The Multifaceted Criminal Notion of Terrorism in International Law

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Abstract

Contrary to what many believe, a generally accepted definition of terrorism as an international crime in time of peace does exist. This definition has evolved in the international community at the level of customary law. However, there is still disagreement over whether the definition may also be applied in time of armed conflict, the issue in dispute being in particular whether acts performed by 'freedom fighters' in wars of national liberation may (or should) constitute an exception to the definition. As a consequence of disagreement on terrorism in armed conflict, states have so far been unable to lay down a general definition of the whole phenomenon of terrorism in a general treaty. The fact, however, remains that under current customary international rules terrorism occurring in a time of peace and which is international in nature (i.e. not limited to the territory of a state and showing transnational connections) may, depending on the circumstances, constitute a discrete international crime, or a crime against humanity. In time of armed conflict, terrorism (i.e. attacks on persons not taking an active part in armed hostilities, with a view to spreading terror among the civilian population) currently amounts to a specific war crime (crime of terror). In time of armed conflict, terrorist acts may also amount to crimes against humanity (if part of a widespread or systematic attack on the civilian population). The objective and subjective elements of each of these three classes of criminal conduct are set out in the article on the basis of existing international law. While in the view of the author, the current legal regulation of terrorism is thus sufficiently clear, the fact remains that states are politically and ideologically divided on whether the actions of 'freedoms fighters' involving attacks on civilians should be defined as terrorist or instead lawful. In this contentious area three divergent political trends are emerging in the world community: (i) to sic et simpliciter *exempt freedom fighters' actions from the category of terrorism, without however specifying what law would regulate their actions or whether such actions are in any case always lawful; (ii) to exclude attacks against civilians in armed conflict from the legal regulation of the international rules on terrorism and thus*

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assign such legal regulation to international humanitarian law solely; (iii) to combine the application of both international norms on terrorism and international humanitarian law to actions in armed conflict, classifying as terrorist (not as war crimes) attacks on civilians carried out in the course of such conflicts with a view to spreading fear.

1. Introduction: the Problem

The need for a generally accepted definition of international terrorism is self-evident. Each state, in passing legislation on the matter, may and does of course define terrorism as it pleases. However, terrorism is a phenomenon that very often affects multiple states, which are all compelled to cooperate to repress it. Hence, however imperfect and incomplete, a common working definition is necessary so that all states concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion? In particular, if some states assert that certain categories of persons who engage in conduct that normally would fall under the definition of terrorism must nevertheless not be classified as terrorists on some ideological or political grounds, how can cooperation be smoothly carried out between these states and others taking a different legal view?

The legally binding Framework Decision on the European Arrest Warrant that the Council of the European Union (EU) passed on 13 June 2002 (and which entered into force on 1 January 2004) is a telling instance of this need for cooperation. The Decision provides that terrorism is one of the offences for which arrest warrants can be issued in one of the Member States of the EU and expeditiously executed in another Member State (see Article 2(2)). Clearly, as far as terrorism is concerned, the Decision can be easily implemented as among Member States of the EU only because on the very same day the EU Council also adopted a legally binding Framework Decision on Combating Terrorism,[1] which in Article 1 contained a detailed definition of terrorist offences.[2]

1 Pursuant to Art. 11(1) of the Decision Member States of the European Union 'shall take the necessary measures to comply with this Framework Decision by 31 December 2002'.

2 Art. 2 of the Decision stipulates as follows: 'Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as (*sic*) defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
— seriously intimidating a population, or
— unduly compelling a Government or international organisation to perform or abstain from performing any act, or
— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences:
(a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of

It is common knowledge that interminable polemical arguments were exchanged between states in the 1970s through the 1990s over what should be meant by terrorism. The bone of contention was two-fold: could 'freedom fighters' engaged in national liberation movements be classified as terrorists? Should the working out of international rules on terrorism be made contingent upon delving into the root causes of this phenomenon?[3] Many states asserted that as long as no agreement was reached on these two contentious issues, no consent could evolve on the very notion of terrorism either.

As a consequence, *treaty rules* laying down a comprehensive definition have not yet been agreed upon. However, over the years, under the strong pressure of public opinion and also in order to come to grips with the spreading of terrorism everywhere, in fact widespread consensus on a generally acceptable definition of terrorism has evolved in the world community, so much so that the contention can be made — based on the arguments I shall set forth subsequently — that indeed a *customary rule* on the objective and subjective elements of the crime of international terrorism in time of peace has evolved. The requisite practice (*usus*) lies in, or results from, the converging adoption of national laws, the handing down of judgments by national courts, the passing of UN General Assembly resolutions, as well as the ratification of international conventions by a great number of states (such ratifications showing the attitude of states on the matter). In contrast, disagreement continues to exist on a possible *exception* to such definition: whether to exempt *in time of armed conflict* from the scope of the definition acts that, although objectively and subjectively falling within its purview, according to a number of states are nevertheless *legitimized* in law by their being performed by 'freedom fighters' engaged in liberation wars.

It would appear that generally speaking the question of investigating the historical, social and economic causes of terrorism has instead been put on

a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).'

3 On this issue see, for instance, § 9 of the UN GA Res. 40/61, adopted on 9 December 1985 or § 8 of Res. 42/159, adopted on 7 December 1987. See also the statement the delegate of Ghana made on 6 February 1986 in the Security Council ('. . . the international community, including the [Security] Council, must summon the necessary political will to delve into the reasons why the frustrations of dispossessed Palestinians are vented in this manner. A glib condemnation of terrorism alone, without a scientific and impartial study of its origins will not, we are afraid, eradicate the phenomenon'.) (S/PV.2655/Corr.1, 18 February 1986)

the backburner, although very recently the UN Secretary-General has again drawn attention to the need to 'address conditions conducive to exploitation by terrorists'.[4]

2. The Current International Legal Framework

A. Factors Pointing to a Generally Agreed Definition of International (or Transnational) Terrorism in Time of Peace

As emphasized above, many factors point to the formation of substantial consensus on a definition of terrorism in time of peace. First, the Conventions on terrorism adopted by the Arab League, the Organization of African Union (OAU) and the Conference of Islamic States, while providing in terms for the aforementioned exception, nevertheless lay down a definition that is to a large extent in line with that enshrined in other international instruments.[5] Secondly, both the 1999 UN Convention for the Suppression of the Financing of

4 See his Report to the General Assembly of 27 April 2006 (A/60/825), *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, at §§ 20–37.

5 Art. 1(2) of the Arab Convention for the Suppression of Terrorism, of 22 April 1998, defines terrorism as 'Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property, or to [sic] occupying to seizing them, or seeking to jeopardize a natural resources [sic].' (Text online: www.al-bab.com/arab/docs/league/terrorism98.htm; visited 30 August 2006.)
Art. 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism, of 1 July 1999, provides that '"Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorising people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.' (Text online: www.oic-un.org/26icfm/c.html; visited 26 July 2006.) Article 1(3) of the OAU Convention on the Prevention and Combating of Terrorism of 14 July 1999 provides that: '"Terrorist act" means:
(a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State.
(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement or any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).'

Terrorism[6] and various UN General Assembly resolutions contain a similar notion,[7] which is also shared in the Draft Comprehensive Convention on Terrorism that is still being negotiated.[8] Thirdly, most national laws,[9] as well as national case law, take the same approach.[10]

What are the elements of this definition on which there is general consent? They are as follows: broadly speaking, terrorism consists of (i) acts normally criminalized under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally (iii) are politically or ideologically motivated, i.e. are not based on the pursuit of private ends.

