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# 1. The definition(s) of terrorism in international law

*Marcello Di Filippo*

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## 1 INTRODUCTION: THE USES AND ABUSES OF THE TERM 'TERRORISM' – THE NEED TO SHIFT FROM A LABEL TO A JURIDICAL CONCEPT

As with many other words or concepts, 'terrorism' may be used in many ways, or for many purposes. In conflict situations, for instance, it may be an evocative tool apt to disqualify the adversary's side, be it an individual, a private organization, an insurgent group, a movement of national liberation, a state or a group of states. Moreover, the history of great social and political changes in many countries and regions shows how the 'terrorist' of yesterday may change into the national hero of today, and how the founding father (or the enlightened revolutionary) of yesterday may become the terrorist or the criminal of today.

What will be investigated here is not the label 'terrorism' as used in the political arena or in the context of a communication strategy, but its legal dimension, with special regard to international law and with some references to comparative law. The emphasis is placed on the special consequences of derogating from a supposedly general framework applicable to violent activities. As far as international law and terrorism are concerned, reference may be made to enhanced inter-state co-operation tools;<sup>1</sup> derogations from guarantees usually accorded to individuals (in human rights, refugee, or extradition law); special security measures adopted by the United Nations Security Council or other international agencies (including in the financial sector); the application of the international crimes regime;<sup>2</sup> the attribution of violent activity to a state under the law of state responsibility;<sup>3</sup> the justification of the use of armed force;<sup>4</sup> and so on. On the domestic level, many legislatures commonly employ the language of terrorism to underline the high disvalue associated with some violent behaviour *and*

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<sup>1</sup> To this end, states may be pushed to enter into agreements (bilateral, regional, multilateral, or quasi-universal) regarding co-operation in sensitive criminal matters, transfer of personal data, or police and intelligence activities.

<sup>2</sup> Certain terrorist acts may be qualified as crimes against humanity or war crimes. See, in this book, Saul, Chapter 14 and Arnold, Chapter 19. In recent literature, see also A Bianchi and Y Naqvi, *International Humanitarian Law and Terrorism* (Hart, 2011).

<sup>3</sup> See Trapp, Chapter 3 in this book.

<sup>4</sup> See Wood, Chapter 13 in this book.

to justify the application of a special regime, with a special emphasis on criminal law,<sup>5</sup> even though other fields of law may be engaged.<sup>6</sup>

A preliminary clarification is necessary. A recurrent complicating factor in the identification of a possible definition of terrorism concerns state terrorism or terror, namely the involvement of states in the financing, support, or conduct of serious violent activities, through the use of irregular groups or their own agents (especially armed or police forces). Various authorities wisely underline that a supposed notion of terrorism should include both private and state actors, to avoid an unbalanced treatment of especially violent activities.<sup>7</sup> Nevertheless, in my opinion, the already complicated framework related to terrorism risks becoming intractable if both categories of potential perpetrators are jointly taken into account. Different sets of legal provisions have historically developed for violent conduct carried out by state agents or by private persons. In theory, the concept of 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. When a state is involved, broader legal questions and entire sets of legal provisions become relevant.<sup>8</sup> Much more complicated (and somewhat evanescent) is the framework applicable to private actors, where abuses and distortions may occur absent a common understanding of the meaning of terrorism, while significant deadlocks may arise in prevention and repression strategies. Thus, the object of this chapter will be the possibility of drawing a legal definition of terrorist activities of private actors, able to avoid intolerable subjectivism or unpredictable outcomes in the enforcement of special rules or of derogations to ordinary regimes.

The wide use of the term ‘terrorism’ in a legal context, both on the domestic and international levels, makes one wonder if a common perception of its technical meaning has spread among international actors. This search is even more important if due attention is paid to the

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<sup>5</sup> Including higher penalties, or aggravating circumstances for ordinary violent crimes; more severe penitentiary treatments; and simplified or special trial procedures. Recently, a strong emphasis has been put on the definition of terrorism-related crimes, whose contours are often uncertain, and on the setting up of several administrative surveillance mechanisms, not regulated by criminal law: for some illustrative examples and for the related need of an enhanced legal clarity on what terrorist-related crimes are and which guarantees are available to suspected persons, see M Gutheil et al., *EU and Member States’ policies and laws on persons suspected of terrorism-related crimes*, Study for the European Parliament No. 596.832, December 2017. See also, in the UN context, the concerns raised by the High Commissioner for Human Rights in his 2014 Annual Report on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/28/28, 19 Dec 2014. For a cautious approach purported by the judiciary, see for instance Cassazione (Italian Supreme Court), criminal section No. 5, judgment No. 48001/2016 of 14 July 2016, *Hosni et al.*; Cour Constitutionnelle (Belgium), judgment No. 31/2018 of 15 March 2018.

<sup>6</sup> Such as special investigative powers for police and intelligence agencies (including surveillance); preventive or administrative measures based on mere suspicion (including financial or other targeted sanctions); detention or removal of aliens with very limited chances to mount a legal challenge; systematic denial of visas or entry for aliens into the national territory or enhanced control on transfrontier travel by nationals.

