The Trouble with Terror

Liberty, Security, and the Response to Terrorism

Tamar Meisels

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What is terrorism and can it ever be defended? Beginning with its definition, proceeding to its possible justifications, and culminating in proposals for contending with and combating it, this book offers a full theoretical analysis of the issue of terrorism. Tamar Meisels argues that, regardless of its professed cause, terrorism is diametrically opposed to the requirements of liberal morality and can only be defended at the expense of relinquishing the most basic of liberal commitments. Meisels opposes those who express sympathy and justification for Islamist (particularly Palestinian) terrorism and terrorism allegedly carried out on behalf of developing nations, but, at the same time, also opposes those who would tolerate any reduction in civil liberties in exchange for greater security. Calling wholeheartedly for a unanimous liberal front against terrorism, this is a strong and provocative attempt to address the tension between liberty and security in a time of terror.

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to Terrorism

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For Abigail and Martha

Contents

Acknowledgments

This book consists of seven chapters written at various times throughout the six years following September 11, 2001. Most of these chapters are versions of articles that have already been published. I begin by thanking the editors of the following journals for allowing me to use these materials here:

to Israel. I am particularly grateful for his participation in a conference on terrorism that I organized at Tel-Aviv University in March 2004. I learned a great deal from the paper he presented there on "The Problem of Defining Terrorism," which first called my attention to the questions I address in Chapter 1. His book *Romantics at War* had a great influence on me when setting out on this project. All this is greatly appreciated.

I am also indebted to Alan Dershowitz for his helpful points of clarification on an early version of Chapter 7. His comments have helped make this chapter much better, and more accurate, than it was in its original form.

Meir Dan-Cohen's "acoustic separation" sparked some of the ideas in Chapter 7. A very memorable conversation we had with some others in the lobby of the Tel-Aviv Hilton, as army helicopters circled above at the beginning of operation "Defense Wall," first raised the question, "What's wrong with killing the bad guys?" which gave rise to Chapter 5 of this book. Aside from which, he deserves special thanks for being a real friend at a time of personal need, helping to resolve disputes and restore calm, without which I doubt this book could have been completed.

Last, and most important: my deepest thanks go to Jeremy Waldron for his invaluably helpful comments on the various chapters in this book. Though we do not always agree, the influence of his work on terrorism and torture is apparent throughout this book. I am especially grateful for the discussions we have had on these issues, and for the opportunity to benefit from his scholarly criticism, learned comments, and illuminating suggestions. Like Waldron himself, his contribution to this work is in a league of its own.

Introduction

In the days following September 11, 2001, many foreign nationals paid homage to New York's victims by laying wreaths and writing inscriptions in memorial books. Among those paying their respects and offering condolences were a large number of Israeli visitors and ex-patriots who, whether individually or collectively, had already experienced several decades of terrorist atrocities. While the collapse of the twin towers was indeed a uniquely momentous event – a horrific spectacular carried out on the world's largest stage – the Israeli New Yorkers had already witnessed the essence of this horror before. They had smelled the smoke and witnessed the carnage. They had seen such devastation and destruction – the bodies, the families, the loss, the death, and the bereaved. They had already buried many victims of terrorism and embraced many survivors. No one could have been more sympathetic to New Yorkers on that fateful day.

One Hebrew inscription attached to a wreath sticks in the mind. Summoning up the words of the prophet Jeremiah, one anonymous Israeli in the crowd wrote of her pre-September 11 American friends: "they had eyes, but could not see."[1] A week later, former Israeli Prime Minister Benjamin Netanyahu expressed similar sentiments when addressing the US Congress. He said America had received a wake-up call from hell.[2] His words were received with loud, unanimous applause by members of the House. America may once have been blind, but now could see.

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[1] The reference is to Jeremiah 5:21, KJV: "Hear now this, O foolish people, and without understanding; which have eyes, and see not; that have ears, and hear not."

[2] Netanyahu's speech in the US Congress, September 20, 2001, reprinted in Benjamin Netanyahu, *Fighting Terrorism* (New York: Farrar, Straus, and Giroux, 2001), p. xix.