These are the rough elements of a generally accepted definition. Let us consider how they can be translated into a rigorous articulation within international law. Thereafter, it will be appropriate briefly to look at the contentious *exception*.

6 Art. 2(1)(b) provides that terrorism is 'Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.' So far 134 states are parties to the Convention.

7 Since 1994, the UN General Assembly has adopted resolutions including the following proposition: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.' See § 3 of the Declaration on Measures to Eliminate International Terrorism, annexed to Res. 49/10 adopted on 9 December 1994; § 2 of the subsequent resolutions 50/53 (11 December 1995), 51/110 (17 December 1996), 52/165 (15 December 1997), 53/108 (8 December 1998), 54/110 (9 December 1999), 55/158 (12 December 2000), 56/88 (12 December 2001), 57/27 (19 November 2002), 58/81 (9 December 2003), 69/46 (16 December 2004).

8 See Art. 2, in Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth Session (28 January–1 February 2002), A/57/37, Annex II (at 6).

9 For instance, see the US Iran and Libya Sanction Act of 1996 (Public Law 104-172, 5 August 1996); the US Antiterrorism and Effective Death Penalty Act of 1996; the UK Terrorism Act 2000, Section 1; Art. 83.01(1) of the Canadian Criminal Code (which defines terrorism as a criminal offence that is committed '(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada'. See also Art. 15 of the Italian law: Executive Decree (*decreto legge*) no. 144 of 27 July 2005, passed as Law no. 155 on 31 July 2005), which adds Art. 270 *sexies* to the provisions of the Italian Criminal Code.

10 See for instance the decision of the Supreme Court of Canada in *Suresh* (judgment of 11 January 2002, online at www.scc-csc.gc.ca; visited 5 October 2006), where the Court held that the definition of terrorism laid down in Art. 2(1)(b) of the UN Convention for the Suppression of Financing of Terrorism 'catches the essence of what the world understands by "terrorism"' (§ 98; see also § 93).

B. The Ingredients of International Terrorism as a Discrete International Crime in Time of Peace

1. The Objective Element

A first element of international terrorism (as distinguished from, i.e. not necessarily coinciding with terrorism under national legislation) relates to *conduct*. The terrorist act must lie in conduct that is *already criminalized* under any national body of criminal law: murder, mass killing, serious bodily harm, kidnapping, bombing, hijacking and so on. This conduct may, however, be in some exceptional instances, lawful per se: for instance, financing of an organization. It becomes criminal if the conduct has the requisite connection to terrorism, for example, if the organization to which money is provided or channelled, or on whose behalf it is collected, is terrorist in nature. In that case, the character of the organization makes the otherwise lawful action tainted with criminality.

Furthermore, the conduct must be *transnational* in nature, that is, not limited to the territory of one state with no foreign elements or links whatsoever (in which case it would exclusively fall under the domestic criminal system of that state). The transnational nature of international terrorism is pithily caught in Article 3 of the Convention for the Suppression of the Financing of Terrorism ('This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis . . . to exercise jurisdiction . . .').

As for the *victims* of criminal conduct, they may embrace both private individuals or the civilian population at large and also state officials including members of state enforcement agencies.

2. The Subjective Element

A second element characterizing terrorism concerns the *purpose* of the act. A number of international instruments and national laws provide that the objective pursued by terrorists may be *either* to spread terror among the population *or* to compel a government or an international organization to perform or abstain from performing an act.[11] Other instruments also envisage a third possible objective: to destabilize or destroy the structure of a country.[12]

11 See for instance § 3 of Security Council Res. 1566, adopted on 4 October 2004; Art. 83.01(1)(B) of the Canadian Criminal Code.

12 See, for instance, Art. 1(2) of the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism; Art. 1 of the EU Framework Decision on Combating Terrorism (which refers to the aim of 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization').

One can understand that, both for descriptive purposes and also in order to cover the whole range of possible criminal actions, these treaties, laws or other legal instruments enumerate a wide set of terrorist aims. In addition, expressly contemplating various alternative purposes pursued by terrorists may prove useful to prosecutors and other enforcement agencies when the demands of terrorist groups are not clear or are not made with regard to a specific terrorist attack; in these cases, in order to classify the conduct as terrorist, it may suffice to determine that at least the immediate aim of terrorists was to spread panic among the population. This, indeed, may greatly facilitate the action of prosecutors in applying national laws against terrorism. However, close scrutiny and legal logic demonstrate that, in fact, the *primary goal* of terrorists is always that of coercing a public (or private) institution to take a certain course of action. The spreading of deep fear or anxiety is only *a means* for compelling a government or another institution to do (or not to do) something; it is never an end in itself. Also the destabilization of the political structure of a state is a means of making the incumbent government take a certain course of action. To be sure, in some instances the terrorists' goal is not set forth in so many words either before or after the terrorist action. For instance, the 11 September attack on the Twin Towers and the Pentagon was not accompanied by demands of the terrorist organization that had planned the attack. Yet, even in these cases, the murder, bombing or kidnapping are not made for their own sake; it is instrumental in inducing a public or private authority to do or refrain from doing something. In the 11 September case, the attack was clearly intended to prompt the US government to change its overall policy in the Middle East, in particular, by pulling out its military forces there and reversing its policy vis-à-vis Israel.

Hence, it can be said that ultimately terrorism always pursues one primary and essential purpose, that of coercing a public authority (a government or an international organization) or a transnational private organization (for instance, a multinational corporation) to take (or refrain from taking) a specific action or a certain policy. This is the hallmark of any terrorist action.

The purpose in question can be attained through *two possible modalities*. First, by spreading fear or anxiety among civilians (for instance, by blowing up a theatre, kidnapping civilians or planting a bomb in a train, in a bus or in a public place such as a school, a museum or a bank). Clearly, the aim of terrorists is to induce the scared population to put pressure on the government authorities. Secondly, the purpose may be achieved by engaging in criminal conduct against a public institution (e.g. blowing up, or threatening to blow up, the premises of Parliament, the Ministry of Defence or a foreign embassy) or else against a leading personality of a public or private authority (for instance, the head of government, a foreign ambassador, the president of a multinational corporation and so on).

Another element unique to terrorism regards *motive*. The criminal conduct must not be taken for a personal end (for instance, gain, revenge or personal hatred). It must be based on political, ideological or religious motivations. Motive is important because it serves to differentiate terrorism as a

manifestation of *collective criminality* from criminal offences (murder, kidnapping and so on) that are instead indicative of *individual criminality*. Terrorist acts are normally performed by groups or organizations, or by individuals acting on their behalf or somehow linked to them. A terrorist act, for instance the blowing up of a disco, may surely be performed by a single individual not belonging to any group or organization. However, that act is terrorist if the agent was moved by a collective set of ideas or tenets (a political platform, an ideology or a body of religious principles), thereby subjectively identifying himself with a group or organization intent on taking similar actions. It is this factor that transforms the murderous action of an individual into a terrorist act.

Let us now translate the above into rigorous legal language. It can be said that for terrorism to materialize two subjective elements (*mens rea*) are required. First, the subjective element (*intent*) proper to any underlying criminal offence: the requisite psychological element of murder, wounding, kidnapping, hijacking and so on (*dolus generalis*). Second, the *specific intent* of compelling a public or a prominent private authority to take, or refrain from taking, an action (*dolus specialis*).

