
Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes

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Abstract

Notwithstanding the emphasis placed on the need for concerted international action to confront the problem of terrorism, positive international law is far from treating the issue of defining the criminal notion of terrorism coherently; the discussion of such a notion is being made hostage [sic!] to the abuse of the term ‘terrorism’ in the course of the debate and to the confusion between an empirical description of a phenomenon and its treatment under criminal law. Proposing a core-definition approach, this article elaborates a notion based upon the basic rights of civilians and on the unacceptability of their violation by terrorist methods carried out by private organized groups. The definition proposed here, which does not recognize in the perpetrator’s motivations any material relevance because of the overwhelming importance of the value infringed, is able to minimize the relevance of some abused arguments (such as state terrorism or the treatment of ‘freedom fighters’), could quickly gain customary status and would prove useful in interpretation and in drafting exercises, both at international and national level. As for the inclusion of terrorism in the category of international crimes, it is submitted that two interpretive options are open: to consider the category of crimes against humanity as already able to embrace core terrorism; or to place the strong rationale underlying the stigmatization of terrorist crimes in the perspective of the gradual emerging of a discrete international crime of terrorism. National case law seems to point to the latter option, but the question does not appear settled: for this reason, the discussion regarding the

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prospect of an amendment to the ICC Statute expressly to include terrorist crimes continues to be of interest. An express inclusion could be useful to avoid doubts or discrepancies at national level and to solve some outstanding issues of the international community's criminal policy.

1 The Need to Assess the Proper Role of Co-operation in Criminal Matters in Fighting against Terrorism

Addressing, and possibly defeating, terrorism needs a comprehensive strategy. As far as legal instruments are concerned, some developments were made following the events of 9/11, but it is regrettable that decisive improvements are yet to come, especially at a universal level. In particular, notwithstanding the adoption of UNSC Resolution 1373 (a piece of universal legislation covering some aspects of juridical co-operation and setting up a specialized committee¹), some divergences among groups of states and in theoretical approaches still seem able to make the adoption of a comprehensive UN convention difficult. In recent times a relevant emphasis has been put on the military option² and on intelligence co-operation in order to prevent and punish terrorist acts, somewhat overshadowing the relevance of the tools of criminal law and of juridical co-operation.

In my opinion, it is still worthwhile dwelling on a criminal law approach and on assessing the ability of existing legal tools to tackle the problem of terrorist activities with international implications, trying to single out the current deadlocks. The *Leitmotiv* of this enquiry is the focusing primarily on a tentative definition of terrorist crimes and on the tools for legal co-operation, both among states and, eventually, between states and the International Criminal Court. It is not my intention to dwell on the use of force to fight terrorism, nor to discuss the political strategy for addressing the ultimate causes of terrorism and fanaticism, while being well aware of the interest of the topics and of the complex underlying issues.³

Having thus identified the subject under discussion, some justification must be given for an enquiry which follows many others, often from eminent authors. For a long time partial and contradictory data from practice and a somewhat sharp ideological contrast in legal doctrine constantly led to the conclusion that a consensus

¹ In this act, the Security Council calls on all states to prevent the financing of terrorist activities, as well as the supply of weapons and the concession of 'safe haven' or any type of support to terrorist groups. It also calls for the introduction of adequate criminal sanctions in domestic legislation and for active collaboration with other states and sets up an Ad Hoc Committee.

² On some occasions, recourse to targeted extrajudicial killings is advocated.

³ In this context, I will confine myself to recalling the remarks of Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *Int'l and Comp LQ* (1989) 589, at 606–607, where he underlines how 'coercive means can give, perhaps, some short-term results, while peaceful responses are often effective in the medium term', and where he recalls the need to address the ultimate causes of terrorism, thus laying the foundations for a positive peace, as opposed to a merely negative peace. For a criticism of the current trend to use force instead of strengthening international co-operation and addressing the root causes of terrorism see Abi-Saab, 'The Proper Role of International Law in Combating Terrorism', 1 *Chinese J Int'l L* (2002) 305, at 311–313.

in the international arena did not exist. In recent years, it seems that some factors have changed significantly: the empirical manifestations of terrorism have reached a complexity that clearly shows the limits of the sectoral approach which was initially preferred to an overall strategy; moreover, terrorist acts have reached such a degree of seriousness that the members of the international community and public opinion realize how costly poorly drafted anti-terrorist strategy can be; lastly, terrorism has ceased to be a phenomenon confined mainly to certain territories or political questions, and has assumed the features of a globalized criminal activity able to reach and hit any state and any population. All those factors, strictly interlinked with the gradual decrease in importance of the juxtaposition between the fight against terrorism and the pursuit of international values of a different nature (such as self-determination of peoples⁴), have prepared for the maturing of a different sensitivity amongst the international community, the terms of which deserve a thorough examination. In this context, elements of international practice will be weighed according to the historical context which produced or accompanied them, in order to verify the feasibility of the construction of a notion of terrorism shared by the international community. Moreover, I suggest that not all such elements are necessarily likely to become constitutive elements of a supposed crime of terrorism. Sometimes, some of those factors can lie in the background or in the criminal policy context of a technical notion of terrorist crime, but must not be confused with its constitutive elements.

Having briefly reviewed the state of the art, this article will focus first on the definitional question of terrorism and try to single out a core notion which could facilitate the use of existing instruments of co-operation and the drafting of more satisfactory legal rules (Sections 2–6); it would be based on the quality of the protected value (basic rights of civilians, rather than the integrity or independence of the state) and the particularly heinous way of harming it (the recourse to terrorist methods by an organized group). I will try to demonstrate that a core approach to a criminal law notion of terrorism can avoid some supposed difficulties related to the political dimension in which this phenomenon is undoubtedly located and allow a satisfactory outcome of the negotiations on the draft UN Comprehensive Convention, as hoped for in the conclusions of the 2005 UN World Summit.⁵ Later, the results of this enquiry will be weighed against the sensitive issue of the inclusion of terrorism in the category of individual international crimes in order to demonstrate that the main problem lies in the interpretive option whether to consider the category of crimes against humanity as being already able to cover the vast majority of terrorist acts, or, alternatively, to affirm the process of the crystallization of a discrete crime of terrorism partially detached from the paradigm of such a category (Section 7).

What I hope to demonstrate is that co-operation in criminal matters, if based upon a proper and ‘core’ definition of terrorism, can play a more relevant role in the fight

⁴ As explained below (*infra*, sect. 5), nowadays contradictory data still arise from international practice, although a general trend can be observed which outlaws the use of terrorist *methods* in order to attain whatever *purposes*, no matter whether legitimate or not.

⁵ See Doc A/RES/60/1, at para. 83.

against contemporary terrorism and can avoid some often criticized abuses, although it cannot be the sole tool, given the need for a complex strategy, as aptly indicated in the last policy document issued by the UN Secretary General.⁶

2 Terrorism in National and International Law: the Uneasy Search for a Coherent Framework

In national legal orders a great variety of solutions can be found concerning the repression of terrorism.⁷ It must be remembered that such options are subject to the priorities of national political agendas and to developments dictated by changes in the perception of the danger carried by terrorist activities: this means that not all the data from this particular source of practice may be useful in detecting the tendency of the international community nowadays, because the data may be outdated or may not have been conceived in order to tackle matters of international relevance.

Furthermore, it must also be remembered that terrorist crimes may present some element of transnationality, antecedent,⁸ concomitant,⁹ or successive¹⁰ to their consummation. In such cases a need for international co-operation arises and the situation is likely to become extremely complicated. It is well known that inter-state co-operation meets peculiar problems in the criminal field, especially when politically sensitive matters are at stake.

Given this background, in the absence of a comprehensive strategy, for a long time the interest of the international community in defining mechanisms of co-operation aimed at improving the repression of terrorism generated nothing but selective and random interventions (the so-called piecemeal approach). This is particularly evident at the universal level: the UN and some specialized or related agencies adopted some conventions which dealt with specific aspects of the phenomenon,¹¹ but did not solve the problem regarding the need to punish any terrorist activities – by introducing a general definition of

⁶ See ‘Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy’, Doc A/60/825.

⁷ Terrorism did not have a homogeneous or parallel level of diffusion in the past. In some countries, terrorism acquired a purely local dimension, while it did not appear in other states. Thus, while some states did not expressly tackle the problem, others contented themselves with introducing aggravating circumstances for the determination of the relevant penalty, given that crimes committed by terrorist groups are normally classifiable among ordinary violent crimes (such as murder, extermination, bodily harm, kidnapping, etc.). In other countries, on the other hand, lawmakers considered ‘traditional’ terrorism to represent a serious threat to national security and the stability of state structures, and therefore included it amongst the most serious political crimes. In some of those states, a special offence of terrorist association was introduced as well.

⁸ Preparatory acts can be carried out in a country different from that of consummation or of residence of the perpetrators or the victims, etc.

⁹ The victims or the authors can come from different countries; the place of commission can differ from that to which the victims or the authors belong.

¹⁰ The authors can try to find haven in a country different from the one of consummation; the objects or profit of a crime can be moved to another country, etc.

¹¹ For the text of the conventions (both universal and regional), other details and their status, reference can be made to the UN web page <http://untreaty.un.org/English/Terrorism.asp>.

terrorism in criminal terms – and the crime of association *per se*. Moreover, those treaties are usually wide enough to include any crime covered by the offences described, regardless of whether they are inspired by terrorist or political purposes. Although the contents of the various relevant treaties are not entirely similar, some basic features can be traced which are intended to overcome the deadlocks likely to be produced in this area of interstate collaboration, namely the obligation for states parties to introduce specific offences and some provisions on judicial co-operation in their legal orders.¹²

A partial change to this sectoral and cautious approach has been caused by two recent treaties – the 1997 Convention on the Suppression of Terrorist Bombings¹³ and the 1999 Convention on the Suppression of the Financing of Terrorism¹⁴ – which tried to give new momentum to an anti-terrorism strategy after the end of the Cold War and with the renewed expectation of the efficiency of international action.

The above-mentioned sectoral method was for some time adopted at the regional level, and consisted in the adoption of treaties aimed at repressing a series of offences deemed ‘terrorist’ *per se* (*rectius*, usually put in practice by terrorist groups), but, again, avoiding the issues of defining ‘terrorism’ and of introducing a crime of association.¹⁵ More recently, the regional context has shown that an attempt at a comprehensive definition is conceivable.¹⁶ Finally, other regional instruments¹⁷ have gone further,

¹² The following items are usually mentioned: the principle of *aut dedere aut prosequi*; anti-terrorist agreements as a legal tool for extradition where national legal order requires a treaty basis; and, since the 1988 IMO Convention, the impossibility of invoking the political offence exception for extradition purposes. For a brief survey of those aspects see Panzera, ‘La disciplina internazionale sul terrorismo internazionale’, in N. Ronzitti (ed.), *Europa e terrorismo internazionale. Analisi giuridica del fenomeno e Convenzioni internazionali* (1990), at 9.

¹³ Adopted by the UN General Assembly on 15 Dec. 1997 (153 states parties as of 31 Dec. 2007). The Convention tries to give a more detailed regulation of criminalized conduct and procedural obligations for states. Another distinctive feature is the drafting of an offence of association (see Art. 2(3)(b) and (c)).

¹⁴ Adopted by the UN General Assembly on 9 Dec. 1999, this entered into force on 10 Apr. 2002 (160 states parties as of 31 Dec. 2007). Though not conceived to embrace all aspects of terrorism, the Convention makes an important attempt at a general definition of the phenomenon (see Art. 2(1)(b) and applies it to an activity which is functional to *any* forms of terrorism (thus having a sort of ‘horizontal’ reach). Moreover, it also includes (see Art. 2(2)(b) and (c)) the description of an offence of association drafted in terms identical to those in the 1997 Bombing Convention.

¹⁵ Mention should be made of the 1971 OAS Convention and of the 1987 SAARC Convention. The 1977 European Convention simply aims at defining a series of crimes not subject to the political offence exception in extradition procedures, but which allows reservation from states willing to maintain the possibility of assessing, in individual cases, the political nature of the conduct prosecuted by the state requesting the extradition, in the light of all the relevant circumstances.

¹⁶ See Art. 1(1) and Art. 2(3) of the 1998 Convention (an unofficial translation, provided by the UN English translation service, is available at: www.al-bab.com/arab/docs/league/terrorism98.htm). See also Art. 1(1) of the 1999 CIS Treaty. A similar provision can be found in a less well-known treaty, namely the Shanghai Convention on the Fight against Terrorism, Separatism and Extremism, adopted at Shanghai on 15 June 2001 in the framework of the Shanghai Organization on Co-operation (the members of which are China, Kazakhstan, Kirghizstan, Russia, Tajikistan, and Uzbekistan), which entered into force on 29 Mar. 2003 (six states parties as of 15 June 2005; an unofficial translation is available at: www.ln.mid.ru/ns-rasia.nsf/0/4ee37cb1c49a34ab43256cca00284d7c), under Art. 1.

¹⁷ See the 1999 OAU Convention and 1999 OIC Convention. Particular mention should be made of the EU legal framework: see the Common Position No 2001/931/CSFP of 27 Dec. 2001 on the application of specific measures to combat terrorism, OJ (2001) L 344/93 (which provides various sanctions against

in that they provide a general definition of terrorism and a description of the crime of association.¹⁸

As far as co-operation mechanisms are concerned, no decisive progress can be recorded when compared with universal conventions,¹⁹ except for the EU legal system.²⁰ If we look at the post 9/11 initiatives, the African Union,²¹ the Council of Europe,²² the Organization of American States,²³ and the SAARC²⁴ have adopted new treaties, the contents of which are not, however, particularly innovative. We are again faced with the continuing difficulty of providing a clear legal regime for the repression of terrorism even in consolidated regional circles.

In the attempt to draw some conclusions from this brief survey of international legislation, we can see that the normative framework is rather fragmented. The potential of some universal treaties on specific terrorist crimes and of certain technically advanced instruments that have recently been adopted at regional level should not be neglected. However, it cannot be concealed that, looking at the overall situation, first a lack of coherence can be detected in the definition of terrorism and in the treatment of its

terrorists, gives a definition of terrorist acts, and establishes a list of persons and organizations, to be periodically reviewed, to be qualified as terrorist with a view to adopting financial sanctions and to enhancing police and judicial co-operation among Member States); the Framework Decision of the Council No 2002/475/JHA of 13 June 2002, on combating terrorism, OJ (2002) L 164/3 (which establishes common rules for the description of terrorist offences and connected aspects, such as penalties, the treatment of legal persons, mitigating circumstances, jurisdiction, and assistance to victims).

¹⁸ See, for instance, Art. 1(3)(b), of the OUA Convention; Art. 2 of the Framework Decision 2002/475/JHA, *supra* note 17.