Let there be no misunderstanding from the outset. This is a book about terrorism, but it is also, and most definitely, an argument against terrorism. It draws on the existing theoretical, primarily philosophical, literature on terrorism, and argues with much of it. The first part of the book argues against a growing academic reluctance to define terrorism as a specific and fiendish deed. Later, it offers a systematic normative evaluation of the phenomenon of terrorism and of various forms of contending with it from the perspective of liberal morality. Beginning with the definition of terrorism, proceeding to its possible justifications, and culminating in proposals for combating it, this book suggests that regardless of its professed cause, terrorism is diametrically opposed to the requirements of liberal morality and can only be defended at the expense of relinquishing the most basic of liberal commitments. It argues against a considerable body of literature that expresses sympathy, and at times outright justification, for Islamist (particularly Palestinian) terrorism and terrorism allegedly carried out on behalf of developing nations. It takes on the apologists for terrorism and refutes their arguments.

On the other hand, and not one whit less important, this wholehearted call for a unanimous liberal front against terrorism does not bear the practical implications that some self-interested state leaders wish to accord it, nor should it always supply them with the legal and political license they seek to acquire when confronting terrorist threats. Part II looks to liberal democracies and asks how the freedom and security of their citizenry, as well as the rights of suspected terrorists, should be handled by liberal democratic legal systems in an age of terror. Domestically, it questions whether civil libertarians ought to resist any readjustment of civil liberties, even at times of grave security threat, but at the same time argues against those who would tolerate any diminution of civil liberties in exchange for greater security. I sketch my argument on this internal issue in terms of classic social contract theory, which I believe contributes to an illumination of the frequent debate on the supposed tension between liberty and security, particularly in times of crisis.

Part II also offers an analysis of the debate over the legal status of terrorists and their rights. It defends the contemporary American labeling of irregulars as "unlawful combatants" and offers an argument for denying them prisoner of war status as well as the rights of internal due process accorded common criminals. On the other hand, I also argue

adamantly for upholding the basic human rights of irregular combatants and against the more draconian measures implemented by the US Bush administration against terrorists and terrorist suspects.

Internationally, Part III defends particular methods of combating terrorism which are often objected to by liberals. In particular, it defends targeted assassination, and entertains the possibility of employing harsher interrogation techniques for questioning terrorists in life-threatening situations. Crucially, however, the last two chapters deal at length with the specific issue of torturous investigations and with arguments from extreme emergency, and ultimately uphold and defend the age-old liberal commitment against outright torture.

Finally, the outcome is a complex set of views, but hopefully not an incoherent one. Our views on these various issues should be complex and perplexing, not necessarily sitting well with any one political party, state agenda, or world leadership. We live in truly complicated times, and should think accordingly.

Defining and Defending Terrorism

1 | *Defining terrorism – a typology*

As the leaders of Western democracies and their security forces increasingly struggle with terrorism, their lawyers and philosophers continue to struggle with its definition. Several recent studies point to the inconsistencies and inadequacies of existing legal definitions, as well as to the contradictions among them.[1] C. A. J. Coady suggests that there are more than a hundred modern definitions of "terrorism."[2] George Fletcher mentions only dozens, concluding that no one of them is definitive.[3] Consequently, there is no globally agreed, unambiguous definition or description of terrorism – popular, academic, or legislative. Igor Primoratz complains that "Current ordinary usage of the word displays wide variety and considerable confusion; as a result, discussing terrorism and the array of moral, political and legal questions it raises is difficult and often frustrating."[4] Wilkins does not altogether exaggerate when he writes that the number of definitions of terrorism equals the number of works dedicated to the subject.[5] By 1984, Alex Schmid had collected 109 different definitions of terrorism.[6] Later, he states that he "cannot offer a true or correct definition of terrorism" and that "[t]errorism is an abstract phenomenon of which there can be

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[1] Jeremy Waldron, "Terrorism and the Uses of Terror," *The Journal of Ethics* 8 (2004), pp. 5–35; George Fletcher, "The Problem of Defining Terrorism," paper presented at a conference on "Terrorism – Philosophical Perspectives," at Tel-Aviv University (organized by the Department of Political Science and the Minerva Center for Human Rights, Tel-Aviv University Law Faculty), March 2004; and in George Fletcher, "The Indefinable Concept of Terrorism," *Journal of International Criminal Justice* (2006), pp. 1–18.