Motive in criminal law is normally immaterial ('an actor's ultimate reason for acting may not bear on his liability'[13]), although it sometimes is taken into account under some specific conditions in a few national legal systems.[14] Motive exceptionally becomes relevant here: as noted earlier, criminal conduct must be inspired by non-personal inducements. Hence, if it is proved that a criminal action (for instance, blowing up a building) has been motivated by non-ideological or non-political or non-religious considerations, the act can no longer be defined as international terrorism, although it may of course fall under a broader notion of terrorism upheld in the state where the act has been accomplished. This, for instance, holds true for cases similar to an American criminal act that lacks, however, the transnational element proper to international terrorism: Timothy McVeigh's blowing up in 1995 of a public building in Oklahoma City, with the consequent death of 168 persons. Reportedly that action was carried out in revenge for the killing, by the FBI,

13 G.P. Fletcher, *Rethinking Criminal Law* (reprint, Oxford: Oxford University Press, 2000), at 452.

14 For instance, according to the penal provisions applying in Italy before 1981, voluntary murder of either a female spouse, daughter or sister (guilty of having unlawful sexual intercourse with another person) or of their sexual partner, perpetrated in an outburst of anger caused by the offence to the perpetrator's honour or to the 'family honour', was punished with a much lighter penalty (3–7 years' imprisonment) than any ordinary murder (not less than 20 years' imprisonment). See Art. 587 of the 1930 Italian Criminal Code, repealed by the Italian Law no. 442 of 5 August 1981.

At present, political motives are taken into account for the purpose of defining a crime as political and consequently attributing jurisdiction over such crime to Italian courts. Under Art. 8 of the Italian Criminal Code a national or a foreigner committing a crime abroad may be brought to trial before an Italian court if, among other things, the crime was 'determined, in whole or in part, by political motives'.

of members of a religious sect at Waco, Texas. Similarly, if bandits break into a bank, kill some clients and take others hostage for the purpose of escaping unharmed with the loot, this action cannot be classified as terrorism, although the killing and hostage-taking are also intended to spark terror among civilians and compel the authorities to do or not to do something. Here the essential element of ideological or political motive is lacking. Consequently, the offence is one of armed robbery aggravated by murder and hostage-taking, not terrorism. Let us take another example, namely the episode at the Los Angeles International airport (where on 4 July 2002 an Egyptian fired at and killed some tourists who were about to take a plane bound for Israel, and was eventually shot down by enforcement officers). To determine whether this was a terrorist act or simply murder, one ought to inquire into the possible motives of the killer; in that case, these motives could have been inferred from his life, his possible statements, his criminal record, any links he might have had with terrorist groups and so on.

Let me add that of course, motive by itself may not suffice for the classification of a criminal act as terrorist. To clarify this point I shall give an example (although it again relates to terrorist groups that were not involved in transnational terrorism, it may nevertheless be useful for illustration purposes). In the 1970s, some terrorist groups in Italy and Germany (respectively the Red Brigades and the Rote Armee Fraktion) carried out armed robberies against banks to replenish the organization's funds. Here the motive of the criminal act was not personal (to acquire a private gain), but collective (to boost the organization's cash). Yet, the action was not terrorist in nature, but an ordinary criminal offence, because another crucial element proper to terrorism was lacking (the purpose of compelling through criminal conduct an authority to take a certain stand). This conclusion does not exclude however that individual national criminal systems may consider that, since the aforementioned acts were performed to support a terrorist organization, the crimes involved must be characterized as terrorist at least for such purposes as jurisdiction, the use of special investigative methods and so on.

The legal relevance of motive for determining whether one is faced with a terrorist offence does undoubtedly pose serious problems for any prosecutorial agency or criminal court. It may admittedly prove hard to find the reasons that inspired the agent, and to disentangle the specific basis for his action from the intricacies of his possible motivations. In particular, it may be laborious to establish whether he acted out of political, ideological or religious motivations. In addition to this factual difficulty, it may also be difficult to decide in a particular instance whether a set of ideas or aspirations make up a political credo, an ideology or a religion. One easy way out could consist of ascertaining whether the agent only acted out of strictly personal reasons, in which case one could rule out that his acts be termed terrorist. Admittedly, the question is complicated and may give rise to much controversy. The fact remains, however, that the nature of motive is taken into account by international rules as one of the discriminating factors in this matter.

C. Specific Sub-categories of International Terrorism as a Discrete International Crime

It is common knowledge that at the time when ideological clashes mired the international discussion on terrorism, preventing the achievement of general consensus on the matter, in order to break the deadlock states opted for the passing of international conventions on specific categories of conduct. They thus agreed upon a string of conventions through which they imposed on contracting parties the obligation to make punishable and to prosecute in their domestic legal orders certain classes of actions. These actions were defined in each convention by indicating the principal outward elements of the offence. The conventions refrained from terming the conduct terrorist and did not point to the purpose of the conduct or motive of the perpetrators either. Instead, they confined themselves to setting out the *objective elements* of prohibited conduct.

This applies to (i) acts that, whether or not they are offences under national law, may or do jeopardize the safety of aircraft, or of persons or property therein or which jeopardize good order and discipline aboard;[15] (ii) unlawful taking control, by force or threat thereof or by any other form of intimidation, of an aircraft in flight;[16] (iii) acts of violence against persons on board an aircraft in flight or against the aircraft;[17] (iv) murder and other violent acts against internationally protected persons or their official premises, private accommodation or means of transport;[18] (v) unlawful possession, use, transfer or theft of nuclear material as well as threat to use it;[19] (vi) taking control of a ship by force or threat thereof or any other form of intimidation or acts of violence against persons aboard or against the ship;[20] (vii) taking control over a fixed platform by force or threat thereof or any other form of intimidation, or acts of violence against persons on board or against the platform;[21] (viii) acts of violence against persons at an airport serving international civil aviation or against the facilities of the airport;[22] (ix) the manufacture, or the movement into or out of a territory, of unmarked plastic explosives;[23] (x) the delivery,

15 Art. 1(b) of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

16 Art. 1(a) of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.

17 Art. 1(1) of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

18 Art. 2(1) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.

19 Art. 7 of the 1979 Vienna Convention on the Physical Protection of Nuclear Material.

20 Art. 3(1) of the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

21 Art. 2 of the 1988 Rome Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

22 Art. II of the 1988 Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

23 Arts II and III of the 1991 Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection.

placing, discharging or detonation of explosive or other lethal device in a place of public use, a state or government facility, a public transportation system or an infrastructure facility.[24]

Other Conventions, instead, besides setting out the objective elements of criminal conduct, also place emphasis on the *purpose* pursued by the perpetrators. This holds true for the 1979 Montreal Convention against the Taking of Hostages, as well as the 1999 Convention for the Suppression of the Financing of Terrorism. Both Conventions characterize the terrorist actions they deal with as intended to compel a state or an international organization to do or to abstain from doing any act; in addition the latter Convention contemplates the purpose of intimidating a population.[25]

It is warranted to contend that for the whole range of aforementioned conduct the hallmarks of international terrorism as a discrete crime in time of peace, outlined above, were considered *implicit* in the banning of such conduct. Indeed, the primary purpose of those conventions was to put a stop to terrorist conduct belonging to each category of action banned by the conventions and increasingly ubiquitous when the conventions were drafted.