¹⁹ For instance, the 1977 European Convention, intended to exclude terrorist offences by the political exception in extradition law, allows states to make reservations which are so wide as to render its reach ineffective, thus turning out to be less ambitious than universal treaties adopted later (such as the 1988 IMO Convention). Similar criticisms have been raised with regard to the co-operation mechanisms defined in the Conventions drafted by the Arab League and by the OIC, which do not contain an *aut de-dere aut prosequi* clause: see Hoss and Philipp, ‘The Islamic World and the Fight against Terrorism’, in C. Walter *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), at 363, 377–379; Hmoud, ‘The Organization of the Islamic Conference’, in G. Nesi (ed.), *International Cooperation in Counter-Terrorism* (2006), at 161, 166–169.

²⁰ Here the acts regarding terrorism must be read in conjunction with other tools adopted in the framework of the so-called third pillar, following the entry into force of the Amsterdam Treaty, such as the European Arrest Warrant, Europol, and Eurojust.

²¹ See the Protocol to the OUA Convention, adopted at Addis Abbaba on 8 July 2004, not yet in force.

²² See the Protocol amending the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 15 May 2003, not yet in force; the European Convention on the Prevention of Terrorism, adopted at Warsaw on 16 May 2005, entered into force on 1 June 2007 (12 states parties as of 30 April 2008).

²³ The Inter-American Convention against Terrorism, adopted at Bridgetown on 6 Mar. 2002, which came into force on 7 Oct. 2003 (23 states parties as of 31 Dec. 2007). The preliminary draft contained a general definition of terrorism, but during the negotiations this approach was abandoned, under pressure coming mainly from the USA, in order to facilitate the reaching of a consensus. Thus, the Convention applies to offences established in the universal sectoral conventions. On signature, Ecuador deposited a declaration complaining about the unsuccessful attempt at providing a definition of terrorism.

²⁴ See the Additional Protocol to the Saarc Regional Convention on Suppression of Terrorism, adopted at Islamabad on 6 Jan. 2004, which came into force on 16 Jan. 2006 for all the SAARC Member States.

associative aspects.²⁵ As for the definition of terrorism in particular, while the 1999 UN Financing Convention adopts a lowest common denominator approach, limiting its own scope to acts striking at individuals' lives and physical integrity, and not requiring that a political project be pursued by the perpetrators, recent regional conventions broaden the notion following two parallel lines. On one hand, they widen the 'classical' political dimension, stating that conduct aimed at destabilizing the state is terrorist and sometimes qualifying the political purpose as a necessary element; on the other, they increase the number of public interests protected by the relevant criminal offences, namely infrastructures, private property or goods, computer facilities, environment, etc. While some interesting developments should be kept under close scrutiny in the near future (for instance, the growing attention to the environment), it is important to note the raising of issues of uniformity among different 'families' of countries, of coherence between the regional and the universal levels, and of the temptation to use the tools of criminal law in order to repress dissent in too wide a manner.²⁶

Secondly, despite a more resolute attitude towards the description of relevant offences, provisions on judicial co-operation are not always uniform, nor precise enough, with the notable exception of the EU judicial order. The same goes for mechanisms of compliance control. Here, the regional level generally fails to draft enforcement tools able to supplement the vague provisions contained in universal treaties.

Thirdly, the ratification record of the various treaties is quite fragmented, thus causing many loopholes.

This leads to the conclusion that there is a problem of quality in co-operation at the global level, which does not appear very satisfactory and could be exploited by terrorist groups. Furthermore, the great variety of solutions in defining (or not) terrorism does not help in ascertaining the existence of a customary notion of terrorist act. Nor can the well-known Security Council Resolution 1373, adopted few weeks after the 9/11 events, be deemed to be decisive.²⁷

An ambitious effort to overcome this state of affairs is currently being made in United Nations quarters. Two subsidiary bodies of the General Assembly²⁸ are examining a draft comprehensive convention, originally presented by India in 1996,²⁹ concerning

²⁵ On this point see Schmahl, 'Specific Methods of Prosecuting Terrorists in National Law', in Walter *et al.*, *supra* note 19, at 86–87; Walter, 'Defining Terrorism in National and International Law', in *ibid.*, at 28–30.

²⁶ J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism* (2005), at 83.

²⁷ Though claiming to impose new obligations and to address recommendations to UN Member States in a general manner, it 'forgets' to give a definition of terrorism and contains several non-self-executing provisions, hence leaving room for states' widest discretion and consequent divergence of views: see, in this respect, the criticism expressed by Sorel, 'Existe-t-il une définition universelle de terrorisme?', in K. Bannelier *et al.* (eds), *Le droit international face au terrorisme* (2002), at 56; Abi-Saab, *supra* note 3, at 311; Gioia, 'Terrorismo, crimini di guerra e crimini contro l'umanità', 87 *Rivista di diritto internazionale* (2004) 5, at 30.

²⁸ Namely, an Ad Hoc Committee set up by GA Res. 51/210 of 17 Dec. 1996 and a Working Group established each year by the Sixth Committee during the works of the annual session of the General Assembly.

²⁹ Doc A/C.6/51/6 of 11 Nov. 1996. In 2000 India presented an amended version: see Doc A/C.6/55/1 of 28 Aug. 2000, also reproduced in 42 *Indian J Int'l L* (2002) 219.

the repression of terrorist activities in general terms. The work seemed to have gained considerable momentum after the 9/11 events. At the end of 2002 the discussions were at an advanced stage, a preliminary agreement having been reached on the majority of the draft treaty's 27 articles, though some crucial issues (a saving clause for so-called 'freedom fighters', the inclusion of state terrorism, and the relationship with the previous sectoral treaties) were still outstanding.³⁰ Subsequent meetings between 2003 and 2007, alas, did not record any substantial progress,³¹ thus confirming the sceptical comments made by some experts³² on the real capacity of the international community to reach a consensus on a truly global response to terrorism.

It is worth noting that such a draft gives a broad definition of terrorism,³³ expressly punishes the crime of association, and envisages the usual provisions on judicial co-operation and a very loose mechanism of compliance control, rightly criticized by commentators.³⁴ Thus, the path envisaged would be significantly to broaden the universal notion of terrorism (compared with the 1999 UN Financing Convention) while leaving unchanged the (poor) quality of co-operation tools.

3 The Search for a Functional and 'Core' Definition of Terrorism, Suitable for International Co-operation

Given this background, I believe it would be useful to go some steps further in a modest attempt to identify a technique for overcoming, albeit partially, the limits of the

³⁰ See the Report of the Ad Hoc Committee – Sixth session (28 Jan.–1 Feb. 2002), Doc A/57/37; Report of the Working Group of the Sixth Committee on Measures to eliminate international terrorism, Doc A/C.6/57/L.9. In particular, difficulties arose around the following points: the insertion in Art. 2, which gives a definition of terrorism, of a saving clause for activities of national liberation movements, proposed by the states belonging to the Organization of the Islamic Conference (see Doc A/C.6/55/WG.1/CRP.30; A/C.6/55/L.2); the wording of Art. 18, concerning the activities of the parties in armed conflicts and raising the issue of state terrorism; the relationship between the draft comprehensive conventions and the existing sectoral conventions (some delegations conceive the comprehensive convention as merely complementary to the sectoral ones, while others would prefer the establishment of a sort of hierarchical link, where the former prevails over the latter).

³¹ See Docs A/58/37, A/C.6/58/L.10, A/59/37, A/C.6/60/L.6, A/61/37, A/C.6/61/SR.21, and A/62/37. For an account of negotiations see Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention', 4 *J Int'l Criminal Justice* (2006) 1031.

³² See Murphy, 'International Law and The War on Terrorism: The Road Ahead', 32 *Israel Yrbk Human Rights* (2002) 117, at 140; Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law', 4 *Int'l L FORUM* (2002) 159, at 168–169; Hafner, 'The Definition of the Crime of Terrorism', in Nesi (ed.), *supra* note 19, at 43.

³³ Art. 2 of the Draft elaborated by the Committee (Annex II, Doc A/57/37, at 6): '[a]ny person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: Death or serious bodily injury to any person; or Serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment; or Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.'

³⁴ See, for instance, Röben, 'The Role of International Conventions and General International Law in the Fight against International Terrorism', in Walter *et al.* (eds), *supra* note 19, at 816–817.

current legal framework and the drawbacks of the current debate. This task is far from easy, considering that trying to define terrorism produces endless debate, at both the political and legal levels. While political scientists, sociologists, and philosophers can follow, if so required, a case-by-case approach or elaborate definitions the borders of which are quite debatable or which present a preponderant narrative feature, a certain precision is required here, due to the requirements of the principles of criminal law, such as *nullum crimen sine lege* and the strict construction of penal statutes.

As a starting point, I share the view that the search for a unitary or all-encompassing notion of terrorism, in criminal law terms, constantly risks being incomplete or too advanced, because of the different underlying policy choices.³⁵ This being clear, a less ambitious approach can be viable and should be pursued. Authoritative commentators have clarified that, as happens with many debatable concepts, it is possible to elaborate several legal definitions of terrorism, each one useful for specific purposes and thus deserving respect.³⁶ Moving forward on the assumption that we are examining the level of relations among states, I will here concentrate on the possibility of elaborating a notion of terrorism which is workable in international co-operation in criminal matters, is likely to reach a wide consensus among the whole international community, and is equipped with a 'core' content, which would not prevent the possibility of elaborating other notions shared by restricted groups of states or envisaged by single countries.

This being said, the first question to treat should be whether terrorist activities deserve an autonomous legal definition and – in criminal law terms – a dedicated offence, or whether they cannot be satisfactorily distinguished from 'ordinary' violent criminal courses of action.

Terrorist groups are currently described as having political aims which may be considered subversive or ideological,³⁷ whereas ordinary criminal agents pursue profit or other material benefits. In another, and more intriguing, variant, it is often said that the 'political' element consists in the fact that violence is put into practice in order to exert coercion on public authorities, irrespective of the presence of an ideological or political project to be developed on a large scale.³⁸ However, this first attempt at classification is not completely satisfactory, because we cannot exclude criminal associations with

³⁵ Some authors came to the conclusion that, in general international law, terrorism as such has no specific legal meaning: see Baxter, 'A Skeptical Look at the Concept of Terrorism', 7 *Akron L Rev* (1974) 380, at 380; Higgins, 'The general international law of terrorism', in R. Higgins and M. Flory (eds), *Terrorism and International Law* (1997), at 13, 27–28.

³⁶ Murphy, 'Defining International Terrorism: A Way Out of the Quagmire', 19 *Israel Yrbk Human Rights* (1989) 13, at 32, advocates recourse to a functional approach to defining terrorism, where the definition may vary depending upon the function it is intended to serve (though coming to the conclusion that at universal level a general definition is not practically configurable); Tomuschat, 'Comment on the Presentation by Christian Walter', in Walter *et al.* (eds), *supra* note 19, at 45, rightly stresses that building a definition *in abstracto* has little sense if not confronted with the purposes it is intended to serve.

³⁷ Armed action against enemy states, invading forces, or oppressive governments; the realization of extra-constitutional or revolutionary forms of government; opposition to certain international political or economic processes; advancement of religious or cultural ideals, etc.

³⁸ See Sorel, *supra* note 27, at 68; B. Saul, *Defining Terrorism in International Law* (2006), at 38–45 and 60–61.

'mixed social objectives', i.e. entities that follow both political and economic objectives. The idealistic terrorist, who is not interested in making money or profits, does not seem fully to correspond to reality, nor does the Mafioso or drugs trafficker who is not interested in politics.

But another argument shows that such an approach is inadequate. It is true that states have traditionally primarily dedicated attention to politically motivated terrorism, which historically directs its action against representatives of the state or other victims of symbolic value.³⁹ However, some states have demonstrated that this rationale does not necessarily turn the political aim into an element of a terrorist crime.⁴⁰ More broadly, it still has to be demonstrated that the social danger of certain conduct is less when the authors are not politically motivated. It can be observed that in recent years the emphasis has, at least partially, concentrated on the inhuman way of harming innocent victims; from this point of view, if civilians are killed or taken hostage on a random basis, the picture does not change that much if the criminal actor is a politically motivated group or a profit-minded criminal association.⁴¹

To put it differently, the motivations of the perpetrators may be no more than a policy stimulus to the legal drafting of an offence (the content of which does not recognize those motivations as proper elements of the crime), while in some cases it can prove necessary to define them as a psychological element proper, i.e. a *dolus specialis*. The different role that a criminal provision can attribute to the personal motivations of the authors is sometimes neglected, even in legal literature, thus causing some confusion between an empirical description of a phenomenon and its treatment under criminal law.⁴²

For this reason, another criterion which must be examined is the *modus operandi*:⁴³ it is often pointed out that, while ordinary criminal groups normally use violent methods only against those who directly obstruct the activities of the association, terrorist groups utilize tactics aimed at creating terror and insecurity among the civil population and the public authorities. This result is often sought by striking at single

³⁹ The political element undoubtedly played a decisive role, and still does, in the description of some relevant historical manifestations of terrorism and in the general debate, in such a way as to push states to establish mechanisms of international co-operation (in an area, criminal law, where the readiness to collaborate has been traditionally poor) or to enact emergency laws at the internal level (due to the fear for internal security).

⁴⁰ For instance, sectoral terrorism treaties often describe crimes with regard to their objective nature, not distinguishing whether the author is politically motivated or not, thus pointing more at the interests offended by the conduct than the ideological motivations behind it: for this view see also Sandoz, 'Lutte contre le terrorisme et droit international: risques et opportunités', 13 *Revue suisse de droit international et de droit européen* (2003) 319, at 326. The same can be said of some national laws: see Schmahl, *supra* note 25, at 87; Walter, *supra* note 25, at 28–30.

⁴¹ On this view see also Skubiszewski, 'Definition of Terrorism', 19 *Israel Yrbk Human Rights* (1989) 39, at 51.

⁴² An interesting treatment of the issues of intent, special intent, and motive is made by Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *J Int'l Criminal Justice* (2006) 933, at 938–941, who advances a conclusion different from the one here proposed.

⁴³ For this view see, among others, Sorel, *supra* note 27, at 44; A. Cassese, *International Criminal Law* (2003), at 125.

targets with a symbolic value or at publicly frequented places, and possibly involving innocent victims.⁴⁴ Following this reasoning, however, a critical point seems to be the identification of a consensus about the terrorising nature of violent acts. Many violent activities can provoke fear and panic in ordinary people or among public authorities, but deciding what elements must be matched in order to call them terrorism and distinguish them from ordinary criminality is less clear. The risk of circularity, incoherence, or abuse is high, while the need to work on elements shared by the international community at large could require the adoption of a minimalist approach.

In my opinion, it must be admitted that neither the aim pursued by the perpetrator nor the methods employed are *per se* conclusive parameters able to provide reliable guidance in the evaluation of the content of an international notion of terrorist crime. I would submit that a preliminary step in the analysis must consist in the examination of two elements, namely the juridical interest undermined by the violent actions and the appreciation of the inadmissibility of its infringement by the community of states, according to the prevailing values affirmed in general international law. Only after such elements are examined does it become possible to explore the room for the drafting of an international category of terrorist crimes and to single out which special elements must be added (*a dolus specialis*, a particular method of action, or both).