[2] C. A. J. Coady, "Defining Terrorism," in I. Primoratz (ed.), *Terrorism – The Philosophical Issues* (New York: Palgrave Macmillan, 2004), p. 3–14.

[3] Fletcher, "The Problem of Defining," p. 2.   [4] Primoratz, *Terrorism*, p. xi.

[5] Burleigh T. Wilkins, *Terrorism and Collective Responsibility* (London: Routledge, 1992), p. 2.

[6] Alex P. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (Amsterdam: North-Holland Publishing, 1984), pp. 119–58.

no essence which can be discovered or described," commenting that "authors have spilt almost as much ink as the actors of terrorism have spilled blood."[7] Indeed, to date, academic standpoints remain diverse. When it comes to defining terrorism some, like Walter Laqueur, seem to forego analysis in favor of platitudes, in the belief that "[a]ll specific definitions of terrorism have their shortcomings simply because reality is always richer (or more complicated) than any generalization."[8]

At least one reason for the disparity of definitions stems from the variety of objectives we have in defining terrorism. Lawyers desperately require definitions in order to prosecute and sanction "terrorists." They must distinguish terrorism in precise legal terms from other forms of crime. Social scientists aim to describe this phenomenon in a way which will better our sociological and psychological understanding of it and enable us to face this modern challenge more successfully.[9] Heads of state and politicians often adopt definitions that serve their national, political, or ideological agendas. Naturally, they usually define terrorism as a form of violence that is carried out exclusively by non-state groups. As Primoratz puts this: "Nobody applies the word to oneself or one's actions, nor to those one has sympathy with or whose activities one supports."[10]

Recently, both George Fletcher and Jeremy Waldron have questioned whether we should spend time worrying about definitional issues at all. Fletcher suggests that, "when it comes to terrorism, we know it when we see it – as Justice Stewart famously said about pornography."[11] According to Fletcher, while people have strong intuitions about what is and what is not terrorism, no definition of terrorism can be filtered from a specification of necessary and sufficient conditions.[12] Specific forms of conduct, he claims, cannot be identified as terrorism by simply running a relevant test on them. Instead, he probes the relevance of eight variables on the contours of terrorism: violence, intention, the victims, the wrongdoers, just cause, organization, theater, and what he calls the "no guilt, no regrets" of the

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[7] Alex P. Schmid and Albert J. Jongman, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature*, 2nd edn. (Amsterdam: North-Holland Publishing, 1988), p. xiii.

[8] Walter Z. Laqueur, *The Age of Terrorism* (Boston: Little, Brown, 1987), p. 145.

[9] Waldron, "Terrorism," p. 6.   [10] Primoratz, *Terrorism*, p. xi.

[11] Fletcher, "The Problem of Defining," p. 2; Waldron, "Terrorism," p. 6.

[12] Fletcher, "The Problem of Defining," p. 3; Fletcher, "The Indefinable Concept of Terrorism," pp. 16, 18.

perpetrators.[13] Drawing on Wittgenstein's "relationships of family resemblance," Fletcher argues that terrorist acts do not presuppose necessary and sufficient conditions. Instead, a given terrorist act may resemble a second terrorist act in some respect, and a third terrorist act in another. The features of the second and third terrorist acts that resemble one another may be different as well. There is, however, no common denominator for all acts of terrorism, apart, perhaps, from their theatrical nature.[14]

In "Terrorism and the Uses of Terror," Waldron pursues some interesting distinctions among, for example, "terror," "terrorism," and "terrorization," and reveals some psychological insights into the fearful elements of terror, but he concludes that no canonical definition emerges from these observations.[15] In one such invaluable insight, Waldron ascribes the term "terrorization" to the type of action that induces desperate panic and overwhelms a person's rational decision-making capability, and distinguishes it from coercion, which concerns actions that leave room for rational deliberation on the part of the victim.[16] Nonetheless, he argues ultimately that defining "terrorism" is difficult and not an enterprise worth undertaking, except for specific legal purposes.[17] While Fletcher and Waldron both expend the necessary effort in investigating this definitional question, they essentially concur that, in the end, "The quest for a canonical definition of terrorism is probably a waste of time."[18] This book argues, to the contrary, that a canonical and consistent definition of "terrorism" can and should be pursued, particularly by philosophers.