Nevertheless, as the classes of actions prohibited by the aforementioned first 10 conventions are very broad, one cannot exclude from the scope of such conventions conduct that, although clearly banned by them, does not fall under the category of terrorism for lack of the requisite elements. For instance, the hijacking of a plane by a robber that aims at obtaining a huge sum of money as a ransom or the release of some fellow criminals in exchange for saving the passengers, plainly falls under the 1970 Hague Convention, without however constituting an act of international terrorism proper.

D. International Terrorism in Armed Conflict: a Sub-category of War Crimes

At present, both international humanitarian law and international criminal law already cover acts of terrorism performed during an international or internal armed conflict.

24 Art. 2(1) of the 1998 International Convention for the Suppression of Terrorist Bombings.

25 Art. 1(1) of the Convention on the Taking of Hostages provides that 'Any person who seizes or detains or threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages ("hostage-taking") within the meaning of this Convention.'

Art. 2(1)(b) of the Convention on the Financing of Terrorism provides that a person commits an offence within the meaning of the Convention if that person provides or collects funds to carry out among other things any act 'intended to cause death or serious bodily injury to a civilian, to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.

One question with which we should deal at the outset is that of so-called *state terrorism*. It is claimed that in time of war attacks carried out by a belligerent against the enemy civilian population may amount to state terrorism. This is primarily a political or ideological catchword without legal value (except when referring to possible instances of state responsibility for serious violations of international law, as we shall soon see). In legal terms those attacks, if they are deliberate and only target civilians, amount to a grave breach of international humanitarian law; if they target instead the enemy combatant but cause incidental damage to civilians, they may be regarded as unlawful if the damage to civilians is disproportionate.[26] As we shall soon see, terrorist acts performed by states in time of war can only occur when a belligerent engages in unlawful attacks on civilians intended to spread terror; their planners or perpetrators may consequently be punished for war crimes of terrorism.

Let us now move to the crucial question of terrorist acts performed by combatants (be they members of the armed forces of a state, or rebels or guerrillas, or members of the armed forces of a non-state entity).

International rules indisputably ban terrorism in time of armed conflict. Article 33(1) of the Fourth Geneva Convention of 1949 prohibits 'all measures . . . of terrorism' against civilians. Although the provision was primarily calculated to forestall terrorism by Occupying Powers or, more generally, by belligerents,[27] terrorist acts are also prohibited if perpetrated by civilians or organized groups in occupied territories or in the territory of a party to the conflict. Thus Article 33(1) is a provision of general purport, applicable in any situation (whether terrorism is resorted to in the territory of one of the belligerents, in the combat area or in an occupied territory).

A similar provision is contained in the Second Additional Protocol of 1977. Article 4(2)(d) prohibits 'acts of terrorism' against 'all persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted' [Article 4(1)].

The two Protocols also spell out the general prohibition of terrorism. Article 51(2) of the First Protocol prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. Article 13(2) of the Second Protocol repeats word for word this prohibition.

26 See for instance: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), §§ 5.32–5.33.5; J.-M. Hanckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Cambridge: Cambridge University Press, 2005), at 46–76; A. Cassese, *International Law* (2nd edn., Oxford: Oxford University Press, 2005), at 415–423.

27 According to the ICRC Commentary, Art. 33(1) was aimed primarily aimed at forestalling a common practice, that of belligerents resorting to 'intimidatory measures to terrorise the population' with a view to preventing hostile acts (see ICRC, *Commentary, Fourth Geneva Convention* (Geneva, ICRC, 1958), at 225–226).

It can be safely contended that all these provisions reflect, or at least have turned into customary law.[28]

Thus, international humanitarian law proscribes terrorism both in international and internal armed conflicts. The question, however, arises of whether, in addition to addressing its prohibition to states, international customary and treaty law also *criminalize* terrorism in armed conflict. An International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber convincingly proved in 2003 in *Galić* that already in 1992 (when the facts at issue in that case occurred) a serious violation of the prohibition against terrorizing the civilian population entailed, at least under treaty law, the individual criminal responsibility of the person breaching the rule.[29]

Contrary to this holding, one could object that the Statute of the International Criminal Court (ICC), which carefully and extensively lists in Article 8 the various classes of war crimes, fails to mention resort to terror against civilians. This argument would not, however, be compelling. Indeed, the various provisions of the ICC Statute are not intended to codify existing customary rules; this is borne out by Article 10 of the Statute ('Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'), as well as by the fact that some specific provisions of the Statute concerning the crimes over which the Court has jurisdiction go beyond customary or previous treaty rules, whereas others only partially take account of customary law.[30]

Support for the criminalization of terrorist acts in the course of armed conflict can be found in various normative developments. The relevant provisions of the Statutes of the ICTR and the Special Court for Sierra Leone, in granting these two criminal tribunals jurisdiction over violations of international

28 In its Decision on Interlocutory Appeal issued on 22 November 2002, the ICTY Appeals Chamber in *Strugar and others* (IT-01-42-AR72) held that 'the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol 1 and Article 13 of Additional Protocol II are principles of customary international law' (§ 10).
It is notable that in 1977, at the close of the Geneva Diplomatic Conference on the Reaffirmation of International Humanitarian Law, the United Kingdom stated that Art. 51(2) was 'a valuable reaffirmation of existing customary rules of international law designed to protect civilians (CDDH, *Official records*, vol. VI, at 164, § 119). The 2004 British *Manual of the Law of Armed Conflict* referring to the prohibition of 'terror attacks', seems clearly based on the assumption that this rule is general in nature (see UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, *supra* note 26, § 5.21.1).
The important research work undertaken by the ICRC on customary law also concludes that a customary rule has evolved on this matter (see Henckaerts and Doswald-Beck, *supra* note 26, at 8).

29 ICTY, Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, §§ 113–129. It would seem, however, that the Trial Chamber's finding that the prohibition of terror in armed conflict was criminalized was essentially limited to the case at issue and to the accused standing trial. In addition, the Trial Chamber left open the question of the possible criminalization of terror under customary international law (see § 138).

30 See A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 59–62, 93–94, 107–108.

rules of humanitarian law, include 'acts of terrorism'.[31] This proves that the drafters of those Statutes considered that such acts may amount to war crimes. Also the 1996 ILC Draft Code of Crimes against Peace and Security of Mankind takes the view that 'acts of terrorism' committed in internal conflicts constitute war crimes. Furthermore, it seems significant that Article 2(1)(b) of the 1999 Convention of the Financing of Terrorism explicitly refers to 'a situation of armed conflict', thus implying that terrorist acts can be committed in such a 'situation'. Of course the Convention is only binding on the contracting parties. Nevertheless, so far the Convention has been ratified or acceded to by 153 states (only three of which have entered reservation to the relevant treaty stipulation);[32] the provision at issue is, therefore, indicative of the generally held view that terrorism is also criminalized in time of armed conflict.

In sum, attacks on civilians and other 'protected persons' in the course of an armed conflict, aiming at spreading terror, may amount to war crimes (although not to grave breaches of the Geneva Conventions,[33] with the consequence that the Geneva provisions on mandatory universal jurisdiction over such crimes do not apply, such universal jurisdiction being simply authorized by the Geneva Conventions[34]).

What are the *constitutive elements* of terrorism as a war crime?