The first values that come to mind are the essential rights of individuals (life and physical integrity); no detailed discussion is required to demonstrate that such rights are universally considered a value to be protected. But, if we place ourselves in the context of international relations, it cannot be denied that the selection criterion of the victim plays a relevant role; courses of action which target civilians are constantly condemned, while actions hitting state agents (political leaders, diplomats, police and military personnel, security services⁴⁵) are apparently not. If we want to find an explanation of this tendency of the international social conscience, we should look at three points.

First, state agents, when entrusted with the exercise of coercive powers or essential sovereign prerogatives, embody one state – according to an international relations perspective – and the violence (no matter how serious) against them is also violence against the state, putting at risk the state's integrity and security: the latter value, in this case, tends to prevail over the former.⁴⁶ Even nowadays it seems debatable whether actions *exclusively* directed against those agents would receive a uniform evaluation

⁴⁴ In this respect, experts have talked about direct and indirect targets of terrorist strategies, whereby the former are the objects that are materially hit, and the latter are those to whom the terrorist groups want to transmit their terrorizing message, of a political or other nature. Delmas Marty ('Le crimes internationaux peuvent-ils contribuer au débat entre universalisme et relativisme des valeurs?', in A. Cassese and M. Delmas Marty (eds), *Crimes internationaux et jurisdicitions internationales* (2002), at 59, 67) speaks of '*dépersonnalisation de la victime*'.

⁴⁵ As far as civil servants are concerned they could be equated with ordinary individuals. See also *infra* notes 47 and 56.

⁴⁶ A different approach is advocated by Cassese, *supra* note 42, at 938–939 and 949–950, who advances the view that the possible victims of terrorist acts can be either civilians or state officials. In critical terms see also Fletcher, 'The Indefinable Concept of Terrorism', 4 *J Int'l Criminal Justice* (2006) 894, at 903–905.

in terms of absolute condemnation,⁴⁷ given the trend of international actors to express a value judgement about the ‘quality’ of the parties concerned (a state and a group having recourse to violence). Here, consensus among states can be reached only with regard to individuals charged with a function deemed to be particularly important in an international relations perspective,⁴⁸ or in the context of strict political alliance or of shared principles of government action (democracy and respect for human rights, first of all). So far, the international community still looks divided on this point,⁴⁹ whether we like it or not.

Secondly, civilians are usually unprepared to face bloody or serious attacks and are extraneous to the motivations of the violent conduct, being nothing more than chance targets. The fact of devaluing the very essence of a human being, undefended and innocent, is the object of immediate condemnation by the international social conscience, which constructed a relevant part of its legal system after World War II around the primacy of basic human rights.

Thirdly, on this ground we cannot avoid reference to the evolution of the set of rules destined to regulate the exercise of violence in the most extreme situation we can discuss, i.e. armed conflicts. Here, the use of violence is deemed physiological, but since the four 1949 Geneva Conventions the international community has clearly condemned violence against civilians. What is forbidden in wartime cannot be admitted in peacetime, when the context is less dramatic and the use of violence is to be considered exceptional and not ordinary.

Examination of the values at stake reveals the potential content of a notion of terrorism common to the entire international community. When essential rights of civilians are impaired, a notion of terrorism can be elaborated which entails conduct putting at special risk this basic value: special treatment in criminal law terms can be based upon the intention to spread a climate of panic among the population, leaving the actual motivations of the perpetrators to the field of juridical indifference. They can be political, of course, or ‘mixed’, or even evanescent. What counts is that the rationale behind the criminalization is the protection of a universally recognized value against a particularly heinous form of attack. The intention of spreading terror should mainly be inferred from the material features of the conduct: experience shows that, when civilians are hit in the normal course of their everyday affairs in an indiscriminate and

⁴⁷ When actions directed against state officials are conducted by means or methods which do not allow the differentiation of civilian targets, who could be hit by chance, the first notion would be applicable.

⁴⁸ Certain public figures on mission in a foreign state (Heads of State and Government, Ministers for Foreign Affairs, diplomats) enjoy international protection, inasmuch as their activity is functional to a distinct fundamental value of international law, e.g., the correct and free conduct of international relations. For this reason, a dedicated regulation could be developed (see UN 1973 Convention of Internationally Protected Persons). Such a protective regime is, however, confined to the needs arising from the safeguard of the value mentioned: the rights of individuals in themselves are not the primary purpose of the regulation, nor situations in which the same persons are not on mission abroad.

⁴⁹ This point is also raised by Sandoz, *supra* note 40, at 324, where he notes the persistent difficulty of the international community in agreeing some basic principles governing the respect of human rights, democratic principles, rules applicable to internal disturbances and strife not covered by Geneva Conventions and Additional Protocols.

possibly massive way, we can speak of terrorist activities, due to the fact that individuals feel insecure about their lives and basic rights.⁵⁰

We could also add that another distinctive feature of terrorism should lie in the presence of an organization actually carrying out acts of serious violence; in fact, where people perceive the presence of a group behind acts of violence and the probability of the repetition of similar acts, the spread of terror is more evident, if compared with the action of an isolated agent.⁵¹

This approach may also offer some suggestions with regard to a possible expansion of the scope of a universal definition of terrorism. The values protected could also embrace, together with life and the physical integrity of individuals, those of personal freedom and dignity⁵² at any time at which they are undermined by violent actions committed regardless of the identity of the victims. A push in that direction could come not only from sectoral anti-terrorism treaties having regard to the taking of hostages in various contexts,⁵³ but also from human rights treaties⁵⁴ and rules on crimes against humanity.

A different path should be followed, in my opinion, where the value to be protected is one to which adherence by the international community is less strict, or when the condemnation of violent acts is subject to a discretionary evaluation which may be open to different results. Thus, as an example of the latter situation, we can think of the case, already mentioned above, of violent acts directed against groups of agents of the state or public figures (political leaders, diplomats, members of the police or the military). They are usually considered terrorist targets when they are chosen in order to create fear among the relevant group (and not 'simply' to harm the targeted individual, as in political assassination).⁵⁵ What I want to point out here is that the search for a notion of terrorism which is really workable in an international community, still divided on some issues of political relevance, inevitably obliges us to accept that a minimal consensus is far from being reached

⁵⁰ A recent judgment of the ICTY, focussing on the infliction of terror upon civilians as set out in Art. 51 of Additional Protocol I and Art. 13 of Additional Protocol II to the Geneva Conventions, clarifies the terrorizing nature of violent actions in terms that can be taken as valid also in contexts not qualifiable as armed conflict: see ICTY (Chamber), Judgement of 5 Dec. 2003 in case no. IT-98-29-T, *Galić*, at paras 592–594. Civilians were attacked while in ambulances, trams, and buses; while cycling; tending gardens, attending funerals, or shopping in markets, or clearing rubbish in the city. Children were targeted while playing or walking in the streets. In general, victims were engaged in everyday civilian activities and hit by surprise.

⁵¹ This organizational dimension presents some points of contact with the magnitude threshold of the act or acts carried out, in terms of victims or geographical impact, required for crimes against humanity. This issue will be treated *infra*, in sect. 7.

⁵² A 'core' notion of dignity here means a basic value of humanity represented by any person and which calls for the banning of any humiliating and degrading treatment, rendering the human being an object without respect for his or her uniqueness.

⁵³ Such treaties reveal a common understanding by states about the unacceptability of some conduct and receive strong support, in terms of accessions.

⁵⁴ Such as those banning torture and inhuman or degrading treatment.

⁵⁵ For this distinction see Guillame, 'Terrorisme et droit international', 215 *Recueil des Cours de l'Académie de Droit international* (1989-III) 287, at 305 ff.

on the qualification of conduct the victims of which are state representatives or agents.⁵⁶

As for those values the importance of which is perceived as relatively less according to the orientation of the international community, we can think of the environment, public (or also private) economic facilities or goods, and computer or communication networks.⁵⁷

In these terms, it seems conceivable that violent actions against such values could receive special criminal treatment when the perpetrators pursue a political project or aim at coercing a government: thus, the political element would be shifted from the irrelevant ground of the inner motivations of the perpetrators to the area of the elements of crime, under the heading of *dolus specialis*.⁵⁸ The relevant difference from acts against civilians is that the aggravating feature of this latter line of acts is based upon a political element open to differing evaluations, which seem unlikely to lay the foundations of a notion shared by the international community and able to produce binding effects on states.

In conclusion, notwithstanding all the confusion and the diversity of opinion surrounding the notion of terrorism, a theoretical approach – focused on the values protected by law and on the stance of the international community at large – can shed some light on the debate and lead to the conclusion that two main classes of ‘specially violent’ crimes can be legally conceived: one covering violent actions which undermine civilians’ essential rights (i.e. universal values, such as life, physical integrity, freedom, and dignity) in a manner likely to receive absolute condemnation; and another the condemnation of which by the international community is not homogeneous, owing to the values involved (the essential rights of state agents, public or private goods, computer networks, the environment). While the distinctive, and aggravating, features of the former kind (core terrorism) are the presence of an organizational dimension and the intention to spread terror among

⁵⁶ As already specified, what is suggested here does not concern rules drafted with regard to another value, i.e. the conduct of international relations. It may be asked whether a different reasoning should be applied to agents of intergovernmental organizations: in my opinion, the picture does not change that much, unless the individuals damaged belong to an organization acting on behalf of the whole international community for the pursuit of universal values (primarily, the UN family, or regional organizations acting under the Security Council’s mandate).

⁵⁷ Although the environment is often seen as an emerging common heritage of mankind, the still not very firm status in international law of such a value and the persistent debate on the lawfulness of activities undermining it realistically invite prudence. While actions having direct consequences on human health would be covered by the universal notion of terrorism (for instance, the use or threat of use of weapons of mass destruction), the same still cannot be said of actions damaging the environment which have only indirect effects on the wellbeing of human communities. Analogously, with regard to economic infrastructures or interests, it does not seem possible to identify a widely enough shared attitude by the international community about the fundamental nature of such goods and the inadmissibility of whatsoever lesion of them.

⁵⁸ The need to characterize the higher social danger implied in such a course of action, if compared to action motivated by merely personal reasons or at any rate unconnected with a political plan, would lead to including an additional subjective requirement in the cases that we are discussing.

the population,⁵⁹ the latter kind of action owes special treatment, in criminal law, to the fact that the actors pursue a political end. However, when shifting the rationale of special punishment to that ground, states must run the risk of encountering difficulties and divergences in the evaluation of situations and actors.⁶⁰

According to the core meaning here advocated, terrorism becomes an absolute notion that is no longer linked with the preservation of a state system (and its governing bodies), but focuses on safeguarding the protection of innocent individuals and the interests of victims, and on the human values that these subjects embody.⁶¹ That element makes following political objectives or strategies completely irrelevant, regardless of the idealistic or 'noble' nature of the same, and also reduces the scope of the question of freedom fighters.⁶² On the same footing, the simplistic identification of terrorism with political violence or armed fights can be misleading and should be avoided.⁶³

⁵⁹ Placing the element of terror in the subjective component of an offence (*dolus specialis*) does not imply the introduction of uncertain and dubious assessments, but simply aims at avoiding aggravated criminal responsibility not being supported by the necessary culpability. Moreover, court practice shows that this subjective element can be inferred from objective circumstances which show the likelihood of the acts to spread fear among the population, because it seems possible to infer the terrorist nature of violent actions solely from those data. Lastly, the wording of Art. 2 of the 1999 UN Convention on financing terrorism may be recalled here.

⁶⁰ Although the proposed solution is not an all-embracing one, it does not passively take note of an alleged '*impossible dépolitisation "conceptuelle" du terrorisme*' (see Hugues, 'La notion de terrorisme en droit international: en quête d'une définition juridique', 129 *Journal du droit international* (2002) 753, at 765) and tries to overcome, albeit partially, the problems of a 'value ridden' definition (see van Leeuwen, 'Confronting Terrorism', in M. van Leeuwen (ed.), *Confronting Terrorism. European Experiences, Threat Perceptions and Policies* (2003), at 3) and of the legal relevance of some primary factors usually detected in the description of terrorism (see Fletcher, *supra* note 46, at 910–911).

⁶¹ A victim-oriented approach has already been advocated in legal literature: see, for instance, Green, 'The Nature and Control of International Terrorism', 4 *Israel Yrbk Human Rights* (1974) 134, at 164; Slaughter and Burke White, 'An International Constitutional Moment', 43 *Harvard Int'l LJ* (2002) 1, at 11–12; S. Johnson, *Peace Without Justice. Hegemonic Instability or International Criminal Law?* (2003), at 67.

⁶² Whoever commits such acts can be charged with terrorist crime, regardless of the fact of being 'common criminals', revolutionary groups, freedom fighters, and the like. In other words, terrorism is, from a criminal law perspective, a heinous technique of using violence and its condemnation is a condemnation of the methods employed, irrespective of the context in which it is used. Ultimate purposes can be idealistic or materialistic; what counts is that some methods are outlawed by the international community. What is judged in negative terms is not the fight conducted (in broad terms, i.e., hostilities towards an occupying power or an authoritarian regime), but only the peculiar method employed.

⁶³ Terrorism is often used on the same footing as 'rebellion', 'subversion', or 'armed fight', due to the pejorative connotations it carries. These associations risk offering a pretext for authoritarian regimes or for authoritarian involutions of democratic states: see Murphy, *supra* note 36, at 13; Mertens, 'L'"introuvable" acte de terrorisme', in *Réflexions sur la définition et la répression du terrorisme* (1974), at 25, 43; Duez, 'De la définition à la labellisation: le terrorisme comme construction sociale', in Bannier et al. (eds), *supra* note 27, at 112; Schmid, 'Terrorism – The Definitional Problem', 36 *Case Western Reserve J Int'l L* (2004) 375, at 396–397. More broadly, those conceptual associations are rather misleading, since it is easy to conceive of organizations with 'subversive' political aims that do not adopt terrorist techniques (such as activities linked with political dissent or civil disobedience, or armed action using guerrilla techniques that do not indiscriminately target non-military objectives), and 'ordinary' criminal organizations which utilize terrorist-like means of operation.

Moreover, the emphasis put on the safeguarding of individuals' essential rights indicates that the adherence of the international community to this notion is not subject to aspects such as the transnational nature of the conduct:⁶⁴ a particularly serious violation of human rights is of common concern for the international community even though it occurs in a context which is 'purely' internal to a single state⁶⁵ and the relevant need of international co-operation arises only later, due for instance to the movement across the borders of the people responsible.

4 The Relative Importance of Some Debated Issues

In this perspective, it is here submitted that some issues which usually complicate the debate on terrorism are scarcely relevant.

First, the diversity in legal data coming out of international conventions and domestic penal statutes is for several reasons less important than it appears at first sight; the very wide historical spectrum in which those data were generated, in times when the attitude towards terrorism was quite different; the parallel existence of data of a different nature, especially in recent times, underlying the possibility of crystallizing a first universal notion of terrorist crimes, the legal relevance of which will be minimal (in the meaning explained *infra*, Section 6) but equally appreciable; and the very object of this enquiry, focussing on a core notion and not on an all-encompassing definition, thus allowing the search for the lowest common denominator.