In his recent and provocative book, *What's Wrong with Terrorism?* Robert Goodin humorously accuses political theorists, myself included (in a slightly different connection) of having "a limited range of tools in their intellectual toolkits. Presented with real world events, they rummage around to see what among their standard equipment best fits this occasion, rather than necessarily doing any first order philosophy on the situation at hand."[19] Goodin is probably right, and it is not

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[13] Fletcher, "The Indefinable Concept of Terrorism," pp. 8–16; Fletcher, "The Problem of Defining" considers only the latter six of the eight variables mentioned above.
[14] Fletcher, "The Problem of Defining," throughout; Fletcher, "The Indefinable Concept of Terrorism," esp. p. 18.
[15] Waldron, "Terrorism," esp. pp. 8–9, 11–12, 33.   [16] Ibid., pp. 11–12.
[17] Ibid., p. 33.   [18] Ibid., p. 5.
[19] Robert Goodin, *What's Wrong with Terrorism?* (Cambridge, UK and Malden, MA: Polity Press, 2006), p. 170.

surprising then that we have in recent years witnessed a veritable slew of academic writing on the definition of terrorism. Political philosophers are rather fond of framing classifications and typologies, and categorizing and defining. Contra Waldron and Fletcher, however, I do not consider this a waste of time. If we are to fruitfully pursue the further moral issues regarding the changing character of modern war, we must first agree on a canonical definition of terrorism. As Coady observes, "There are two central philosophical questions about terrorism: What is it? And what, if anything, is wrong with it?" We must deal with the first question because of the importance of the second.[20]

I have another piece of old equipment in my toolbox that I believe meets the occasion. Aristotle observed long ago that our definitional powers are essentially linked to our ability to distinguish good from evil. The gift of speech, Aristotle tells us, goes beyond the physical capacity to utter sounds and even the ability to recognize and name objects in the physical world. The essential attribute of human speech is captured by the ability to differentiate, categorize, and define a variety of incidents as belonging to a common genus, while excluding others. It is the capacity to distinguish and define which enables us to make ethical judgments.[21] To bring this observation into the present, the twenty-first-century philosopher's objective must be to define terrorism in order to identify its morally crucial features.

Aside from pure moral inquiry, there are also other, more practical, objectives to be served by a clear definition of terrorism. As I have said, lawyers require definitions in order to prosecute terrorists. Chapter 4 of this book looks at the legal status of irregular combatants. Chapters 5 to 7 contemplate the appropriate attitude on the part of the international community towards certain modes of combating terrorism and terrorists, specifically towards the practices of targeted assassination and investigative torture. In view of recent events, there is a great need to adapt international law to the reality of modern warfare. Legislation on terrorism, and the legitimate modes of combating it, is sorely lacking. Legally defining terrorism would be a very good place to start. An orderly definition would specify the category of persons we call terrorists for the purpose of both prosecuting and fighting them, and distinguish them from those who would categorically be immune from such repercussions. A definitive description of terrorism would enable us

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[20] Coady, "Defining Terrorism," p. 3.
[21] Aristotle, *The Nicomachean Ethics* (London: Penguin, 1976), pp. 75–6.

to consider policies designed to combat it, such as targeted killing, without lending our hand to related practices, such as the murder of political enemies, which we ardently condemn. An internationally agreed-upon definition of terrorism is a necessary first step in the right direction.

Why are Western theorists having such a hard time agreeing on a definition of terrorism? Israeli legal theorist Alon Harel suggests that the various conflicting definitions fall roughly into two categories, each with a distinct political agenda. One large group of contemporary definitions seeks to highlight a specific aspect of terrorism that is said to single it out as a particularly fiendish and condemnable practice. In contrast, a second group of definitions aims to blur the distinction between terrorism and other violent acts, suggesting that terrorism is no worse than many forms of state-employed violence.[22] While Harel never names particular scholars in each of his categories, most authors on terrorism do indeed fall distinctly into one of the two groups.