It would seem that in humanitarian law terrorism as a war crime has a narrower scope than the notion contemplated by the whole body of general international law of peace. First of all, the *prohibited conduct* arguably consists of any *violent action* or *threat* of such action *against* civilians or other persons not taking a direct part in armed hostilities (wounded, shipwrecked, prisoners of war). It can be inferred both from the whole spirit and purpose of international humanitarian law and also from the wording of Articles 4(1) and (2)(d) of the Second Additional Protocol (a rule that, it is submitted, codifies a general principle applicable to any armed conflict)[35] that attacks on combatants not

31 Art. 4(d) of the 1994 Statute of the ICTR provides that the Tribunal has jurisdiction over violations of common Art. 3 of the Geneva Conventions and the Second Additional Protocol and explicitly provides for jurisdiction over 'acts of terrorism'. Article 3(d) of the 2000 Statute of the Special Court for Sierra Leone grants the Court jurisdiction over 'acts of terrorism'.

32 See above, 2.A.

33 The relevant provisions of the 1949 Geneva Conventions (Arts 50/51/130/147) do not include 'acts or measures of terrorism' among the offences amounting to grave breaches.

34 As rightly held, with regard to the war crime of torture in armed conflict, by The Hague District Court in the *Afghani* cases (judgments of 9 February 2006). The Court rightly emphasized the importance of the common provision of the Conventions (Arts 49(3); 50(3); 129(3); 146(3)) stipulating that 'Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.'

35 This provision is simply an expansion and elaboration of common Art. 3 of the four Geneva Conventions of 1949, which the International Court of Justice stated in 1986 in *Nicaragua (merits)* constitutes 'a minimum yardstick' applicable to any armed conflict (at § 218). For the state practice and the practice of international organizations that can corroborate the proposition set out above in the text, see the wealth of material collected in Henckaerts and Doswald-Beck, *supra* note 26, at 306–83. See also the *Report of the International Commission of Inquiry on Darfur*, UN Doc. S/2005/60 (25 January 2005), at §§ 154–167.

being actively engaged in armed hostilities can also amount to terrorism: for instance, attacks (or threats of attack) on officers attending a mass or praying in a mosque, a church or a synagogue, or military personnel taking their children to the movie. This proposition is borne out by the aforementioned Article 2(1)(b) of the Convention for the Suppression of the Financing of Terrorism, which includes among the possible victims of terrorist acts in time of armed conflict 'any other persons [than civilians] not taking an active part in the hostilities'.

The violent action or threat thereof can also be directed against a civilian object, even if it is empty (for instance, a square, a private building as a theatre), as long as the goal pursued in taking such an action is that of terrorizing the population. As rightly noted by the 2004 British Manual of the Law of Armed Conflict, the rule prohibiting terror attacks 'would apply, for instance, to car bombs installed in busy shopping streets, even if no civilians are killed or injured by them, their object being to create panic among the population'.[36] As for threats, again the British Manual rightly pointed out that 'threats of violence would include, for example, threat to annihilate the enemy's civilian population'.[37] In contrast, the prohibition on terror does not cover terror caused as a by-product of attacks on military objectives 'or as a result of genuine warning of impending attacks on such objectives'.[38]

We can thus move to the *subjective element* of the action or threat of action. Articles 51(2) of the First Protocol and 13(2) of the Second Protocol, which, as I stated earlier, can be taken to spell out in many respects the terse content of other provisions on humanitarian law on terrorism, make it clear that terrorist acts in armed conflict are acts calculated to 'spread terror' among the civilian population or other protected persons. Here, then, the purpose of coercing a public (or private) authority to take a certain course of action disappears or, at least, wanes. The only conspicuous purpose appears to be that of terrorizing the enemy. In other words, in international humanitarian law, terrorist acts are acts performed within the framework of the general goal of defeating the enemy. Their ultimate purpose is to contribute to the war effort. Instead of simply attacking civilians, a belligerent carries out actions (for instance, random killing of persons passing through a bridge, or haphazard blowing up of civilian installations, or systematic shelling of an empty place in a populated area) designed to beget profound insecurity and anxiety in the population (and consequently in the enemy belligerent).

36 *The Manual of the Law of Armed Conflict*, *supra* note 26, at §5.21.1.

37 *Ibid.*

38 See M. Bothe, K.-J. Partsch and W.A. Solf, *New Rules for the Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague, Boston, London: M. Nijhoff Publishers, 1982), at 301; *The Manual of the Law of Armed Conflict*, *supra* note 26, at § 5.21.1.

It is thus clear that also in time of armed conflict international criminal law requires *intent*, with the consequence that, as rightly emphasized in *Galić*, simple *dolus eventualis* or recklessness must be ruled out.[39]

In addition, *motive* becomes immaterial in terrorist acts as war crimes. In time of armed conflict, actions designed to spread terror in the enemy are always 'public' in nature and any personal motives (for instance, desire for revenge, racial or ethnic hatred, anger and so on) of the officer or the leader of an armed group ordering such acts does not acquire any legal relevance.

In sum, during an armed conflict, belligerent acts of terrorism, being prohibited and criminalized, are covered both by international *humanitarian* law and international *criminal* law. They may also be covered by rules on terrorism as a discrete crime to the extent that a state fighting terrorism is bound by an international convention on terrorism that addresses terrorism both in time of peace and in time of war. In this event, there would be a *twofold legal characterization* of the same conduct or the *combined simultaneous application of two different bodies of law* to the same conduct. A case in point is the Convention on the Financing of Terrorism. If a state is party to such convention, it may apply its provisions to the financing of terrorist acts performed or planned in a foreign country where an armed conflict is underway. It would consequently punish the financing of violent acts abroad directed against persons not taking an active part in armed hostilities, whereas, it would not consider unlawful the financing of groups solely aimed at attacking enemy armed forces in the foreign country concerned.

E. International Terrorism as a Sub-category of Crimes against Humanity

Can terrorist acts amount to crimes against humanity? Yes, subject to a number of conditions.

First of all, it can be inferred from the relevant international rules and case law on crimes against humanity that terrorist acts may fall under this category of crimes, *whether they are perpetrated in time of war or peace.* Furthermore, they must cause (or consist of) the following *conduct:* (i) murder, or (ii) great suffering, or (iii) serious injury to body or to mental or physical health, or else take the form of (iv) torture, (v) rape or even (vi) enforced disappearance of persons (namely, 'arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the

39 The Trial Chamber noted that 'the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts — or, in other words, that he was aware of the possibility that terror would result — but that that was the result which he specifically intended. The crime of terror is a specific-intent crime'(§ 136).

intention of removing them from the protection of the law for a prolonged period of time'[40]).

Terrorist acts must also meet the basic requirements of the category of crimes under discussion. Consequently (i) terrorist action must be part of a widespread or systematic attack against a civilian population; (ii) the perpetrator, in addition to *mens rea* required for the underlying offence (murder, torture, etc.) must also have *knowledge* that his action is part of a widespread or systematic attack.

It would seem that, as in the case of terrorism as a discrete crime, also when terrorist acts are such as to amount to crimes against humanity, the *victims* may embrace both civilians and state officials including members of armed forces. Admittedly, the Statutes of international criminal tribunals, in granting jurisdiction to these tribunals over crimes against humanity, stipulate that the victims of such crimes must be civilian. However, this limitation cannot be found in customary international law, which to my mind provides instead that crimes against humanity may also be perpetrated against military personnel and members of other enforcement agencies.[41] Generally speaking, it would be contrary to the whole spirit and logic of modern international human rights law and humanitarian law to limit to civilians (especially in time of peace) the international protection of individuals against horrendous and large-scale atrocities. This, I believe, also holds true for terrorism as a crime against humanity. For instance, it would not make sense to suggest that the 11 September 2001 attacks against the Twin Towers in New York, housing almost exclusively civilians, amounted to a crime against humanity, whereas the crashing of a civilian aircraft into the Pentagon in Washington D.C. constituted a different category of crime because the victims were not civilians but primarily state officials (mostly even military personnel) at work.