Another complicating factor concerns the involvement of states in the financing, support, or conduct of terrorist activities, through the use of irregular groups or their own armed or police forces. The expression 'state terrorism' is widely employed in literature, with different meanings, thus leading to some confusion. It seems useful to recall the distinction between 'state terror' and 'state terrorism' *stricto sensu*, advanced by a leading authority.⁶⁶ Here the problem lies in the fact that different sets of legal provisions can be applicable to violent conduct carried out by state agents: the concept of core terrorism can be applied even to cases of state terror or terrorism, but attention must be drawn to the fact that in international law the actor *does* matter. Thus, while state terror raises problems of concern for human rights protection and of application of the relevant provisions,⁶⁷ state terrorism involves mainly public international

⁶⁴ For a different view see Cassese, *supra* note 42, at 938.

⁶⁵ Such as the Beslan School hostage crisis, which took place in Russia between 1 and 3 Sept. 2004.

⁶⁶ See Guillame, *supra* note 55, at 297 ff: where the former means a legal order which currently employs terror violence in order to maintain power and pursue its purposes, the latter refers to the implication, with varying degrees, of a state in violent activities carried out in other countries.

⁶⁷ Or respect for humanitarian law, if terror activities are employed to defeat insurgents during an internal armed conflict reaching the threshold required by Additional Protocol II or by common Art. 3 to the four Geneva Conventions. As for the relevance of human rights treaties with regard to conduct not reaching the threshold of crimes against humanity, the concern was raised (see Klein, 'Le droit international à l'épreuve du terrorisme', 321 *Recueil des Cours de l'Académie de Droit international* (2006) 203, at 246–249) that, by not including violent acts by state agents (especially security forces) in a criminal definition of terrorism, the penalization of such acts would not be assured, given that those treaties do not

law issues such as non-intervention, responsibility, countermeasures, and recourse to force.⁶⁸ As already indicated, these aspects are not the main object of this study (which focuses on the treatment of private actors and on the quality of inter-state co-operation), notwithstanding the fact that we will see below how an objective definition of terrorism, tailored for international co-operation in criminal matters, could also be of some use in the treatment of state agents involved in acts of terror violence, thus reducing their chance of impunity, as long as their conduct can be placed in the framework of international individual crimes; in such cases, the differential treatment of private actors and state agents can be reconciled under a common regime.⁶⁹

A third problem with the international response to terrorism is that, as outlined above when discussing the stage reached by the works on the UN draft Comprehensive Convention, states argued for a long time about the exact scope of the notion, i.e., whether or not the use of terrorist methods to achieve certain objectives (such as fights for self-determination of peoples) can be justified. Much of the emphasis put on the question of the struggle for self-determination frankly seems to be ill-directed. I will try to explain this assumption in some detail.⁷⁰

It is well known that a lot of water has flowed under the bridge of self-determination since the 1960s, when the legal protection afforded to oppressed peoples was taking its first cautious steps.⁷¹ Nowadays, it is hard to maintain that national liberation movements or freedom fighters would enjoy any blanket exemption with regard to terrorist acts. The international community, while awarding some *locus standi* in international

oblige states to introduce offences punishing the violation of individuals' rights. In my opinion, it is hard to maintain that, at least for acts recalling the concept of terrorism here framed, human rights treaties protecting the basic guarantees for individuals (right to life, physical integrity, and basic dignity) do not oblige states to have recourse to criminal law in order to punish the perpetrators (no matter whether or not acting in the performance of a public function).

⁶⁸ Or humanitarian law, if put into practice during armed conflict.

⁶⁹ The impunity likely to be enjoyed by Western states' agents involved in violent activities abroad is often invoked as a critical point by Islamic or non-aligned countries. Here it is submitted that when terrorism receives an objective and 'core' definition and the conduct presents the features here proposed, the issue of international criminal responsibility of any perpetrators (state agents included) can be raised in any appropriate forum (see *infra* sect. 7), thus making the debate on terrorism more transparent and able to reject the possible objection of adopting a unilateral view of violence, which stigmatizes the violence used by private groups but ignores that used by state authorities.

⁷⁰ From a methodological point of view, it has been rightly pointed out that such a dispute does not insist on the very definition of terrorism, but, rather, on an exception the importance of which must not be over-estimated when assessing the content of the main notion: see Cassese, *supra* note 43, at 120–121; Bianchi, 'Enforcing International Norms Against Terrorism: Achievements and Prospects', in A. Bianchi (ed.), *Enforcing International Norms Against Terrorism* (2004), at 496. Though sharing this opinion, I think it is worthwhile to discuss such an issue at some length, given that in recent years it has again shown a formidable capacity to create deadlock in the debate at the UN level.

⁷¹ Undoubtedly, there was a certain sympathy towards 'freedom fighters' and not much severity when coming to judge the methods they followed to attain their legitimate goals, partly because the recourse to extreme means was often caused by the risk of being subjected to ill-treatment if unsuccessful, applicable humanitarian law not affording satisfactory protection. In fact, they were qualified as criminals, not being entitled to POW status, and could rely only on the limited protection afforded by common Art. 3 to the four Geneva Conventions.

relations to movements of national liberation and their struggles in adopting the Additional Protocol I to the Geneva Conventions, at the same time demanded respect for some basic values, thus expressing hostility towards terrorist methods by those actors.⁷² It is hard to maintain that the clear indications therein laid out are not an expression of a broader stand of the international community. Not by chance was it made clear later that terrorism is an unacceptable course of action in general terms, even when Additional Protocol I is not applicable.⁷³

Nevertheless, three recent regional anti-terrorist conventions (namely, those adopted by the Arab League, the OIC, and the OAU) contain a provision according to which the struggles waged by peoples in accordance with the principles of international law for their liberation or self-determination shall not be considered terrorist acts.⁷⁴ According to some commentators, those regional conventions may show the renewed and worrying tendency of a consistent group of states (especially Islamic ones) to advocate, even nowadays, that freedom fighters (with special regard to Palestinians against Israel) may be allowed to use terrorist techniques in order to attain their legitimate purposes.⁷⁵ A claim to some form of exception for freedom fighters may finally be confirmed by the negotiating position assumed by OIC states in the discussions concerning the UN draft Comprehensive Convention and by the positions recently assumed by the plenary organs of the same OIC and of the Non-Aligned Movement (NAM).⁷⁶

⁷² Inasmuch as the relevant conditions of applicability are satisfied, ‘freedom fighters’ enjoy POW status but recourse to inhuman and terrorist methods of fighting are forbidden to oppressed people, as they are to states (see, for instance, Art. 51(2) of Additional Protocol I). It is worth noting that some flexibility was conceded to freedom fighters (for instance, with regard to the criteria for identifying legitimate combatants), but no concession was made with regard to actions directed against civilians, who receive, on the contrary, enhanced protection by the provisions of the Protocol: see, for further references, Gasser, ‘Interdiction des actes de terrorisme dans le droit humanitaire’, 68 *Revue internationale Croix Rouge* (1986) 207; Klein, *supra* note 67, at 257–259 (with regard to the discussions on the UN Draft Comprehensive Convention).

⁷³ Reference must be made to GA Res 40/61 of 1985, adopted by consensus on 9 Dec. 1985, where for the first time acts of terrorism received unconditional condemnation, by whomsoever and for whatsoever reason committed. This stance was confirmed and reinforced by the well-known GA Declaration on Measures to Eliminate International Terrorism, attached to GA Res 49/60, adopted on 9 Dec. 1994, and the subsequent resolutions on measures to eliminate international terrorism, adopted at each ordinary session of the GA.

⁷⁴ Art. 2(a) of the Arab League Treaty states that all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. For a more nuanced wording see also Art. 2 of the OAU Convention and Art. 2 of the OIC Convention.

⁷⁵ See Murphy, *supra* note 32, at 142–144. In particular, as aptly underlined by Gioia, *supra* note 27, at 28, the regional treaties would give strong confirmation to such a view, taking into consideration that in that context states are drawing up legal obligations and not a ‘simple’ non-binding GA resolution.

⁷⁶ See the Final Communiqué of the Tenth Session of the Islamic Summit Conference, held in Putrajaya on 16–17 Oct. 2003, at para. 50 and the resolutions adopted in that context, in particular Res 6/10-LEG (IS) on the OIC Convention on Combating International Terrorism, at para. 5, and Res 7/10-LEG (IS) on Convening an International Conference under the Auspices of the UN to Define Terrorism and Distinguish it from People’s Struggle for National Liberation. Almost identical statements are included in the Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement, held in Kuala Lumpur on 24–25 Feb. 2003. More recently, see also Res 12/32-P on Combating International Terrorism, adopted by the 32nd Session of the OIC Conference of Foreign Ministers (28–30 June 2005), at para. 3.

Those elements would confirm the persistent absence of a common agreed definition of terrorism in the opinion of the international community. In my view, the abovementioned provisions and the position of states which can be grouped, for the sake of simplicity, under the NAM/OIC label, cannot be deemed to have a meaning as far-reaching as to point to exempting freedom fighters from a tentative definition of terrorist acts, especially if drafted according to a core content approach, both for textual reasons⁷⁷ and for the overall context.⁷⁸ Rather, a more convincing explanation of the insertion of such clauses would lie in the need to address three needs: providing for a counter-balance to the very broad definition given in such conventions of the scope of the terrorist act,⁷⁹ countering the simplistic labelling as terrorism of *any* action conducted by national liberation movements, and expressing support for Palestinians and condemnation of Israel's policy in the Occupied Territories.⁸⁰

⁷⁷ Looking more closely at the wording of the three treaties, it must be noted that the OAU and OIC Conventions adopt a language which is quite vague, thus allowing for a restrictive interpretation of the *ratio* and of the scope of the provisions. Only the Arab League Convention employs words expressing a clearer will to exempt individual violent acts, put into practice by freedom fighters, from the notion of terrorism: nevertheless, a sort of double standard is endorsed, which inevitably undermines the legal relevance of the provision contained in this treaty, if put in the perspective of an enquiry into the position of the international community on terrorism. In fact, Art. 2(a) of the Arab League Treaty adds that the 'saving clause' shall not apply to any act prejudicing the territorial integrity of any Arab state. Moreover, the explicit reference to the respect of the principles of international law can, and should, be interpreted as avoiding giving a sort of blanket exemption, at least as far as the most serious violent actions of the 'freedom fighters' are concerned, i.e., acts inconsistent with basic principles of humanity, enshrined in customary rules, human rights treaties, and humanitarian law.

⁷⁸ First, it looks at least strange that NAM/OIC countries, when coming to draft regional treaties, change attitude significantly with respect to the position expressed at UN level (AG Declarations and Resolutions, adopted by *consensus*) or in regional *fora* (see, for instance, the unequivocal condemnation of terrorism expressed in the Dhaka Declaration adopted by the 13th SAARC Summit held on 13 Nov. 2005, in which states like India, the Maldives, and Pakistan participated). Secondly, the consistency of the attitude of such states is far from coherent: some of them contributed, in the same years, to the drafting of other regional treaties not containing any form of 'exemption' for freedom fighters (for instance, Kazakhstan and Kyrgyzstan, members of the OIC, are parties to the CIS Convention and to the Shanghai Convention but neither signed the OIC one). Thirdly, the OUA and the OIC Conventions did not receive full support if we look at their status, while only the Arab Treaty had relative success in terms of accessions, overshadowed, in any case, by the double standard approach mentioned above. Lastly, many NAM/OIC states (including several Arab countries) acceded to sectoral universal treaties (which do not allow any exception for terrorist methods, regardless of whether or not employed by national liberation movements) without claiming, by reservations or declarations, a sort of impunity for 'freedom fighters'. Very few exceptions can be recorded, promptly contested by a consistent number of states, including – as would be logical – Western states, but sometimes others too. Mention can be made of the 1997 Bombings Convention ('saving declaration' made by Pakistan, acceding in 2002, criticized by Russia and formally objected to by Australia, Canada, the EU states, Israel, Japan, Moldova, New Zealand, and the USA) and of the 1999 Financing Convention ('saving declaration' by Jordan, Egypt, and Syria, deposited between 2003 and 2005, qualified as an inadmissible reservation or sharply criticized by Argentina, Canada, the EU states, Japan, Norway, Russia, and the USA).

⁷⁹ See Gioia, *supra* note 27, at 22–26.

⁸⁰ This is particularly evident in three recent documents, namely the OIC Kuala Lumpur Declaration on International Terrorism, adopted by the Extraordinary Session of the Islamic Conference of Foreign Ministers on Terrorism (1–3 Apr. 2002), at paras 10–12; the Algiers Declaration of the Summit

By adopting a different approach to the subject and construing a notion of terrorism confined to inhuman acts directed against civilians, such concerns lose momentum and two misapprehensions can be avoided: first, that freedom fighters can do what they please in the pursue of their aims; instead, whenever Additional Protocol I or customary humanitarian law is applicable, it must obey the relevant provisions (including those protecting civilians), while if they are outside their scope the rule on core terrorism provides a basis for the criminalization of conduct deemed unacceptable by the whole international community; secondly, that acts directed against values other than civilians' basic rights may be classified as terrorist crimes; rather, whether or not Additional Protocol I is applicable, they may amount to lawful acts of belligerence if the relevant criteria are met; otherwise they may be classified as criminal under domestic law, but will not be covered by the international notion of core terrorism here proposed.

In conclusion, while it must be admitted that, under the circumstances now singled out, certain acts committed by national liberation movements (or by any other subject claiming the label of 'freedom fighter') can be qualified as terrorist crimes, it must be clear that violent acts during armed conflicts embraced by Additional Protocol I or customary humanitarian law and the phenomenon of state terror or state terrorism, rather than influencing the spelling out of a core notion of terrorism, basically call for the application of provisions not covering conduct carried out in peacetime by private agents.⁸¹ A point of reconciliation can be detected in situations amounting to international crimes, as will be detailed below (Section 7).

of the Arab League, adopted on 23 Mar. 2005, in the last para.; the Final Communiqué of the 3rd Extraordinary Session of the Islamic Summit Conference (7–8 Dec. 2005), pt II. It is worth noting, moreover, that Palestine (represented by the Palestine Liberation Organization) is a member of both the OIC and the NAM. The relevance of the Palestinian issue is underlined also by Hoss and Philipp, *supra* note 19, at 5 and 15. Additional confirmation can be traced in the statements made in the meetings of the Security Council, attended also by non-Council members, relating to the adoption and discussion of Res 1456 (2003) of 20 Jan. 2003 (adopting a Declaration on the issue of combatting terrorism) by states like Iran (Doc S/PV.4710, at 32); Lebanon (Doc S/PV 4845, at 32); Pakistan (Doc S/PV.4688, at 12–13; Doc S/PV.4734, at 11 and 20). In that context, only 2 states maintained a clear position in favour of the 'exemption' for freedom fighters: Libya (Doc S/PV.4845, at 11) and Syria (Doc S/PV.4688, at 23; Doc S/PV.4734, at 19). By contrast, other Arab states carefully avoided clear reference to the controversial issue or quite generically invoked the necessity of a distinction between terrorism and people's legitimate resistance, without further elaboration: Bahrain (Doc S/PV.4710, at 14); Egypt (Doc S/PV.4710, at 16–17); Yemen (Doc S/PV.4710, at 26; Doc S/PV4845, at 12). See also the statements made by Turkey (on behalf of the OIC), the Philippines, and Benin during the meeting of the Security Council leading to the unanimous adoption of Res 1566 (2004) of 8 Oct. 2004, concerning measures additional to Res 1373 (2001) and 1456 (2003): Doc S/PV.5053, at 2, 8.