Throughout this chapter, I pursue this distinction between two broad categories of definitions based loosely on their respective goals. I refer to them as the "inclusive" and the "restrictive" definitions respectively. In the next section, after pursuing several paradigmatic definitions of the inclusive category, I criticize this type of definition, suggesting that it is entirely politically motivated, misguided, and normatively unhelpful in understanding the modern phenomenon that is terrorism. While authors of these wide, inclusive definitions accuse their opponents of begging important moral questions – allegedly defining terrorism as unjustified – they themselves advance their political agenda by shaping definitions that suit them. Chapter 2 offers a more detailed refutation of such political agenda. This chapter, as well as the next, suggests that a satisfactory definition of terrorism must specify its uniqueness and distinguish it from other types of human activity, specifically from other types of violent action. If terminology is to contribute to ethical judgment, the definition itself ought to highlight the characteristic normative aspect of the category in question. The term "terrorism" is derogatory, at least in ordinary usage. That is why no one applies it to themselves and practically everyone nowadays attempts to apply it to his or

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[22] Alon Harel, "Is Terrorism a Moral Category?" paper delivered at a conference on "Terrorism – Philosophical Perspectives," at Tel-Aviv University (organized by the department of Political Science and the Minerva Center for Human Rights), March 2004.

her enemies. Therefore, I argue here, the characterizing features we are looking for are bound to be at least objectionable if they are to bear any connection with ordinary speech. Finally, I conclude the present chapter by siding with what has been dubbed a "tactical definition" of terrorism; tactical in that it focuses on the specific problematic tactic of terrorism as an action category.[23] I do so without reference to the nature of the perpetrators of such a tactic or the justness of their goal and without rendering it morally and politically unjustifiable by definition. The following chapter looks more closely at political motivation and the question of justification.

Inclusive definitions

The *Oxford Student's Dictionary for Hebrew Speakers* describes terrorism as merely the "use of violence and intimidation, especially for political purposes."[24] Interestingly, this was also Leon Trotsky's understanding of terrorism: as violence intended to intimidate and thereby achieve political objectives.[25] Quite obviously, many acts of conventional warfare can equally be described as violent and intimidating for political purposes. Several modern-day theorists adopt a variety of inclusive definitions of terrorism that blur, or deconstruct, the distinction between terrorism and other forms of political violence. This type of definition aims to obliterate the distinction between terrorism and other violent acts, with the clear implication that terrorism is, in and of itself, no worse than many other practiced forms of violence which are internationally sanctioned.

Many theorists believe that the very concept of terrorism, or at least its current usage, has been molded in a sinister way in order to serve the political interests of the stronger powers within the international community, specifically those of the United States. Hence, it is argued, the United States' labeling of particular individuals, groups, states, and organizations as "terrorists" is biased and unjust.[26] There is nothing

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[23] Coady, "Defining Terrorism," pp. 3, 7. For Coady's tactical definition, see also C. A. J. Coady, "Terrorism, Morality and Supreme Emergency," in Primoratz, *Terrorism*, p. 80.

[24] A. S. Hornby, *Oxford Student's Dictionary for Hebrew Speakers* (Tel-Aviv: Kernerman, 1991).

[25] Leon Trotsky, "A Defense of the Red Terror," in Primoratz, *Terrorism*, pp. 31–43.