In the case of terrorist acts, what matters from the point of view of law is not so much the sheltering of civilians from becoming the target of grave crimes. What is crucial is to avoid (and punish) criminal action, whomever its victims, taken to compel a public or private entity to do or not to do something. In a way, the victims play almost a secondary role in the criminalization of conduct. What clearly emerges from current international law is that the widespread or systematic attack required as the necessary *context* of a crime against humanity must be one that targets the civilian population. This is only logical, for a widespread or systematic attack against members of armed forces in time of *peace* would simply constitute part and parcel of

40 This is the definition of 'enforced disappearance of persons' set out in Art. 7(2)(i) ICCSt., which can be taken to be declaratory of existing rule of customary international law banning and criminalizing that offence. See also the International Convention for the Protection of All Persons from Enforced Disappearances, recently adopted by the UN Human Rights Council. It applies in all circumstances (see http://daccessdds.un.org/doc/UNDOC/LTD/G06/125/78/PDF/G0612578.pdf?OpenElement; visited 5 October 2006).

41 See Cassese, *supra* note 30, at 85–91.

an armed conflict (internal if the attackers are within the territory, international if they come from outside); in time of *war*, depending upon the circumstances that attack could, or could not, amount to a string of large-scale breaches of humanitarian law. If, instead, a widespread or systematic attack is undertaken against the civilian population, for such atrocities to amount to a crime against humanity, one set of atrocities (for instance, torture, rape or other inhumane acts of similar gravity) may also be directed against military personnel.

Let me give some examples. If in time of peace a group of terrorists, in addition to conducting attacks on civilians, engages in atrocities against military or police personnel such as bombing barracks, blowing up police stations, destroying a major building of the defence ministry, or else kidnaps servicemen and subjects them to torture or rape, these acts (murder, imprisonment, torture, rape and so on) should be classified as crimes against humanity. Similarly, if in time of armed conflict an armed group or organization (or even a state), besides indiscriminately and violently attacking on a large scale civilians and other persons not taking an active part in hostilities, captures, rapes or tortures enemy combatants for the purpose of spreading terror among the enemy belligerent or to obtain from him the release of imprisoned members of the group, organization (or state), these acts, which normally would be classified as war crimes, may acquire the magnitude of a crime against humanity.

It is clear from what I have just pointed out that, in addition to the aforementioned objective elements, it is also necessary for the author of terrorist acts to entertain the *specific intent* required for terrorism as a discrete crime, namely, the purpose of compelling a public or private authority to take, or refrain from taking, a certain course of action, a purpose that may be achieved by either generating fear and anxiety among the public or by other criminal actions (see above).

In sum, terrorism as a crime against humanity substantially constitutes an *aggravated form* of terrorism as a discrete crime.

3. The Current Controversy over Acts of Freedom Fighters in Armed Conflict

A. The Principal Bone of Contention

So far I have set out what I consider to be the international legal regulation of the various categories of terrorism: terrorism as a discrete crime and as a subcategory of war crimes or of crimes against humanity. I must now tackle the major political and legal issue currently dividing the international community: whether 'freedom fighters' involved in armed conflict against a foreign belligerent, a national authority allegedly oppressing them or an occupying power may be exempt from criminal responsibility when they engage in acts

that would normally (under the definitions suggested above) be termed terrorist.

For many years, this exception has been propounded in rather ambiguous terms. The Arab, OAU and Islamic Conventions generically refer to struggles for self-determination and against foreign occupation and aggression.[42] The scope and purport of this exception are not clear. In particular, it is not clear whether these Conventions intend to refer to the whole set of armed actions undertaken by liberation movements, and thus exempt them from the label of terrorism, or whether instead they more specifically aim at removing the characterization of terrorism from those acts performed by members of liberation movements that are directed against civilians and calculated to spread terror or fear. It would seem that no state practice or official statements are available that cast light on this issue.

B. The Three Different Attitudes Emerging among States

Be that as it may, recently the stand of many Arab or Islamic countries seems to have changed.[43] *Three different positions* of states and other authorities may be identified, positions that do not necessarily exclude one another, and in some instances overlap.

The first is that of states stubbornly insisting on any act by peoples or organizations engaged in wars of self-determination being *exempt from the*

42 The 1998 Arab Convention for the Suppression of Terrorism provides in Art. 2(a) that 'All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.'
Art. 3(1) of the 1999 OAU Convention on the Prevention and Combating of Terrorism provides that 'Notwithstanding the provisions of Article 1 [defining terrorism] the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, aggression and domination by foreign forces shall not be considered as terrorist acts.'
Art. 2(a) of the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism stipulates that 'Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.'
The same notions are restated in other documents. See for instance the Kuala Lumpur Declaration on International terrorism adopted on 1–3 April 2002 at the Extraordinary session of the Islamic Conference of Foreign Ministers on Terrorism (§§ 8–11; and see also § 3 of the Plan of Action adopted by the same Conference; online: www.oic-oci.org/English/fm/11.extraordinary/declaration.htm; visited 5 October 2006). See also the Final Document of the Thirteenth Conference of Heads of State or Government of the Non-Aligned Countries (Kuala Lumpur, 20–25 February 2003), §§ 106–108 and 115 (in UN Doc. A/57/759 or S/2003/332). See also the Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa (Algiers, 13-14 October 2004), at preambular paragraph 3.

43 See in this special issue the contribution by M. Hmoud.

label of terrorism (even when they engage in attacks against civilians). These states, however, *do not clarify what law would govern such acts* or whether, and more simply, these acts should be held to be *authorized* under international law. This stand was taken, for instance, by Pakistan in 2002 when acceding to the 1997 Convention for the Suppression of Terrorist Bombing. The Convention excludes from its scope activities of armed forces, including freedom fighters, in armed conflict, keeping such activities subject to the legal regulation of international humanitarian law. Pakistan entered a reservation[44] that can be held to be at least ambiguous. A very similar position is taken by other states, which purport to exclude the application of *anti-terrorist conventions* to armed conflict, without, however, clarifying whether the use of force by freedom fighters against civilians in such conflicts must be covered by international humanitarian law. This stand was taken by Egypt, Jordan and Syria in the reservation they made in 2003–2005 when ratifying, or acceding to, the Convention for the Suppression of the Financing of Terrorism.[45]

The second position is that of states or authorities which hold that, while any act performed by freedom fighters in wars of national liberation is

44 That Convention stipulates in Art. 19(2) that 'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.'
In 2002 Pakistan, in acceding to the Convention, made the following reservation: 'The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggles, for the realization of the right to self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969, which provides that an agreement or treaty concluded in conflict with an existing *jus cogens* or preemptory norm of international law is void, and the right to self-determination is universally recognized as a *jus cogens*' (www.coe.int/t/E/Legal.affairs/Legal.co-operation/Public.international.law/Texts.&.Documents/2003/CAHDI%20.2003.%202E.pdfI; visited 5 October 2006). This reservation was rejected by many States Parties as inconsistent with the object and purpose of the Convention. These states declared that they nevertheless did not consider their objection as preventing the entry into force of the Convention between themselves and Pakistan (see *ibid.*).