⁸¹ A similar methodological approach is advocated by the UN Secretary General in his well-known Report entitled *In Larger Freedoms: Towards Development, Security and Human Rights for All*, Doc A/59/2005, where it is clearly stated that 'it is time to set aside debate on so-called "State terrorism". The use of force is already thoroughly regulated under international law. And the right to resist occupation must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians' (at para. 91).

5 Indications Coming from Recent Practice: One Step Forward, Half a Step Back

Confronting the approach here chosen with the legal literature, it seems interesting to note that several years ago one leading commentator, in order to single out a common feature of terrorist crimes, proposed an analogy with war crimes, evoking the employment of cruel offensive methods and the attacking of targets which either are innocent or lack military value.⁸² This theoretical approach has been partly echoed in the activities of the International Law Association,⁸³ and has found new proponents who have focused, as a distinctive feature of terrorist acts, on their inhuman nature (due to the serious and indiscriminate use of violence against innocent persons).⁸⁴ Those theoretical cues deserve appreciation, in that they spell out some features, common to a line of acts, reputed to be intolerable by any state, in the light of the emergence of some basic values of the whole international community.⁸⁵

⁸² See the definition proposed by David, 'Le terrorisme en droit international (définition, incrimination, répression)', in *Réflexions sur la définition*, *supra* note 63, at 103, 125: 'tout acte de violence armée qui, commis dans un but politique, social, philosophique, idéologique ou religieux, viole parmi les prescriptions du droit humanitaire celles interdisant l'emploi de moyens cruels et barbares, l'attaque d'objectifs innocents, ou l'attaque d'objectifs sans intérêt militaire' [any act of armed violence which breaches humanitarian law provisions such as the one banning the employment of cruel and barbaric methods, the attack on innocent targets or on targets deprived of military value, each time the aim of such act is of political, social or philosophical nature]. This concept was later picked up by other authors: see, e.g., Cumin, 'Tentative de définition du terrorisme à partir du *jus in bello*' [2004] *Revue de science criminelle et de droit pénal comparé* 11, at 29–30; Sassoli, 'Terrorism and War', 4 *J Int'l Criminal Justice* (2006) 959, at 979–980. It should be stressed that, more recently, David elaborated a partly different notion, according to an overall assessment of the international practice: see David, 'Les Nations Unies et la lutte contre le terrorisme international', in J.-P. Cot *et al.* (eds), *La Charte des Nations Unies. Commentaire article par article* (2005), at 163, 191.

⁸³ See Art. 2 of Res 7 1984 on International Terrorism, in ILA, *Report of the Sixty-First Conference* (1984), at 6; Report of the Committee on International Terrorism, in *ibid.*, at 314–315.

⁸⁴ See, for instance, Carrillo Salcedo, 'Bilan de recherches de la section de langue française', in Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism* (1988), at 14, 21; Frowein, 'The Present State of Research Carried Out by the English-speaking Section', in *ibid.*, at 57; Francioni, 'Crimini internazionali' [1989-IV] *Digesto discipline pubblicistiche* 464, at 474; Skubiszewski, *supra* note 41, at 42 ff; Murphy, 'The Need for International Cooperation in Combating Terrorism', [1990] *Terrorism: An International Journal* 381. The growing concern about the deliberate targeting of civilians, under circumstances not covered by the law of armed conflict, and the existence of a common approach, in term of strict condemnation of such acts, was witnessed by the result of research carried out by US and (then) Soviet experts between 1988 and 1990, transposed in a joint recommendation to the respective governments in order to support the conclusion of an international convention that would make the deliberate targeting of a civilian population an international crime: see Task Force Recommendation No. 9, pt a), in Beliaev and Marks (eds), *Common Ground on Terrorism. Soviet-American Cooperation Against the Politics of Terror* (1991), at 169; Recommendation No. 4 of the Legal Working Group, in *ibid.*, at 177.

⁸⁵ Following this line of reasoning, the emphasis used by Sorel (*supra* note 27, at 68) seems interesting on the disturbance of public order – as defined by the international community, particularly through the emergence of *ius cogens* and the category of international crimes – caused by the use of serious and indiscriminate violence in order to generate terror with the aim of influencing political action. A core of values, recognized in the international public order, and a certain use of violence (serious and indiscriminate) are thus put at the centre of the definition of terrorism.

It is equally true that, even recently, authoritative scholars have included in their definition of terrorist crimes the pursuit of a political or ideological purpose⁸⁶ or, though not contemplating such an element, referred generically to actions against human life or health, without distinction for the nature of the target (and, thus, for the values involved).⁸⁷

Rebus sic stantibus, I think that a closer look at recent international practice could be useful in order to check whether the tentative definition advanced here is likely to receive confirmation, albeit partial. What can be noted is the gradual accumulation of data which support a core definitional approach, although it would be incorrect to state that the indications emerging are univocal.

Taking a closer look at the legal provisions, both domestic and international, it cannot be concealed that political intent is frequently required for an act to constitute a terrorist offence. It may again be remembered that the sectoral universal conventions usually reject such an approach. Moreover, a survey of situations in which a general definition of terrorism is given provides useful indications of the political element not being a prerequisite. On some occasions, the international community seems inclined to adopt a definitional approach to terrorist acts that does not recognize an exclusive role to the ideological objectives of the actors or the political impact of their initiatives, admitting that terrorism can arise solely on the basis of a widespread climate of terror created (or sought) in a community. It thus gives autonomous relevance to safeguarding the protection of individuals and acquires a dimension which could be defined as ‘humanitarian’.⁸⁸ Moreover, when confronted with this aspect of the complex phenomenon of terrorism, the international community looks more united in expressing a common position, when compared with the stance towards politically motivated acts of violence against targets other than innocent civilians. It is worth noting that on some occasions, however, old divisions among states come out again, especially when dealing with the drafting of international rules.

True, in the past some indications – bearing witness to the particular attention shown to the interests of individuals, notwithstanding the pre-eminence given to states’ interest in their own self-preservation and security – had already emerged, but

⁸⁶ In this sense see, amongst others, C. Bassiouni (ed.), *International Terrorism: Multilateral Conventions* (2001), at 16 ff; Alexander, ‘Terrorism: A Definitional Focus’, in Y. Alexander and E. Brenner (eds), *Terrorism and the Law* (2002), at 3, 7; Sorel, *supra* note 27, at 68; Paust, ‘Terrorism as an International Crime’, in Nesi (ed.), *supra* note 19, at 27; Cassese, *supra* note 42, at 937–943; Saul, *supra* note 38, at 38–45 and 60–61.

⁸⁷ See, for instance, Guillame, ‘Terrorism and International Law’, 53 *Int'l and Comp LQ* (2004) 537, at 540.

⁸⁸ Probably a certain influence was exerted by the consolidation, in an area of international law particularly connected with the use of violence (i.e., humanitarian law), of the principle of the safeguard of civilians: the Geneva Conventions and the 1977 Additional Protocols make clear the primacy of the protection of civilians with respect to actions of states, movements of national liberation, and insurgents. It is difficult to admit that what is banned in contexts where violence is admitted as a normal course of conduct can then be admitted in peacetime, for whatever purpose. This principle finds a natural field of expansion in the discourse on terrorism.

in a merely ancillary way, as in the 1977 European Convention on Terrorism⁸⁹ or in the 1979 UN Hostages Convention.⁹⁰ Coming to more recent practice, the 1994 Declaration of the UN General Assembly on measures to eliminate international terrorism⁹¹ and the 1997 UN Convention for the Suppression of Terrorist Bombings may be considered significant steps forward.⁹² Later, the 1999 UN Convention on the Suppression of the Financing of Terrorism goes even further, expressly tackling the political element of the purpose of coercing some public authorities into doing or not doing something. In fact, under Article 2, it is applicable to conduct that may cause the death, or seriously compromise the physical integrity, of a civilian or any other person who is not taking an active part in the hostilities in a situation of armed conflict, each time the aim of such an act, because of its nature or context, is to intimidate

⁸⁹ This Convention starts by including in the list of terrorist crimes which states cannot deem political offences 'involving kidnapping, the taking of a hostage or serious unlawful detention' or 'the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons' (see Art. 1(d)–(e) and, in the 'optional' list, any other offence involving an act of violence against the life, physical integrity, or liberty of a person (see Art. 2). Furthermore, though leaving states the option of formulating a reservation aimed at allowing the reintroduction of the political offence exception in individual cases for offences included in the 'compulsory list', the Convention singles out some basic guidelines expressing a standard of judgment for such practice: in fact, Art. 13 states that the individual state must 'take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including: a) that it created a collective danger to the life, physical integrity or liberty of persons; or b) that it affected persons foreign to the motives behind it; or c) that cruel or vicious means have been used in the commission of the offence'.

⁹⁰ The relevant offences refer to the depriving of personal freedom of any person (most of all, civilians, given that the main categories of state agents, when on mission abroad, are covered by the 1973 UN Internationally Protected Persons Convention) with the intent to exert pressure on state authorities or any other person or body, thus leaving room for a concept of terrorism which can be realized in the absence of politically coloured elements. In the past, the so-called anti-terrorism universal conventions had a rationale focused on preponderant economic motivations (security of international navigation) or on state interests (protection of state agents): here the interests of common people seem to gain momentum.

⁹¹ UN GA Res of 9 Dec. 1994, Doc A/RES/49/60. It states that it is not possible to justify all those criminal acts carried out to create a state of terror among the public at large, in a group of people, or in certain people for political purposes, irrespective of any possible reason (political, philosophical, ideological, racist, ethnic, religious, or other); para. 3. Although the political purpose is still recalled, it seems that this reference plays in the direction of affirming the legal irrelevance of the reason underlying the use of terror violence; to put it differently, the political purpose would be not a component of the *mens rea* but no more than the synthesis of the personal motivations of the authors, irrelevant from the criminal law perspective. This position is reaffirmed in further resolutions on measures to eliminate international terrorism: see, for instance, Res 57/27 of 19 Nov. 2002 and Res 58/81 of 9 Dec. 2003.

⁹² Art. 5 calls on the states parties to ensure that the criminal acts therein covered, especially when aimed at creating a state of terror among the public, in a group of people, or in individual people, can never be justified irrespective of the political, philosophical, ideological, racist, ethnic, religious, or other motivations behind them. It is worth noting that none of the earlier conventions, adopted at universal level, contains a similar provision, the clarity of which is beyond doubt in that it places the political element out of the constitutive elements of the terrorist offence. According to Art. 2(1), '[a]ny person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a) with the intent to cause death or serious bodily injury; or b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss'.

a population *or* to force a government or international organization to carry out, or abstain from carrying out, a certain activity.⁹³

The last Convention mentioned sets out some very interesting aspects: the use of serious violence against civilians, depending on its features, can amount to terrorism in itself, without the political element of the intent to coerce public authorities or pursuing a political plan being an indispensable requisite, because the crime can be realized solely on the ground of a particular intent to spread terror. However, the picture is not completely satisfactory, for the political element is still contemplated as an alternative *dolus specialis* and the victims can also be state agents, inasmuch as they do not actively participate in an armed conflict.⁹⁴

The UN Draft Comprehensive Convention⁹⁵ and the recent regional instruments⁹⁶ also pay special attention to guaranteeing the safety of the civilian population, leaving room for the identification of a dimension of terrorist crime which is not linked to political plans or to prejudicing the stability of political institutions. That notwithstanding, the unsatisfactory aspects here are even greater, because the various contents of the *dolus specialis* are listed with regard to a diverse range of values or possible targets, without a distinction based on qualitative elements.⁹⁷

These data thus offer some guidance, but are not conclusive; it is other factors which prove to be more important. For instance, the reactions following the 9/11 acts seem to confirm the stand of the international community, originally codified in humanitarian law; attacks on civilian populations are unanimously condemned as an offence against the whole international community. For the sake of brevity, no reference will be made to the impressive quantity of statements and resolutions issued in the weeks following the massacres. More interesting, in my opinion, are some steps taken later by states.

For example, the Declaration attached to SC Resolution 1456, adopted unanimously on 20 January 2003, explicitly affirms that acts of terrorism ‘are to be

⁹³ Moreover, Art. 6 calls on states to ensure that the described offences are not justifiable under any circumstances, thus echoing the wording of Art. 5 of the Bombing Convention.

⁹⁴ For a different view see David, ‘Les Nations Unies’, *supra* note 82, at 184–185: in his opinion, the wording of Art. 2 implies the impossibility of qualifying as terrorist any act directed in peacetime against military personnel. Interestingly, the 2004 SAARC Additional Protocol, greatly inspired by the 1999 UN Convention, refers exclusively to civilians (see Art. 4(1)(b)).

⁹⁵ See *supra* note 33.

⁹⁶ EU Framework Dec 2002/475/JHA is a good example. Art. 1 opts for a complex description of the terrorist crime, which includes the humanitarian notion but does not couple it with a strictly political vision of terrorism. In fact, a wide range of crimes are defined as terrorist acts when, given their nature or context, they may seriously damage a country or an international organization when committed with the aim of seriously intimidating a population *or* unduly compelling a government or international organization to perform or abstain from performing any act *or* seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organization.

⁹⁷ The risk of overreach is aptly underlined by Weigend, ‘The Universal Terrorist. The International Community Grappling with a Definition’, 4 *J Int’l Criminal Justice* (2006) 912, at 928–932.

unequivocally condemned, especially when they indiscriminately target or injure civilians'.⁹⁸ Later, Resolution 1566 of 8 October 2004 renewed the emphasis on the unacceptability of terror violence directed against civilians.⁹⁹ The impetus added by the ratification process of the 1999 UN Financing Convention is also remarkable, as is the consistent line of condemnation expressed by Islamic countries, whose stand on terrorism sometimes presents some *distinguo* or ambiguities¹⁰⁰ towards recent terrorist acts targeting civilians in various countries.¹⁰¹ The Report of the High-level Panel, appointed by the UN Secretary General in order to analyse problematic issues and to suggest solutions,¹⁰² the subsequent Report adopted by the Secretary General,¹⁰³ and the GA Resolution on the outcome of the 2005 World Summit all go in the same direction.¹⁰⁴ It is also true, nevertheless, that positions recalling well-known disputes resurfaced in the post-9/11 era.¹⁰⁵

⁹⁸ Emphasis added. The Secretary General, addressing the Council before it discussed and voted on the draft resolution, underlined the necessity for the UN to issue 'a clear message on the unacceptability of acts of violence targeting civilians': see Doc S/PV.4688, at 2. During the debate, many states, usually on opposite sides when treating the controversial topic of terrorism, significantly converged in identifying a common feature of absolutely 'unacceptable' terrorism; for example, indiscriminate attacks against the lives or physical integrity of innocent civilians: see the statements of Colombia (Doc S/PV.4792, at 27); Iran (Doc S/PV.4710, at 31); Israel (Doc S/PV.4710, at 9); Lebanon (Doc S/PV.4845, at 31); Pakistan (Doc S/PV.4734, at 20); South Africa (Doc S/PV.4845, at 26); Uganda (Doc S/PV.4792, at 26; Doc S/PV.4845, at 16); USA (Doc S/PV.4688, at 18).

