CRP.3, 19 November 2014, para. 1.

Civilians, including men, women and children, ethnic and religious minorities who remain in ISIS-controlled areas live in fear. Victims and witnesses that fled consistently described being subjected to acts that terrorise and aim to silence the population. . . . ISIS has beheaded, shot and stoned men, women and children in public spaces in towns and villages across north-eastern Syria. . . . By orchestrating systematic harm against a civilian population, ISIS has demonstrated its capacity and intent to wilfully apply measures of intimidation and terror, such as violence to life and inhuman treatment inflicting great suffering and injury to bodily integrity.¹²⁵

Islamic State's overwhelming military defeat in Iraq and Syria in 2017 did not, however, end its use of terror tactics. According to the Syrian Observatory for Human Rights, at least 600 people were killed in dozens of attacks by Islamic State in Syria in 2021.¹²⁶ In Iraq, a double-suicide bombing in January in central Baghdad and a suicide bombing in July in Sadr city each killed more than thirty people.¹²⁷ In February 2022, its (then) latest leader, Abu Ibrahim al-Hashimi al-Qurayshi, was killed in the course of a US raid in Syria; he was reported to have detonated a suicide vest, killing his own children in the process.¹²⁸ In November 2022, Islamic State announced the appointment of his successor, Abu al-Husain al-Husaini al-Quraishi.¹²⁹ He in turn was killed only a few days later, in Syria.¹³⁰

In Syria, the violent repression of peaceful protests during the Arab Spring led to civil war, and terror was a tactic routinely employed by the regime in Damascus. In February 2021, Eyad al-Gharib was convicted and sentenced to fifty-four months' imprisonment for aiding and abetting crimes against humanity. He had arrested anti-Assad protesters who were then transported to the Al-Khatib centre, a facility known as 'Hell on Earth'.¹³¹ In January 2022, a German court sentenced a fifty-eight-year-old Syrian colonel, Anwar Raslan, to life in prison for crimes against humanity for his role in the torture of more than 4,000 people in the same facility. The court heard how detainees were beaten and doused in cold water. Others were raped or hung from the ceiling for hours on end. Torturers tore out the fingernails of their victims and administered electric shocks. One survivor told the media he could hear the screams of people being tortured all day, every day. Thousands died from their suffering.¹³²

As this brief historical overview has illustrated, sometimes terrorism is directed at the general population or a segment of it, or a particular minority, while at others it is aimed at a nation's leadership. Peaceful protest is never to be deemed terrorism under international law, even though it is treated as such in a number of repressive national jurisdictions. Always relevant is the unlawful, often barbaric nature of the act and the intent of the perpetrator, whether that is expressed verbally or in writing or where it is otherwise manifest. These issues are explored in [Chapter 1](#).

Debate though continues to surround the extent to which international law should address the conduct of State actors as terrorism. The United States is at the vanguard of those arguing that

¹²⁵ *Ibid.*, paras. 19, 32, 45.

¹²⁶ S. Kajjo, 'Analysts: Islamic State Poised for More Attacks in Syria in 2022', Voice of America, 4 January 2022, at: <https://bit.ly/3LdptBN>.

¹²⁷ C. Bunzel, 'Explainer: The Islamic State in 2021', Wilson Center, 10 December 2021, at: <https://bit.ly/3sbBC1w>.

¹²⁸ D. Vergun, 'Leader of ISIS Dead Following U.S. Raid in Syria', DOD News, 3 February 2022, at: <https://bit.ly/3oogWSY>.

¹²⁹ E. Kourdi, 'ISIS acknowledges the death of its leader, announces his successor', CNN, 30 November 2022, at: <http://bit.ly/3XKqKWf>.

¹³⁰ C. Lister, 'ISIS leader's death raises intriguing questions', Middle East Institute, 5 December 2022, at: <http://bit.ly/3KlhWmG>.

¹³¹ C. Otto, T. Qiblawi, and S. Halasz, 'In world first, Germany convicts Syrian regime officer of crimes against humanity', CNN, Updated 24 February 2021, at: <https://cnn.it/3AVwFxG>.

¹³² J. Hill, 'German court finds Syrian colonel guilty of crimes against humanity', BBC, 13 January 2022, at: <https://bbc.in/3oorHoq>.

treaties should focus on the repression of the activities of non-State actors given that other rules of international law constrain the acts of States. But for a number of other States, especially many within the Non-Aligned Movement (NAM),¹³³ the actions of States (and particularly the United States) should also be the focus of attention and not those armed groups representing peoples engaged in a struggle for national liberation. Already in 1973, many States were arguing in the United Nations that State terrorism ‘was the most harmful, noxious, cruel, pernicious or dangerous form of terrorism’.¹³⁴

As a matter of law, it is clear that any entity (State or non-State) and indeed any individual can engage in terrorism, even absent membership of or adherence to an existing terrorist group. It is primarily the *intent* of the salient individual, group, or entity that distinguishes an ‘ordinary’ crime of murder from a terror attack. That intent may be expressed or it may be inferred from the nature and consequences of the act or acts that are perpetrated. And what is clear from practice is that terrorism may even be perpetrated when a State is ostensibly engaged in counterterrorism. Indiscriminate violence and, a fortiori, violence targeted at civilians is evidence of terror tactics. Such violence can occur on land, at sea, in the air, and even in cyberspace.

¹³³ Serbia’s Ministry of Foreign Affairs explains that the Non-Aligned Movement ‘emerged as an expression of the efforts of a large number of developing countries, mostly in the process of decolonisation, as a kind of political alternative to avoid opting for one military-political bloc during the Cold War division of the world and articulate an independent foreign policy approach’. The first Conference of Non-Aligned Countries was held in 1961 in Belgrade at the initiative of the Socialist Federal Republic of Yugoslavia (SFRY), to which Serbia is the successor State. During the Cold War, the Non-Aligned Movement ‘played a significant role in preserving peace and calming the competition between the two blocks, and especially in accelerating the decolonisation process’. Republic of Serbia Ministry of Foreign Affairs, ‘The Non-Aligned Movement’, accessed 1 February 2022 at: <https://bit.ly/3GOhA2z>.

¹³⁴ B. Saul, ‘United Nations Measures to Address the “Root Causes” and “Conditions Conducive” to Terrorism, and to Prevent Violent Extremism: 1972–2019’, chap. 37 in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., pp. 532–33.