45 Art. 2(1)(b) provides that terrorist acts are, in addition to those prohibited by some specific conventions on terrorism, 'Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.'
Egypt, Jordan and Syria made a reservation to the effect that they did not consider 'acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of Article 2(1)(b)'. Many other states objected, considering the reservation contrary to the object and purpose of the Convention, but nevertheless held that their objection did not preclude the entry into force of the Convention between the objecting and reserving state (see www.untreaty.un.org/ENGLISH/bible/englishinternet bible/partI/chapterXVIII/treaty1; visited 5 October 2006).

not covered at all by the body of international law on terrorism, it remains nevertheless *governed by the international humanitarian law of armed conflict*. It would seem that this view was implicitly taken by the Secretary-General of the Arab League, Mr Amre Moussa. On at least two occasions, he clearly asserted that the legitimacy of the Palestinian struggle for self-determination did not imply that innocent civilians (be they Palestinian or Israeli) might be attacked.[46] By this he clearly meant to say that Palestinians legitimately fighting in the occupied territories against the foreign Occupant were not allowed by international law deliberately to attack civilians. Similarly, the Member States of the Islamic Conference participating in the UN negotiations for the elaboration of a Comprehensive Convention on Terrorism have proposed a draft provision encapsulating the famous exception to the notion of terrorism. However, this time the proposal spells out the hitherto ambiguous formula used by Arab and Islamic countries.[47] It is now specified that actions undertaken in the course of an armed conflict 'including in situations of foreign occupation' are not covered by the Convention, hence may not be classified as

46 See the interview given by the Secretary-General on 30 July 2002 in French [online at: www.arableagueonline.org/arableague/english/details.en.jsp?art.id=1262&leve; visited 5 October 2006: '*La situation au Moyen-Orient, ou entre Israël et la Palestine, ce n'est pas le terrorisme face à une campagne de lutte contre le terrorisme. C'est un cas d'occupation militaire étrangère et de résistance à l'occupation. Tant qu'il y aura occupation, il y aura résistance. Cela dit, je ne défends ni ne soutiens l'implication de civils innocents israéliens et palestiniens dans le conflit*' (at 1); '*il s'agit de l'occupation militaire d'un territoire étranger: cela ne justifie pas le terrorisme, mais cela justifie la résistance. Lorsque les Israéliens affirment que tuer un soldat israélien dans les Territoire occupés, c'est du terrorisme, c'est un non-sens. Si l'on suit cette logique, alors toute la résistance française était un mouvement terroriste*' (at 3)]. See also the speech made by Mr Moussa at the 2004 Ambrosetti Conference: '. . .we DO condemn any action, any crime that results in killing innocent people, children or women or men, be that in Israel or in Egypt, or in Algeria, or in Palestine, or in Russia, or in Colombia or in the United States or in Spain'. (*ibid.*, at 1)

47 See the text of Art. 18 proposed by the Member States of the Organization of the Islamic Conference: 'Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
1. The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
2. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law, are not governed by this Convention.
3. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.' This text is reproduced in the UN Doc. A/57/37 (2002), at 17.
The provision proposed by the Coordinator corresponding to §1 speaks of 'the activities of armed forces during an armed conflict'. It would seem that the expression 'armed forces' must be taken to cover all the combatants of any party to the conflict, that is, not only the armed forces of states, but also the organized armed groups of rebels or insurgents or non-state groups or organizations. This view is also taken by the Milan Court of Assize in its judgment of 9 May 2005 in *Bouyahia Hamadi Ben Abdlaziz and others* (transcript, on file with the author, at 26).

'terrorist acts'. Nevertheless — and here comes the novelty — it is now added that those actions remain covered by other rules of international law (in particular, humanitarian law). It logically follows that, if such actions are contrary to those rules, their authors may be prosecuted under other relevant rules of international law. Translated into 'contemporary' terms, this means that, for instance, Palestinians' deliberate attacks on Israeli civilians in the West Bank (occupied territory), while they could not be termed as terrorist acts, would amount to war crimes, in particular to 'crimes the primary purpose of which is to spread terror among the civilian population'; their perpetrators would be liable to be punished under national and international law for such crimes. If this is so, it becomes clear that now the intent of Islamic states is simply to remove the label of 'terrorism' from any action of 'freedom fighters' contrary to international law. The fact remains, however, that even those states now concede — or, at least, it would seem so — that the authors of those actions may be prosecuted and punished for their criminal conduct. The diplomatic contention then boils down to an *essentially ideological dispute* over how to further term an act that is undisputedly criminal: as a *terrorist* act or as a *war crime* (intended to spread terror)? This difference in ideology and social psychology is not, however, the end of the matter. For, classifying an act as terrorist may trigger the use by the relevant national police of a set of investigative powers normally not authorized for any ordinary crime or for any war crime. It follows that, if agreement emerges on assigning acts performed by freedom fighters in armed conflict to the regulation of international humanitarian law alone, the whole range of investigative powers and consequent measures accruing to enforcement agencies may no longer be applied with regard to them.

Be that as it may, it bears stressing that a trend towards removing actions undertaken in armed conflict from the ambit of the legal regulation of terrorism and leaving such actions under the legal commands of humanitarian law can also be seen in Western countries. This is, for instance, apparent in both the Framework Decision of the EU on terrorism[48] and in a text supported by the Western group for inclusion in the Comprehensive Convention on Terrorism.[49]

48 §11 of the preamble of this Decision states that 'Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.'

49 Art. 18(2) of the draft proposed by the Coordinator of the UN Ad Hoc Committee established by GA Res. 51/210 (1996), to a large extent inspired by Western countries, stipulates that 'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.' (see UN Doc. A/57/37 (2002), at 17).
To my mind the expression 'armed forces' used in this provision should be construed liberally, as referring to all those groups of combatants that fight for each of the parties to the conflict. It, thus, also includes armed groups of rebels or organized groups fighting on behalf of a non-state entity opposing belligerent occupation.

A third, middle of the road position, has also emerged, which combines the application of international rules on terrorism with international humanitarian law. This view is enshrined in the UN Convention for the Suppression of the Financing of Terrorism[50] and is shared by 150 out of the 153 current parties to the Convention. The same view is laid down in Canadian legislation on terrorism[51] and has also been put forward by some Italian courts,[52] as well as the Israeli Foreign Minister.[53] It would seem plausible to contend that this stand is shared by the UN Secretary-General.[54] The supporters of this position hold that attacks by freedom fighters and other combatants in armed conflict, if directed at military personnel and objectives in keeping with international humanitarian law, are lawful and may not be termed terrorism. If instead they target civilians, they amount to terrorist acts (not, therefore, to war crimes)

50 See the text of Art. 2(1)(b) of this Convention reproduced *supra*, note 45.

51 Art. 83.01(1)(E) of the Canadian Criminal Code provides that terrorism 'does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law'.