⁹⁹ See operative para. 3 of the Res and the statements made by the US, the Philippines, and Benin during the relevant meeting of the Security Council (Doc S/PV.5053 of 8 Oct. 2004, at 6–8).

¹⁰⁰ In the terms highlighted above, in sect. 3.

¹⁰¹ See, for instance, Res 6/10 LEG (IS) on the OIC Convention on Combating International Terrorism, adopted at the Tenth Session of the Islamic Summit Conference, held in Putrajaya on 16–17 Oct. 2003, at para. 1. See also the declarations issued by the OIC Secretary General (all available at: www.oic-oci.org) after the 9/11 events in the USA, the bombing that targeted the 'Al-Muhayya' housing complex in the city of Riyadh (10 Nov. 2003), the twin terrorist attacks that targeted synagogues in Istanbul (16 Nov. 2003), the bomb attack on the packed Moscow underground train (7 Feb. 2004), the crimes carried out in Riyadh (21 Apr. 2004) and in Al-Khobar (29 May 2004), and the bombings in London (7 July 2005). The Secretary General of the Arab League took an analogous stand with regard to the 9/11 events and the Al-Muhayya, Istanbul, and Al-Khobar bombings: see www.arableagueonline.org/arab-league/index_en.jsp. See also the condemnation of the Madrid bombings of 11 Mar. 2004, reported at: www.foxnews.com/story/0,2933,113921,00.html.

¹⁰² See Report of the High-level Panel on Threats, Challenges and Change, entitled *A More Secure World: Our Shared Responsibility*, Doc A/59/565, at para. 164.

¹⁰³ See 'In Larger Freedom: Towards Development, Security and Human Rights for All', Doc A/59/2005, at para. 91 ('any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act').

¹⁰⁴ See Doc A/Res/60/1, at paras 81–82, where Heads of State and Government 'strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security' and 'welcome the Secretary-General's identification of elements of a counter-terrorism strategy'. The same expressions are employed in the Res adopting the UN Global Counter-Terrorism Strategy and in the annexed Plan of Action, Doc A/RES/60/288 of 8 Oct. 2006.

¹⁰⁵ See the negotiating position assumed by NAM/OIC states on the draft Comprehensive Convention or the reservations or declarations formulated with respect to the 1999 Financing Convention by Jordan, Syria, and Egypt (*supra* sect. 4).

On the national level, it is more difficult to find useful cues, due to the fact that normative and policy responses have been basically drafted in order to tackle specific and local forms of terrorism, usually directed against the relevant system of government, and to adapt the existing framework to the new emergencies. However, some data confirm the possibility of singling out a definition focused on the victims and the civil population, more than on the political purpose of the authors.¹⁰⁶ Having regard to pre-9/11 legislation, we can recall various examples, referring to a wide sample of states.¹⁰⁷ It looks remarkable, moreover, that some states, such as France¹⁰⁸ and Spain,¹⁰⁹ which had previously based the criminal offence on the political element, have in recent times adopted more complex definitions, where the pursuit of a political purpose is indicated as an alternative to the intention to cause alarm or terror in the general public. After 9/11, while some states modified their legislation to maintain a central role for the political element,¹¹⁰ others introduced new provisions containing or confirming a general definition of terrorism, the content of which presents the same features highlighted above, for example the co-existence of different versions of terrorist activity, one focused on the climate of terror spread among the collectivity, another politically motivated.¹¹¹ It must be pointed out that a precise determination of the terrorist purpose is usually lacking in the statutory provisions. Notwithstanding this, it does not seem hazardous to say that national legislation, although not homogeneous,

¹⁰⁶ For a brief survey which confirms such an impression see Schmahl, 'Specific Methods of Prosecuting Terrorists in National Law', in Walter *et al.* (eds), *supra* note 2, at 86–87; Walter, in *ibid.*, at 28–30.

¹⁰⁷ The relevant statutes of several states (Algeria, Azerbaijan, Belarus, Chile, Egypt, El Salvador, Georgia, Mexico, Russia, Syria, Tunisia, and the USA) are reported in UN Legislative Series, *National Laws and Regulations on the Prevention and Suppression of International Terrorism*, ST/LEG/SER.B/22. Other statutes not included in such collection are: for Argentina, Law 25.241 of 23 Feb. 2000, in Art. 1; for Bolivia, Law 1768 of 10 Mar. 1997, which restates Art. 133 of the Penal Code dedicated to terrorism; for Italy, Law 15 of 6 Feb. 1980, which introduced a general aggravating circumstance for any crime committed with the purpose of terrorism or of subversion of the democratic order (in Art. 1). As for the Italian legislation, scholars and courts underlined how terrorism and subversion were not to be confused into a unitary notion (terrorism being characterized by the inhuman and indiscriminate methods employed, able to spread panic among the population): see De Francesco, 'Commento agli articoli 1-3 Legge 6/2/1980 n. 15', 1 *Legislazione penale* (1981) 36, at 50; Ciani, 'Art. 270bis', in G. Lattanzi and E. Lupo (eds), *Codice penale. Rassegna di giurisprudenza e dottrina* (2000), v, at 162–165.

¹⁰⁸ See Art. 421-1 of the Penal Code, as amended in 1996.

¹⁰⁹ Art. 571 of the Penal Code, passed in 1995, qualifies as terrorist a group the violent actions of which aim at severely disturbing the constitutional order or the public peace (*paz pública*). The damage to public peace is currently interpreted as existing when the actions are aimed at spreading fear or panic among the population, due to their intrinsic features and irrespective of the existence of a political plan in the authors' minds: see Choclán Montalvo, 'Terrorismo', in A. Calderón Cerezo and J.-A. Choclán Montalvo (eds), *Derecho penal. Parte especial* (1999), at 1231; Muñoz Conde, *Derecho penal. Parte especial* (1999), at 862–863; Polaino Navarrete, 'Delitos de terrorismo', in M. Cobo del Rosal (ed.), *Curso de derecho penal español. Parte especial* (1997), ii, at 906.

¹¹⁰ See Canada and the UK.

¹¹¹ See the Indian Prevention of Terrorism Act of 26 Mar. 2002, Art. 3(1), in 42 *Indian J Int'l L* (2002) 239, at 241, which replaces the Terrorist and Disruptive Activities (Prevention) Act, 1987, s. 3(1). See also the Indonesian 'Government Regulation in lieu of Law' No. 1 of 2002 (later adopted by the House of Representatives and enacted into Law 15 of 2003) on Combating Criminal Acts of Terrorism, s. 6 (English translation available at: www.law.unimelb.edu.au/alc/indonesia/perpu_1.html).

reflects an overall readiness to accept a meaning of terrorism which can be linked to a core humanitarian notion: the states which still qualify the political element as a pre-requisite constitutive element are few, while the vast majority emphasize the climate of terror spread among the general public, at least as a constitutive element alternative to the political purpose.

Case law offers additional and, in my opinion, decisive indications. Some decisions of state courts show the readiness to single out, in various contexts in which judges can exert a relevant discretionary power due to the circularity or the vagueness of legal provisions (extradition law, immigration and refugee law, criminal law itself), a sort of minimal definition of terrorism, which is felt to be universally shared by civilized nations.

The first interesting insights come from US courts. In extradition cases concerning members of alleged terrorist organizations (such as the Abu Nidal Organization and the then PLO), the application of the political offence was denied on the ground that indiscriminate attacks against civilian populations could never benefit from the qualification of political crimes, even though they might be committed to achieving a political purpose.¹¹² Analogously, the High Court of Ireland conceded extradition for three members of the IRA convicted in the UK for having planned to murder political figures and military personnel by using techniques involving indiscriminate death and serious injury to people unconnected or associated with politics or military matters.¹¹³ In the reasoning of the Court,¹¹⁴ the gravity of the conduct prevails over the eventual underlying political purpose, and such crimes, classed as crimes against humanity and terrorism, cannot be regarded as political for the purpose of extradition.

Such an approach finds confirmation in Latin American case law. In the decision in the *Cauchi* case,¹¹⁵ the Supreme Court of Argentina declined a request to extradite an Italian citizen sentenced in Italy for terrorist crimes, basing the decision upon the fact that the condemnation had been pronounced *in absentia*. However, another point was at stake, namely whether the terrorist crimes allegedly committed by Cauchi could benefit from the political offence exception. While the majority of the Court contented itself with dismissing the Italian request on the sole ground mentioned above, three justices,¹¹⁶ in their dissenting opinions, expressly tackled the question and clearly stated that terrorism – meant as a course of action which involves cruel violence against innocent and undefended individuals and which is thus able to spread terror among the civilian population – cannot be included in the political offences for the purpose of extradition and must be qualified as a crime *iuris gentium* or contrary to international law.

¹¹² Violent actions directed against military or governmental targets could, instead, be protected by the political exception: see *Eain v. Wilkes* (CA, 7th Cir, 1981), 79 ILR (1989) 439; *In re Doherty* (DC, SDNY, 1984), 79 ILR (1989) 475; *Ahmad v. Wigen* (CA 2nd Cir, 1990), 104 ILR (1997) 107.

¹¹³ *Quinlivan et al.* [2000] 3 IR 154 (High Ct, Ireland), also reported in Y. Alexander and E. Brenner (eds), *The United Kingdom's Legal Responses to Terrorism* (2003), at 577.

¹¹⁴ *Ibid.*, at 587–588.

¹¹⁵ Case 1292, *Cauchi, Augusto s/ extradición*, Corte Suprema de Justicia, 13 Aug. 1998, available at: <http://www.csjn.gov.ar>.

¹¹⁶ Boggiano, Lopez, and Nazareno (President).

Similar reasoning was followed by the Supreme Court of Venezuela, which strongly underlined how ‘indiscriminate terrorism’ – consisting of serious violent acts directed against innocent individuals and characterized by barbaric methods or atrocious inhumanity – cannot benefit from the political offence exception to extradition mechanisms, on the basis that its objective gravity prevails over whatever underlying purpose, and added that such terrorism constitutes a *delictum iuris gentium*, an international crime against the law of nations.¹¹⁷ The Constitutional Court of Colombia, dwelling on the extradition provision of the 1997 UN Bombing Convention, stressed the heinous nature of crimes committed against civilians, qualifying them as crimes against humanity (*crímenes de lesa humanidad*).¹¹⁸

Having regard to the recognition of refugee status (requested by a member of the Algerian FIS), a judgment of the English House of Lords – although not offering a unitary definition of terrorism – nevertheless shows the readiness of tribunals to differentiate between violent acts, whether or not inspired by political motives, on the basis of their impact on the life and integrity of civilians, and to consider the employment of techniques consisting in the indiscriminate attack on innocent individuals, i.e., terrorist methods, as unacceptable to any legal system.¹¹⁹

In an immigration case, the Canadian Supreme Court, confronted with the need to decide whether the notion of terrorism evoked in the Immigration Act but not defined therein or in other statutes at the relevant time, was constitutional, i.e., not excessively vague, referred to the stipulative definition contained in the 1999 UN Convention on Terrorism Financing, expressly stating that such ‘definition catches the essence of what the world understands by “terrorism”, i.e., the targeting of innocent civilians.¹²⁰

¹¹⁷ Case 01-847, *Ballestas Tirado*, Sup Ct of Venezuela (Crim Div), 10 Dec. 2001, available at: www.tsj.gov.ve. It is worth noting that the extradition was imposed for crimes like hostage-taking and hijacking, but not for rebellion.

¹¹⁸ Const Ct of Colombia, dec C-1055/03 of 11 Nov. 2003, at para. 6.11.

¹¹⁹ *T v. Secretary of State for the Home Department*, 107 ILR (1997) 553 (HL). Lord Lloyd, for the majority, pointed out that acts having a civilian target, or a military or governmental one but involving indiscriminate killing or injuring of members of the public, are likely to be qualified as serious non-political crimes, notwithstanding the fact that they are inspired by political motives, thus preventing admission to refugee status. The reason lies in the absence of a sufficiently close and direct link between the crime and the alleged political purpose. Lord Mustill tried to go further, criticizing the vagueness of this ‘remoteness’ criterion and proposing an objective criterion based on the terrorist method adopted, where violence is employed against people who have nothing to do with the political strategy of the criminals. According to him, a viable definition of terrorism would be traceable from the League of the Nations Convention of 1937: *ibid.*, at 574–575. Lord Slynn of Hadley followed a similar reasoning, but was even clearer in elaborating a notion of terrorism giving priority to the humanitarian dimension, in that it applies to ‘acts of violence which are intended or likely to create a state of terror in the minds of persons whether particular persons or the general public and which cause, or are likely to cause, injury to persons who have no connection with the government of the state’. In his opinion, indiscriminate bombings which lead to the deaths of innocent people are ‘totally beyond the pale’ and are outside the protection afforded by the Refugee Convention: *ibid.*, at 578.

¹²⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)* (Sup Ct Canada), 124 ILR (2003) 343, at para. 90. See also *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 4 FC (2001) 644 (Fed Ct Canada, Trial Div), also available at: <http://decisions.fct-cf.gc.ca/fct/2001/2001fct1095.html>, at paras 24–28.