[26] Virginia Held, for example, "Terrorism, Rights, and Political Goals," in Primoratz, *Terrorism*, p. 65–79.

distinct about this type of violence that has not already been employed far more extensively by the United States itself and some of its closest allies. Noam Chomsky, for example, clearly holds this view.[27] If so, perhaps the moral appraisal of any specific use of force relies ultimately on the justness of its cause rather than on the means employed in its pursuit.[28]

In "Political Terrorism as a Weapon of the Politically Powerless," Robert Young attempts to justify what he describes as terrorism in terms of "just cause." While he recognizes that states as well as groups use terror tactics, he concentrates on the latter, arguing that "the most promising way, morally, to defend terrorism not carried out by states is as a weapon which those who lack conventional political power can use to fight the just causes they are otherwise prevented from promoting."[29] He admits in advance that killing or injuring the innocent, as well as random or indiscriminate attacks – which are the features most commonly associated with terrorism – are rarely, if ever, justifiable.[30] Young's self-professed political agenda – that of justifying terrorism by the politically powerless – is then squared with his difficulty in justifying the killing of innocents and random indiscriminate violence, by attempting to evade, and subsequently obscuring, the definitional question, which he claims to avoid.[31] Instead, he lists those features which he believes provide a clear description of terrorism.[32] These include causing fear, usually by non-state actors, and a broad range of political goals.[33] Finally, he rejects those definitions that associate terrorism with random indiscriminate violence, as well as with the targeting of non-combatants, as "moralized." Recognizing that "many believe terrorism involves threatening to harm, or harming, non-combatants (which is code for 'innocents'),"[34] thus violating the classic just-war theory

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27 Noam Chomsky, *9–11* (New York: Seven Stories Press, 2001), esp. pp. 23, 40–54, 57, 73–4, 90–1, as well as in his numerous other similar publications.

28 This is pointed out by Alon Harel, "Is Terrorism a Moral Category," and is exhibited in the work of Ted Honderich, *After the Terror* (Edinburgh University Press, 2003) esp. pp. 91–7, and at least implied by Jacques Derrida in G. Borradori, *Philosophy in a Time of Terror* (University of Chicago Press, 2003), pp. 85–136.

29 Robert Young, "Political Terrorism as a Weapon of the Politically Powerless," in Primoratz, *Terrorism*, pp. 55–64 (pp. 55–6).

30 Ibid., p. 57. 31 Ibid., p. 55. 32 Ibid., pp. 56–7.

33 Ibid., p. 56. 34 Ibid., p. 57.

principle of discrimination, Young points out, unoriginally, that civilian victims need not be "innocent" in the moral sense. They may be state officials, supporters of the government, or even heads of state, whose targeting is regarded by others as political assassination rather than terror.

Young's argument here is somewhat circular, as well as fraught with error. For one thing, the term "non-combatant" as it functions within the just-war theory principle of discrimination is not code for "innocent" in any ordinary moral sense. On the contrary, talk of targeting the innocent is shorthand, or code, for "non-combatant" – non-threatening, unarmed personnel. The terminology of just-war theory does not refer to the normal moral or judicial sense of innocence as opposed to blameworthiness, but rather to "innocents" in terms of defenseless, or not immediately threatening, individuals as opposed to armed combatants. There is, therefore, nothing novel in Young's suggestion that non-combatants may be implicated in the terrorist's grievance. This is a well-known fact, and when they are highly implicated (as in the case of politicians) many regard their murder as an act of assassination rather than random terror. Thus, Young's argument is also somewhat circular, as he defines assassination as a form of terror and then continues to argue that "terror" – though perhaps only against the guilty – can be justified.

Young continues to argue that not only does a definition which takes targeting the innocent as a defining characteristic of terrorism "beg the question of its moral justifiability, it is also unwarrantedly prescriptive about which acts of political violence may be considered acts of terrorism."[35] This objection is curious. Definitions are intended precisely to determine what does, and what does not, fall into a particular category, and they would be of little use if they did not do so. Specifically as regards terrorism, Igor Primoratz points out "a conception of terrorism that lumps together the assassination of Reinhardt Heydrich, the Reichsprotektor of Bohemia, and the killing or wounding of a group of civilians traveling on an inter city bus can be of no use in moral thinking."[36] Prescribing which acts of violence fall under the term "terrorism" and which do not is precisely what is warranted by any adequate definition. Instead, Young himself inclusively lumps together, under the joint heading of terrorism, sabotage, political assassination,

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[35] Ibid., p. 57.   [36] Primoratz, "What is Terrorism?", in *Terrorism*, pp. 15–27 (p. 15).