52 See the decision of 24 January 2005 of the Milan Judge (*Giudice dell'Udienza Preliminare*) Clementina Forleo in the *Bouyahia Maher Ben Abdelaziz and others* case (transcript, on file with the author, at 52–64). The Judge held that the raising of funds and forging of documents by a group of Muslim foreigners in Milan in February–March 2003 was aimed at supporting guerrilla fighters in Iraq; however, the prosecution had been unable to prove that the activity of those who would have benefited in Iraq from the funds and the forged documents would carry out actions directed against civilians; hence the actions could not be classified as terrorist, for they were probably directed against military personnel or military objectives. See also the decision of the same judge, acting as *Giudice delle indagini preliminari*, delivered the same day, in *Drissi and Hamraqui* (typescript, at 9–13).
The same view was set out, even more clearly and with a more compelling legal reasoning, by the Milan Court of Assize, in its decision of 9 May 2005, *supra* note 47 (at 15–26 of the typescript) and by Appellate Court of Assizes, in its decision in the same case of 28 November 2005 (at 35–74 of the typescript of the decision). In contrast, other judges excluded the possibility of considering under certain conditions actions by organized groups as lawful if not aimed at attacking civilians. See, for instance, the decision of the Brescia *Giudice delle Indagini preliminari* in *Hamraoui and Drissi* (decision of 31 January 2005, at 12–16 of the typescript).

53 On 11 April 2006, Israeli Foreign Minister Tzipi Livni stated in an interview on US television network ABC that 'Somebody who is fighting against Israeli soldiers is an enemy and we fight back, but I believe that this [does] not [fall] under the definition, if the target is a soldier.' (http://news.yahoo.com/s/afp/20060411/wl_mideast_afp/mideastisraelpalestinianattack; visited 5 October 2006). In a later interview with Israeli public radio, Ms Livni, who is also justice minister, said that a distinction should be made between militants who attack soldiers and those who target civilians (*ibid.*).

54 In his aforementioned Report to the General Assembly, of 27 April 2006 (see *supra* note 4), the Secretary-General wrote the following: 'In order to constrict the pool of those who may resort to terrorism, we must make absolutely clear that no cause, no matter how just, can excuse terrorism. This includes the legitimate struggle of peoples for self-determination. Even this fundamental right defined in the Charter of the United Nations does not excuse deliberately killing or maiming civilians and non-combatants' (at § 10).

if their purpose is to terrorize civilians. Thus the conduct of hostilities is not left to the exclusive legal dominion of international humanitarian law. Principles and rules on terrorism reach out to armed conflict, in that they apply to acts that are not consonant with international humanitarian law.

C. Major Implications of the Three Positions

So far, no consensus has been attained in the international community on any of the three positions outlined above. However, it would seem that the second and third positions are broadly shared by many states. Current negotiations in New York at the UN on the Comprehensive Convention on terrorism show that the second position is gradually mustering increasing support. On the other hand, the third position is shared, as pointed out above, by the 150 States Parties to the Convention on the Financing of Terrorism which all support, at least with regard to the specific but important issue of financing of terrorism, the blending and simultaneous application of norms on terrorism and humanitarian law.

The difference between the two positions is fairly clear. The second position (that emerging in New York in the current negotiations) postulates a *rigid dichotomy* between two bodies of law (terrorism norms and humanitarian law) to the effect that in time of armed conflict terrorism norms stop applying and humanitarian law takes over. The third position is instead grounded on the notion that the two bodies of law can be *combined and applied simultaneously*.

As noted earlier, at first sight, there is no major difference in practical terms between the two positions. Attacks by belligerents (whether or not they are lawful combatants) on civilians or civilian objects in time of armed conflict (including in occupied territory) are in any case criminalized. They are criminalized either as *terrorist offences* or as *war crimes* (or even, whenever the aim of the attack was to spread terror, as war crimes of terror). There is however a two-fold difference. First, the extent of the powers of investigation and collection of evidence granted to criminal investigators is different. In the event of those offences being classified as acts of terrorism, those powers are much broader. Secondly, preparatory acts may be criminalized in the case of terrorism, which normally are not, if the actual offence amounts to a war crime. A good illustration of the last point may be found in the Italian case referred to above: according to Italian courts, the collection of funds and forging of documents in a place (*in casu*: Italy) other than that of perpetration (*in casu*: Iraq) are not terrorist acts when the beneficiaries of those acts are not planning or executing terrorist attacks on civilians in an armed conflict abroad; they are either common offences (forging of documents) or lawful acts (collecting funds). If, instead, the combatants at issue use the funds and documents to attack civilians, these attacks are terrorist and the financing and forging are classified as pertaining to terrorism, hence trigger the broader investigative power (and the heavier penalties) proper to terrorism.

Clearly, it follows from this argument that in contrast, were attacks on civilians in Iraq simply classified as war crimes, such preparatory acts as raising funds abroad would not be criminalized at all.

4. Summing up and Conclusion

I have tried above to distinguish between the current legal regulation of international terrorism that can be found in international law, and the political controversy underway on whether actions by some classes of individuals ('freedom fighters') engaged in armed conflict should constitute an exception to that definition.

My conclusion is that indeed international law defines and regulates international terrorism. International terrorism as a discrete international crime perpetrated *in time of peace* exhibits the following requisites: (i) is an action normally criminalized in national legal systems; (ii) is transnational in character, i.e. not limited in its action or implications to one country alone; (iii) is carried out for the purpose of coercing a state, or international organization to do or refrain from doing something; (iv) uses for this purpose two possible modalities: either spreading terror among civilians or attacking public or eminent private institutions or their representatives; and (v) is not motivated by personal gain but by ideological or political aspirations.

In time of peace, international terrorism may also exhibit the hallmarks of a crime against humanity. This happens when it is part of a widespread or systematic attack against civilians (although terrorist conduct as such may be taken against state officials or even combatants) and in addition takes the shape of certain categories of criminal conduct (murder, causing great suffering or serious injury to body or to mental or physical health, torture, rape or enforced disappearance).

In time of armed conflict, terrorism is criminalized when it consists of violent action (or even threat of such action) taken (i) against civilians or any other person not taking an active part in armed hostilities, and (ii) has as its primary purpose the spreading terror among the civilian population.

At present it is this legal classification relating to the use of terror in time of armed conflict that poses most problems at the political level and has indeed become the political albatross for final agreement on a treaty definition of terrorism. The classification is in fact *rejected* by some states (see *supra*, the reference to the first of the three political positions emerging in the international community on the matter). These states, while in fact opposing the application of some general and treaty rules of humanitarian law, do not propose any alternative to the simple violation of (or disregard for) existing law. Other states are, instead, prepared to accept that classification subject, however, to the condition that the same acts covered by international humanitarian law not also be classified as terrorism under general or treaty rules on terrorism (see *supra*, the reference to the second political stand, taken

by many states and other authorities), or be classified as such with a limited interference of rules on terrorism in time of peace (see *supra*, at § 9 the reference to the third position taken by states).

Time and the upshot of ongoing diplomatic negotiations will tell us which of these three stands will prevail. Admittedly scholars should not have a say on this matter. It is, however, warranted to suggest that the whole thrust of current international law would tip the balance in favour of the third position: it is the only stand that would fully safeguard the concerns of civilians while furthering the interest of a sweeping eradication of terror through criminalization of acts aimed at promoting and financing terrorist action. Let me add that one ought not to exclude that, on account of the current discussions on terrorist conduct by 'freedom fighters', the evolution of the legal regulation of terrorism in time of armed conflict might lead to the formation of a distinct category of *warlike terrorist acts*. In other words, a process could take place similar to that leading to the formation within the broad category of crimes against humanity, of the class of genocide. Genocide, initially a sub-category of crimes against humanity, gradually became a discrete class of international crimes, with distinct requisites different from those of the 'parent class' of crimes against humanity. Similarly, terrorism in time of armed conflict, currently a sub-category of war crimes, might gradually become a discrete class of international crimes as a result of the combined application of humanitarian law and general norms on terrorism.