Finally, when some national judges have been called on to apply statutory provisions concerning terrorist crimes the definition of which was not clearly specified, they have preferred to construe a strict notion, limited to acts which harm innocent citizens in a manner able to spread panic among the population.¹²¹

As we can see, national case law, though originating from different subjects and legal provisions (criminal law, extradition, immigration, asylum) shows that a minimal and universally shared notion of terrorism can be construed and amounts to what I have called ‘core terrorism’. Moreover, such case law not only denies dignity to the political purpose of considering it to be a constitutive element, but goes even further, refusing to give it any material relevance. Lastly, directly or indirectly, language evoking the figure of international crimes is employed.¹²²

6 The Practical Utility of a Core Definition of Terrorism *de iure condito and de iure condendo*

From a look at these data it appears that the real confusion surrounding the criminal treatment of the topic of ‘terrorism’ lies in the temptation of domestic legislators or international actors to use it in order to mix up different phenomena, each of which deserves harsh punishment or strong stigmatization, and in the scant attention paid by some commentators to the peculiarities of criminal law, with regard both to other fields of law and other social sciences. A way out is possible, provided that more clarity is achieved concerning the value protected and the rationale underlying the penalization of offensive conduct. In my opinion, a definition of terrorist crime which is able to receive a wide consensus from the international community is already present in the mass of international practice and only needs to be extracted with more courage. This definition could quickly enjoy customary status, due to the critical number of legally relevant data by now crystallized, to the *opinio* consolidating in the international social conscience and to the overwhelming logical rationale underlying it. To sum up, it is founded on the following elements: a serious violent action against essential rights (life, physical integrity, personal freedom, basic dignity) of civilians;¹²³

with further references to previous case law holding that indiscriminate violence against innocent civilians undoubtedly constitutes terrorism and is unacceptable; *Rogelio Cuevas Fuentes v. Minister of Citizenship and Immigration*, 4 FC (2003) 249 (Fed Ct Canada), also available at: <http://decisions.fct-cf.gc.ca/fct/2003/2003fc379.html>, with interesting clarifications on the notion of civilian targets, confronted with actions against military and governmental targets, admittedly not covered by the *Suresh* definition of terrorism.

¹²¹ For Italy see the references given by the authors quoted *supra* note 107 and, more recently, Case 28491/04, *Drissi* (Tribunale, Milan), 24 Jan. 2005; *Daki* (Corte d’Appello), 28 Nov. 2005; Judgment 35427 (Cassazione), 21 June 2005 and, in more problematical terms, Judgment 1072 (Cassazione) of 11 Oct. 2006. For Spain, see the references given by the authors quoted *supra* note 109.

¹²² Interestingly, a generic reference by national judges, with the exception of the High Court of Ireland and of the Constitutional Court of Colombia which expressly quoted the category of crimes against humanity, is made to international crimes.

¹²³ Or civil servants, not entrusted with basic sovereign prerogatives, primarily the use of coercion.

a *dolus specialis* consisting of the intention to spread terror, to be inferred from, *inter alia*, the methods employed and material features of the conduct leading individuals to feel insecure about their lives and basic rights (for instance civilians being hit, in the normal course of their everyday affairs, in an indiscriminate and possibly extremely violent way); and the presence of a criminal organization able to put in practice a series of actions of such violence.

In order to counter some recurrent arguments against the practical or legal relevance of such notion,¹²⁴ I suggest that, in this first phase of its evolution, this customary notion would have the role of a ‘principle rule’, the legal relevance and ultimate impact of which could be appreciated from different points of view.

First, this legal notion would not have the effect of superseding existing treaty-based definitions or regimes, but would simply supplement them and help orient their interpretation when necessary. The same would go for the enforcement of international legislation such as Security Council Resolution 1373, and the drafting of ‘black lists’ of proscribed organizations or people on the basis of an unspecified notion of terrorism.

Secondly, where national criminal statutes refer to terrorism or terrorist purpose without providing a complete definition of it, judges would now have a sufficiently precise reference, being able to employ the customary meaning of terrorism: this reference is well-founded and restrictive, thus satisfying the (sometimes neglected) principle of strict construction of criminal statutes.

Thirdly, in the absence of specific provisions on terrorist crimes, the political offence exception to extradition and judicial assistance – in both international agreements and state laws – would no longer be considered applicable at the interpretive level, since acts that can fall under the core notion of terrorism cannot be deemed political crimes under any legal system.

Fourthly, the notion here proposed can prove useful even in the interpretation of the 1951 Geneva Convention, where refugee status can be refused to people responsible for having committed serious non-political crimes,¹²⁵ according to Article 1(F). The same can go for similarly drafted rules in other international treaties. Moreover, an analogous reasoning should be followed for the unilateral granting of asylum by a state under the exercise of its territorial sovereignty: no asylum should be given to people involved in the commission of terrorist crimes.

Other effects can be singled out in a *iure condendo* perspective. In fact, notwithstanding the potential coherence of the conceptual framework outlined here, a firmer stand by states would be required in order not to weaken all the possible theoretical efforts as a consequence of the persistent ambiguity in treating terrorism and other phenomena. This is particularly true with law-making exercises, at both national and international levels.

As far as domestic statutes are concerned, the above observations should lead lawmakers to reflect on the content of the national provisions on terrorism. The very

¹²⁴ See, for instance, the authors quoted *supra* note 35 and, additionally, Klein, *supra* note 67, at 260–267.

¹²⁵ Or international crimes, provided that core terrorism is qualified as a crime against humanity, as proposed *infra*, in sect. 7.

existence of a humanitarian dimension of terrorism would not prevent individual states from focusing the description of the relevant offence on the political objectives and public nature of the subjects or interests that are touched. It should be made clear, however, that this choice could lead to diverging evaluations by the authorities of different countries and could therefore make it difficult to obtain collaboration.¹²⁶ If co-operation with other states is to be fully pursued, it would be appropriate for the competent bodies of Member States, when adopting (or amending) national statutes or when implementing their obligations stemming from international rules, to outline discrete criminal provisions (one devoted to core terrorism, another to political terrorism or subversion, if deemed necessary at national level), so as to give greater transparency, with respect to third states, to the procedures and *ratio* behind the incrimination and consequent repression of certain behaviour. This methodological choice would also have the advantage of making it clearer that the current variety in national laws simply is the result of the ‘peaceful’ co-existence of two different approaches to serious violent actions, rather than the proof of a supposed diversity between the international notion of terrorism and the notion of terrorism normally upheld in national legislation.

But a similar approach would be desirable for the drafters of international treaties, too, first of all at the universal level. A treaty-based notion of terrorism must be reduced in scope, curbing the more politically coloured aspects, as the number of states concerned in a regulatory enterprise must be high. Hence, consensus at the universal level is likely to be reached only if the treaty under elaboration does not claim to cover all possible meanings of terrorism, but confines itself to a well-founded and core notion; unfortunately, this need seems neglected at the current stage of negotiations of the UN Comprehensive Convention.¹²⁷ Adopting the minimal notion proposed here could pave the way to significant progress in a twofold direction.

First, the task of dealing with subversive (or politically terrorist) groups which do not resort to inhuman methods would be left to another level, i.e., the selective multi-lateral level, or the regional or bilateral level, thus paving the way for a more focused multi-level response of the international community to violent activities. Secondly, once the definition of a universal treaty is fixed, UN drafters would also be able to draw up really advanced mechanisms of co-operation and compliance control, which could in theory be used by a large number of states. In fact, the assumption that a universal definition in criminal terms of terrorism should be minimal does not entail that the ‘quality’ of the co-operation tools must also be minimal or low; on the contrary, having removed the main cause of divergence among states, it should be easier to find the consensus necessary to introduce a more detailed and ambitious regulation of duties

¹²⁶ This option could be adopted to fight terrorist groups of a mainly local matrix since collaboration with other states would not be essential in these cases, or within the context of bilateral, regional, or ‘selective’ multilateral co-operation, where there can be greater mutual trust and political homogeneity among the countries involved.

¹²⁷ As recalled above (see note 33), the proposed definition is excessively broad, thus facilitating the raising of the usual divergences on saving clauses and state terrorism and the adoption of diverging interpretative approaches.

for national authorities in collaborating with their colleagues in other countries and (why not?) to set up an international supervisory mechanism.¹²⁸

The next steps in the negotiating process will tell us much about the wisdom of political leaders. This researcher will simply observe that the prospective adoption of the current text could give an illusory perspective of unity in the international community: in fact, an agreed text – if technically questionable, open to diverging interpretations, and not accompanied by effective supervisory mechanisms – would probably receive few accessions or unsatisfactory enforcement. So, where would the usefulness of this long awaited exercise lie? It would be better to avoid stipulating a text and to leave customary process to follow its course, because the framework of existing treaties is already ambiguous enough and because the international social conscience and rational arguments might be able to find full expression even outside diplomatic circles¹²⁹ and, hopefully, with wiser outcomes.

7 One Step Further: Terrorism as a *crimen iuris gentium* and its Inclusion in ICC Jurisdiction

Following the approach described above, it is time now to turn to the question of the inclusion of terrorist acts among the *crimina iuris gentium* and in ICC jurisdiction. It is well known that several attempts to include terrorism among international individual crimes, even in recent codificatory efforts, have not been not fruitful, due to the usual contrasts among states and scholars on qualifications and exceptions.¹³⁰ The Statute of the International Criminal Court, in particular, makes no reference to this subject and this is the result of a deliberate choice.¹³¹ Notwithstanding all this, saying that

¹²⁸ Some years ago, Greenwood (in ‘Terrorism and Humanitarian Law – The Debate Over Additional Protocol I’, 19 *Israel Yrbk Human Rights* (1989) 187, at 189–190) noted that terrorism can be divided into an ‘inner core’ (covering attacks directed against civilians with cruel and indiscriminate means, which would be inherently contrary to international law) and an ‘outer region’ (attacks on targets that under humanitarian law would be legitimate). The author, while noting that ‘any attempt to achieve a consensus within the international community regarding what constitutes terrorism would need ... to be based upon the inner core’, expressed the doubt that ‘international agreement on a definition of terrorism that was confined to acts falling within the inner core would inevitably be perceived as casting doubt upon claims that acts falling within the outer category might also be regarded as terrorist’. For this reason, according to the author, the international community chose only to draft sectoral treaties, regarding specific crimes. Such perplexity, in my opinion, goes too far, for it devalues the importance and legal relevance of a globally shared notion of terrorism (coupled with a more courageous system of compliance control) and does not take into account the feasibility of a multi-level approach to the ‘outer region’, which, as the international community stands nowadays, is the only conceivable one.

¹²⁹ As the survey of national case law carried out here demonstrates.

¹³⁰ The 1996 ILC Draft Code of crimes against the peace and security of mankind does not include terrorism, though the item was discussed, following the proposals by Special Rapporteur Thiham. The conclusion was reached that inclusion was premature, notwithstanding that it was recognized that developments on the subject were likely to come from international practice: see ILC Report at the 48th session (6 May–26 July 1996), Doc A/51/10, at 12–13.

¹³¹ Yet, in their final reports, the International Law Commission (see the ILC Report on the work of its 46th session, Doc A/49/10, at 70; ILC Report on the work of its 48th session, Doc A/51/10, at 13) and the Preparatory Committee (see Doc A/CONF.183/2/Add.1 of 14 Apr. 1998, Ch. II, art. 5) listed a number

terrorism is *a priori* beyond the scope of the ICC is imprudent. In general terms, some authors have underlined the link between terrorism, or some kinds of terrorist acts, and international individual crimes.¹³²

It is submitted here that a discrete crime of terrorism can be justified only if it serves a purpose which has not yet been satisfied by other international crimes, thus expanding the area of criminal liability to serious conduct which otherwise escapes an internationally-based reaction. If we look at the two main classes of international crimes, we can easily note the possibility of accommodating inhuman terrorism within the scope of applicability of war crimes, whenever humanitarian law is applicable and the violent conduct is carried out by individuals bound by such body of rules.¹³³ This leads one to wonder whether the other class of crimes, namely crimes against humanity, applicable both in peace- and wartime, is able to embrace terrorist conduct.¹³⁴ Having

of core crimes to be included in the Court's jurisdiction, and left under a separate heading some controversial offences, among which was terrorism. During the Rome Diplomatic Conference, a proposal advanced by Algeria, India, Sri Lanka, and Turkey to include terrorist crimes in the provision dedicated to crimes against humanity (the future Art. 7 of the Statute) received scant support from other states (see Doc A/CONF.183/C.1/L.27/Rev.1). What these 'like-minded' States obtained was nothing other than a sort of acknowledgement of the relevance of the issue raised: in fact, the Final Act of the Conference expressly calls upon the Revision Conference of the Rome Statute – to be convened, according to Art. 123, 7 years after its entry into force – to take into consideration the question of the express inclusion of terrorism in the subject-matter jurisdiction of the ICC (see Doc A/CONF.183/10 of 17 July 1998, Res E). The main reasons underlying the choice not to include terrorism can be summarized as follows: international treaties on terrorism do not adequately reflect customary law as treaties concerning other crimes do; in many cases, terrorist crimes are not sufficiently serious, in comparison with the 'traditional' international crimes, and can be better dealt with at national level, with an increased classical co-operation among national agencies; due to the uncertainty about the definition of terrorism and the exact scope of the notion, the ICC could have run the risk of being politicized.

¹³² See, for instance, Skubiszewski, *supra* note 41, at 53; Cassese, *supra* note 43, at 128–130; Zappalà, 'Do Heads of State Enjoy Immunity from Jurisdiction for International Crimes?', 12 *EJIL* (2001) 595, at 609; Sharma, 'International Crimes and Universal Jurisdiction', 42 *Indian J Int'l L* (2002) 139, at 141.

¹³³ It is well known that war crimes include the use or threat of violence against innocent people (wounded, sick, shipwrecked, prisoners of war, civilians), or in an indiscriminate or particularly cruel fashion, or with means prohibited by the law. Less relevant is the circumstance that isolated provisions evoking terrorist purposes are not recalled among the serious breaches of Geneva Conventions or in the war crimes according to the Statutes of international courts. Given the notion of core terrorism advanced here, it is evident how the general offences already caught by war crimes are adequate to penalize terrorist actions as defined here. For a discussion of war crimes and terrorism see Gasser, *supra* note 72, at 210–220; R. Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), at 66–202; Gioia, *supra* note 27, at 38–57; Cassese, *supra* note 42, at 943–948; Saul, *supra* note 38, at 271–313.

¹³⁴ It has already been stressed in legal literature that certain single acts, currently targeted as terrorist (the examples referred to are usually the 9/11 events), may satisfy the requirements provided in Art. 7, because of their concrete offensive nature and their serious threat to human values: see Cassese, *supra* note 43, at 994–995; Kirsch, 'Terrorisme, crimes contre l'humanité et Cour pénal international', in SOS Attentats, *Livre noir. Recueil des contributions au colloque "Terrorisme et responsabilité pénale internationale"* (2002), at 111, 123; Ellis, 'Accountability for Terrorism', in J. Stromseth (ed.), *Accountability for Atrocities. National and International Responses* (2003), at 449, 478–479; Keijzer, 'Terrorism as a Crime', in W. Heere (ed.), *Terrorism and the Military. International Legal Implications* (2003), at 115, 126–127; von Schorlmer, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism', 14 *EJIL* (2003) 265, at 272–274; Tomuschat, 'Universal Jurisdiction and Terrorism', in SFDI, *Les nouvelles*

regard to the definition proposed here and to the recent developments in international practice, I deem it possible to accommodate terrorism in the framework of crimes against humanity, provided that a liberal reading of the nature of possible perpetrators is adopted and a wide interpretation of the magnitude threshold is followed.¹³⁵

As for the first issue – the possible perpetrators – one might question whether the category of crimes against humanity embraces patterns of action carried out by private organizations, acting against or outside the context of a state organization.¹³⁶ Article 7(2)(a) of the ICC Statute requires that crimes must be committed ‘pursuant to or in furtherance of a State or organizational policy’. What this organization can be is not specified in the Statute.¹³⁷

Some indications can be obtained from Article 18 of the 1996 ILC Draft Code on crimes against peace and security of mankind, where it is specified that the acts as a whole can be instigated or directed by a government, a group, or an organization. The Commentary specifies that such organization or group may or may not be affiliated to a government.¹³⁸ Must this organization, not affiliated to any government, at least be vested with some *de facto* territorial authority? The ICTY *Tadić* case is often recalled as offering guidance: the Tribunal applied the notion to a *de facto* territorial authority (the Bosnian Serbs) and admitted that groups, whether terrorist or not, which do not

menaces contre la paix et la sécurité internationales (2004), at 257, 268; Arnold, *supra* note 132, at 263 ff. *Contra*, see Schabas, ‘Is Terrorism a Crime Against Humanity?’, 8 *International Peacekeeping* (2002) 255. Some doubts are also advanced by Pellet, ‘No, This is not War!’, published on 3 Oct. 2001 on www.ejil.org/forum_wtc/ny-pellet.html; Szurek, ‘Le jugement des auteurs d’actes de terrorisme: quels tribunaux après le 11 septembre?’, in Bannier et al. (eds), *supra* note 27, at 317–318.

