International Terrorism as a European Crime: The Policy Rationale for Criminalization

Following the 11 September 2001 terrorist attacks on the United States, military responses have become entrenched as the international community’s preferred response to terrorist activity. Law enforcement and criminal justice responses have taken a back seat in the global ‘war on terror’, beginning with the pursuit of Al-Qaeda and the ousting of the Taliban in Afghanistan in 2002, through to targeted assassinations of suspected terrorists in Yemen in November 2002 and the invasion of Iraq in March 2003. States such as China, Israel and Russia have taken advantage of this shift by characterizing various forms of domestic political opposition as terrorist and reacting with military force.

One consequence of the proliferation of military responses has been a failure by the international community to fix an appropriate and durable boundary between military and criminal justice responses to terrorist activity. It may well be legally difficult to determine when a terrorist act crosses the threshold of an armed attack, thereby authorizing the use of force in self-defence. Under the law of armed conflict, such a determination will depend on the nature and scale of the attack and whether self-defence is a necessary and proportionate response. Attribution of terrorist acts to a State may also be problematic, and the use of force in self-defence against non-State actors which are not controlled by a State is legally uncertain. While the boundary between law enforcement and the use of military force will always be ill-defined and shifting, the boundary is still essential in minimizing recourse to violence in international relations.

After 11 September, the Security Council resolved that ‘any’ act of international terrorism constitutes a threat to international peace and security. The designation of any international terrorist act as a threat is significant because previously the Council had only found that such acts ‘may’ or ‘could’ threaten peace and security, thus reserving to itself the discretion to characterize some terrorist acts as international threats and others as not so serious. The hardening of the Council’s attitude reflects the general international shift towards militarized responses to terrorism, although

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2. UNSC Res. 1368 (2001), para. 1.
3. See, for example, UNSC Res. 1269 (1999), para. 1.
the Council did not expressly authorize the use of force against terrorism even after 11 September.

Of the non-military international responses to terrorism after 11 September, the most prominent are the various financial restrictions imposed on terrorist organizations, including the freezing and confiscation of assets. These controls are the primary mandate of the Security Council’s Counter-Terrorism Committee, established in Resolution 1373.4 Yet that resolution also required States to establish terrorist acts as serious criminal offences in domestic law, and to ensure that punishment duly reflects the seriousness of such acts.5 The resolution did not, however, contain any definition of terrorism, with the consequence that it conferred a wide discretion on States to unilaterally define the nature and scope of terrorist offences. The resolution also reflects an arrogation of general legislative power by the Security Council, compelling States to adopt criminal laws of general effect and not connected to any particular threat to international peace or security.

As State reports to the Committee show, some States have since availed themselves of this broad legislative license to unilaterally define terrorism, establishing special terrorist offences in their criminal laws. Until recently, few domestic legal systems punished specifically ‘terrorist offences’. Terrorist activities were typically dealt with by resort to ordinary offences such as murder or assault, supplemented by sector-specific offences incorporated from the twelve international anti-terrorism conventions.

Commonly, where States did have existing anti-terrorism laws, such laws did not create criminal law offences but were administrative constructs for jurisdictional, budgetary or administrative purposes.6 Any definitions of terrorism in such laws did not usually ‘serve as a legal term of art upon which liberty depends’.7 Such laws provide for a variety of procedural measures, including ‘special means and methods of investigations, different standards of proof, and increased penalties’, as well as for the ‘forfeiture of property or funds, seizure of assets, the supervision of personal movement and other measures of personal control, evidentiary rules, and investigative and prosecutorial techniques’.8

Reference to terrorism in national law may also trigger emergency laws, permitting the derogation or suspension of rights arising under human rights law, constitutional law or national criminal procedure.9 In immigration law, definitions of terrorism may permit non-citizens suspected of terrorist activities to be indefinitely detained in circumstances where deportation is not possible.10 There has also been a drift towards the automatic exclusion of terrorists from refugee status, even though terrorist offences

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4. UNSC Res. 1373 (2001), para. 1(a)–(d).
5. UNSC Res. 1373 (2001), para. 2(e).
7. C. Walker, op. cit.
9. M.C. Bassiouni, loc. cit., p. 27.