¹³⁵ Other elements of crimes against humanity do not raise particular problems. As far as the potential victims are concerned, according to the prevailing view they must be, at least in the ‘murder-type’ crimes, part of any civilian population. One might wonder whether the actions must target identifiable groups of individuals, according to common elements (race, nationality, religion, etc.), or whether the victims can have no connection among themselves, it being sufficient that they are civilians and find themselves in a certain place in the course of their everyday lives. The latter view has a sounder basis: to accept the contrary opinion would mean to admit that a form of persecutory or discriminatory element is needed, which must be excluded. Having regard to the objective element, the definition of inhuman terrorism proposed here undoubtedly fits into the various headings of Art. 7 of the ICC Statute (in particular, murder, extermination, severe deprivation of physical liberty, torture, enforced disappearance of people, other inhumane acts causing great suffering, or serious injury to body or to mental or physical health). Lastly, another matter is whether there is a coincidence of the *mens rea* requirement in terrorism and in crimes against humanity. In the latter category the knowledge of acting in the framework of an attack on a civilian population is sufficient, while terrorism requires an additional element, that is the intention to create, through such an attack, a widespread climate of fear and panic. Hence, crimes against humanity can stand as generic offences, able to embrace core terrorism to the extent that a specific crime of terrorism will be spelled out in the ICC Statute or elsewhere.

¹³⁶ Core terrorism can present some form of complicity with a government, but the intrinsic gravity of the conduct does not decrease when the actor is a purely private group.

¹³⁷ The preparatory documents do not help that much in shedding some light on that concept, nor do the Elements of Crimes, adopted on 9 Sept. 2002 by the Assembly of States Parties (Doc ICC-ASP/1/3); therein, the introduction to Art. 7(3) refers to an ‘organization’, in the alternative to a state, but adds nothing.

¹³⁸ This requirement is justified, in a negative way, by the need to prevent actions committed by an individual pursuant to his own criminal plan to constitute crimes against humanity: see ILC Report on the work of its 48th session, *supra* note 130, at 47.

control any territory can be the authors of crimes against humanity.¹³⁹ It must be noted, however, that the first passage of the decision refers to a territorial entity, while the second could probably be classified as an *obiter dictum*, because it was not relevant for the discussion of the merits and simply reported the opinion of the Prosecutor and its tacit acceptance by defence counsel without adding any comment. These elements explain why the authority of this passage has been questioned.¹⁴⁰ So the *Tadić* judgment, though useful, can hardly be deemed decisive.

In legal literature, it is not easy to find the univocal treatment of such a topic. A significant number of commentators stress the need for a link between the perpetrators and a government or, at least, an insurgent movement or territorial authority, acting as a factor increasing the gravity of the material conduct, and thus raising concern in the international community.¹⁴¹ Other authors go even further, pointing out that the associative element, and its inherently aggravating effect, could eventually be satisfied by 'purely' private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human values.¹⁴²

I subscribe to this last opinion. Undoubtedly, in the past the category discussed here was linked to a form of state policy, most of all in the light of the tragic experience of the atrocities committed during World War II. Nowadays, however, the crucial point becomes whether we have to consider as a necessary element of crimes against humanity the very presence of states or state-like authorities behind the violent acts, or, instead, the fact that the authors are organized – no matter whether in the context of a state structure or of a private group or network – and able to put into practice 'a course of conduct involving the multiple commission' of serious violent acts undermining the protection of basic human values. Though the latter view can look innovative, I deem it simply as the natural evolution of the category of crimes against humanity. I do not think that this view could raise doubts about compatibility with the principle of strict construction of penal statutes (enshrined *inter alia* in Article

¹³⁹ See ICTY (Chamber), Opinion and Judgment of 7 May 1997, paras 654–655: the works of the ILC on the Draft Code and some decisions of US courts are quoted.

¹⁴⁰ Schabas, *supra* note 133, at 258 takes a strongly critical position about the relevance of this para. of the *Tadić* judgment, noting that 'an ephemeral reference to submissions by the Prosecutor is hardly a firm precedent'.

¹⁴¹ Dixon, 'Article 7, paragraph 2', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), at 158, 159; C. Bassiouni, *Introduction au droit pénal international* (2002), at 51–53; J.-F. Roulot, *Le crime contre l'humanité* (2002), at 150–154; Cassese, *supra* note 43, at 64, 83, and 91; Schabas, *supra* note 133, at 257–260; Gil Gil, 'Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de "Los Elementos de los Crímenes"', in K. Ambos (ed.), *La nueva justicia penal supranacional: Desarrollos post-Roma* (2002), at 65, 73–75; C. Bassiouni, *The Legislative History of the International Criminal Court. Vol. 1* (2005), at 151–152.

¹⁴² In this perspective see Robinson, 'Defining "Crimes against Humanity" at the Rome Conference', 93 *AJIL* (1999) 43, at 50; Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité* (2002), at 415–417; K. Kittichaisaree, *International Criminal Law* (2001), at 98; S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy* (2001), at 69; B. Conforti, *Diritto internazionale* (2006), at 191; Gioia, *supra* note 27, at 62–66; Arnold, *supra* note 132, at 272–273.

22(2) of the ICC Statute).¹⁴³ Besides, by excluding private criminal organizations from the possible authors of crimes against humanity we could reach the conclusion that inhuman terrorism sponsored by any state (even a small and insignificant one) fits into the category, while Al-Qaida actions do not (at least, the ones following the fall of the Taliban government): this sounds not only illogical, but even contrary to the current position of the international community.

This said, however, it must be conceded that a certain tension arises between the traditional conception of crimes against humanity and the emerging notion of core terrorism as far as the issue of possible perpetrators is concerned.

If we look at the material threshold, referred to in the ICC Statute as the element of the ‘systematic or widespread attack’, we again find some difficulty, although not an insurmountable one. Taken separately, ‘widespread’ refers to the magnitude of single acts, while ‘systematic’ means the repetition of similar acts, showing a consistent pattern of action. Often, the two elements are present together, but the use of the alternative conjunction ‘or’ would warrant the conclusion that the repetition of acts with a small number of victims amounts to a crime against humanity (the systematic dimension), as well as a single act striking at a considerable number of victims (the wide spread). Such conclusion would be confirmed by several data from case law and the work of the International Law Commission.¹⁴⁴ Nevertheless, it must be admitted that the ICC Statute takes a rather restrictive stand: a look at Article 7(2)(a) shows that an element of, at least potential, repetition is required, so leaving aside isolated acts, no matter whether on large scale. This being said and leaving unsettled, for the sake of brevity, the question whether on this point the ICC Statute fully corresponds to customary law, the characteristics of core terrorism seem satisfied inasmuch as the terrorizing features distinguishing these types of conduct, singled out above,¹⁴⁵ are owed, *inter alia*, to the presence of an organization which is able to repeat similar acts targeting civilians. It can be supposed, however, that some acts of core terrorism could not reach the threshold spelled out in the Rome Statute, depending on the interpretation that will be given to it by ICC judges, and thus would not be embraced by the notion of crimes against humanity embodied in the Statute and the relative legal regime.¹⁴⁶ A critical point could be the occurrence of distinct actions (not necessarily catastrophic as far as the number of victims is concerned) carried out in different countries against different populations: would they still be classifiable as crimes against humanity?

¹⁴³ The following elements can be recalled: the general purpose of protecting basic human values which underlines Art. 7 and the whole Statute; the deliberate choice to use the term ‘organizational’ (or ‘organization’ in the Elements of Crimes), which has a wider meaning of state or other territorial entity; the capacity gained by private criminal groups to commit the serious crimes enumerated in Art. 7 (or at least some of them) with an efficiency and danger comparable to those of state structures.

¹⁴⁴ See, for instance, G. Mettraux, *International Crimes and the ad hoc Tribunals* (2005), at 170–171 (with further references to the case law of the *ad hoc* Tribunal and to the work of the ILC).

¹⁴⁵ See sect. 3.

¹⁴⁶ This issue is judged as relatively important by Arnold, *supra* note 132, at 263 ff, while Ascensio ('Terrorisme et juridictions internationales', in SFDI, *Les nouvelles menaces contre la paix et la sécurité internationales* (2004), at 271, 280) emphasizes it as a factor able to drive many cases away from the ICC jurisdiction.

Again, the outcome of the discussion owes much to an orthodox view of the category or to a liberal interpretation of its scope.

In conclusion, if the opinion proposed here concerning possible perpetrators is deemed acceptable and a liberal interpretation is given of the scope of the element of 'widespread or systematic attack' typical of the notion of crimes against humanity, this category could already be able to cover the typical manifestations of core terrorism.¹⁴⁷ Opting instead for a restrictive reading of those problematic issues, the path is paved for the emergence of a discrete crime of core terrorism.¹⁴⁸ The method employed here to construe a notion of terrorism has shown how rooted in the international social conscience is the rationale for improving co-operation among states in the fight against core terrorism: national case law (a relevant element in the evolution of this peculiar branch of international law) seems to offer indications in that direction. Hence, it does not seem rash to state that, if the issues of the material threshold and of the possible authors of crimes against humanity are solved in a restrictive manner, core terrorism is a natural 'candidate' for becoming a fully fledged discrete crime, covered by an emerging rule of customary law.¹⁴⁹

This leads to a final question, namely whether it is necessary or desirable to include core terrorism in the ICC Statute on the occasion of the future revision conference. If qualified as a crime against humanity, core terrorism could be included in the list in Article 7 for the sake of clarity, thus casting away any doubt about the inhuman nature of such conduct. Such an option could be deemed scarcely innovative and ambitious. However, it deserves more attention, inasmuch as it could have interesting effects. First, it would elucidate that private actors can be authors of crimes against humanity. Secondly, spelling out a definition of core terrorism in the ICC Statute could exert a significant pedagogical effect on national judges, discouraging undesirable discrepancies with regard to the regime of consequences and possibly mitigating circumstances.¹⁵⁰

¹⁴⁷ Other data from international practice can be recalled: in 2004, the Parliamentary Assembly of the Council of Europe expressly defined terrorist acts as crimes against humanity (see Recommendation 1644 (2004) 1, at para. 8), while a few years ago it simply asked the Committee of Ministers to 'review the relevant existing conventions in the light of the recent events and declare terrorism and all forms of support for it to be crimes against humanity' (see Recommendation 1534 (2001), at para. 5.xii).

¹⁴⁸ Theoretically, another option is envisageable: deeming the material threshold of the ICC Statute, as restrictively interpreted, as not corresponding to the customary notion of crimes against humanity, and thus inserting core terrorism into this category.

¹⁴⁹ The category of crimes against humanity includes several specific crimes (i.e. apartheid, torture, enforced disappearance) or sub-categories possessing a certain autonomy (i.e. murder-type crimes and persecutory crimes). The history of this group of international crimes shows that it is perfectly conceivable that certain conduct, at least partly covered by the requirements of the category, slowly develops specific features depending on the evolution of international social conscience, thus leading to the formation of autonomous offences, recognized by positive law (see the case of genocide) or by a customary rule (such as the discrete crime of torture, as suggested by Cassese, *supra* note 43, at 118–119).

¹⁵⁰ In fact, state authorities, while no longer showing a consistent will to exclude some acts by the definition (especially after 9/11 events), can still show different aptitudes when applying consequences to types of conduct depending on the context or on the ultimate purpose pursued by the actor, especially when it finds some form of legitimization in international political debate: so, soft penalties could be imposed by national courts on terrorist actions put into practice in a fight against a foreign oppressive regime (violating self-determination or basic human rights), while some aspects of the international crime regime could *de facto* be applied in a less severe way or not applied at all (statutes of limitation, universal jurisdiction, limits on the grant of amnesty, etc.).

Moving from another perspective, which qualifies core terrorism as an emerging discrete international crime, a more innovative and propulsive option could be conceived, such as an amendment introducing an article devoted to core terrorism, which could expand the scope of the ICC Statute to terrorist acts not caught by the category of crimes against humanity as there defined¹⁵¹ or as interpreted by a significant part of the legal literature.¹⁵² The inclusion of a dedicated offence in the ICC Statute, partially detached from the current paradigm of crimes against humanity, could be associated with some basic choices of international criminal policy related to the appropriateness of the ICC intervention.¹⁵³

Those possible developments, however, should not shift attention away from the need for another international law-making exercise, which is more urgent, as outlined earlier (in Section 6): a UN comprehensive convention on terrorism, based on a core notion, the primary task of which would be the elaboration of a legal framework increasing both inter-state co-operation in this field and compliance control (a matter not tackled, except in an indirect way, by the ICC Statute), and thus paving the way for a more efficient fight against this contemporary scourge of the international community.

¹⁵¹ With regard to the material threshold.

¹⁵² With regard to the private character of the authors.

¹⁵³ In fact, such innovation could be accompanied by the insertion of additional requirements justifying the intervention of the ICC, such as some form of state involvement and a transboundary dimension, thus recalling the solution envisaged for war crimes in the *chapeau* of Art. 8 of the ICC Statute. Such requirements have been singled out as constitutive elements of a discrete crime of terrorism, already present in customary law, by Cassese (*supra* note 43, at 126 ff). In his opinion this notion of terrorism (to be added to terrorism as a war crime and terrorism as a crime against humanity) gained momentum following the 9/11 acts and the subsequent reaction (UNSC Res 1368 of 12 Sept. 2001, UNGA Res 56/1 of 12 Sept. 2001; other international practice) and is accompanied by a universal jurisdiction rule. Here, it is submitted that such additional requirements and the relevant manifestations of international practice can surely be appreciated in the perspective of the assessment of the existence of a threat to peace or international security (under Ch. VII of the UN Charter) but are less convincing when assembled with a view to ascertaining, *de iure condito*, the existence of a discrete crime of international terrorism.