<sup>7</sup> See, e.g., MC Bassiouni, ‘Perspectives on international terrorism’, in MC Bassiouni (ed.), *International Criminal Law* (3rd edn, vol I, Martinus Nijhoff, 2008) 697, 704–6.

<sup>8</sup> On this point, see above n 3–4; M Di Filippo, ‘Terrorist crimes and international cooperation: Critical remarks on the definition and inclusion of terrorism in the category of international crimes’ (2008) 19 *European Journal of International Law* 533, 548–9.

fact that severe legal implications arise for individuals specially targeted as terrorists.<sup>9</sup> Several scholars expressed deep scepticism about the very possibility of elaborating a legal notion of terrorism.<sup>10</sup> For a long time, partial and contradictory practice and a sharp ideological division in legal doctrine constantly led to the conclusion that no consensus existed in the international arena. Rather than a common notion of terrorism, we could only refer to several definitions of it. In recent years, however, some factors have changed significantly and have enabled the maturing of a different sensitivity amongst the international community, the terms of which deserve a thorough examination.<sup>11</sup>

Having reviewed the state of the field, this chapter will single out a core notion which is based on the quality of the protected value (namely, the 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). The chapter aims to demonstrate that a core approach to a legal notion of terrorism (deeply inspired by the conceptual rigour of a criminal law approach that is also respectful of civil liberties) is technically viable and sound, enjoys sufficient support in international practice and can avoid some supposed difficulties related to the political dimension in which this phenomenon is undoubtedly located.<sup>12</sup>

## 2 TERRORISM IN INTERNATIONAL TREATIES: THE UNEASY SEARCH FOR A COHERENT FRAMEWORK

After an unsuccessful attempt made under the auspices of the League of Nations,<sup>13</sup> and in the absence of a comprehensive strategy, for a long time the international community's interest

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<sup>9</sup> This aspect has been rightly underlined by several commentators: see, e.g., B Golder and G Williams, 'What is "Terrorism"? Problems of legal definition' (2004) 27 *University of NSW Law Journal* 270, 271–2; K Roach, 'The case for defining terrorism with restraint and without reference to political or religious motive', in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 39, 40–1; C Walter, 'Terrorism', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (online edn, OUP, 2011) www.mpepil.com [1]; B Saul, *Civilizing the Exception: Universally Defining Terrorism* (Sydney Law School Legal Studies Research Paper No. 12/68, 2012) 9.

<sup>10</sup> See, e.g., RR Baxter, 'A skeptical look at the concept of terrorism' (1974) 7 *Akron Law Review* 380; G Levitt, 'Is "terrorism" worth defining?' (1986) 13 *Ohio Northern University Law Review* 97, 114–5; R Higgins, 'The general international law of terrorism', in R Higgins and M Flory (eds), *Terrorism and International Law* (Routledge, 1997) 13, 27–8; J Dugard, 'The problem of the definition of terrorism in international law', in P Eden and T O'Donnell (eds), *September 11, 2001: A Turning Point in International and Domestic Law?* (Transnational, 2005) 187, 198–205; C Begorre-Bret, 'The definition of terrorism and the challenge of relativism' (2006) 27 *Cardozo Law Review* 1987, 1990; M Aksenova, 'Conceptualising terrorism: international offence or domestic governance tool?' (2015) 20 *Journal of Conflict and Security Law* 277.

<sup>11</sup> On this view, see further Di Filippo, above n 8, 534–5. For a partly similar view, see R Young, 'Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation' (2006) 29 *Boston College International and Comparative Law Review* 23, 29.

<sup>12</sup> For some indications on the practical utility of a core definition of terrorism *de iure condito* and *de iure condendo*, see Di Filippo, above n 8, 561–4.

<sup>13</sup> Convention for the Prevention and Punishment of Terrorism, opened for signature 16 November 1937, 19 *League of Nations Official Journal* 23, never entered into force.

in defining mechanisms of co-operation to repress terrorism generated nothing but selective and random interventions. This is particularly evident at the universal level: the UN and some specialized or related agencies adopted several piecemeal or sectoral conventions which dealt with specific aspects of the phenomenon,<sup>14</sup> but did not punish *any* terrorist activities by introducing a general definition of terrorism. Moreover, those treaty offences were usually wide enough to cover conduct regardless of whether they were inspired by terrorist, political or other purposes.<sup>15</sup> A partial change to this cautious, sectoral approach came with the 1999 Convention on the Suppression of the Financing of Terrorism (UN Financing Convention),<sup>16</sup> which provides something of a general definition, as we will see below.

The above-mentioned sectoral method was also adopted at the regional level for some time.<sup>17</sup> More recently, the regional context has shown that a comprehensive definition is conceivable.<sup>18</sup> Since 9/11, the African Union,<sup>19</sup> Council of Europe,<sup>20</sup> Organization of American

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<sup>14</sup> For the text of the conventions, other details and their status, reference can be made to United Nations Treaty Collection, <http://treaties.un.org>, and to the UN Office of Counter-Terrorism, <http://www.un.org/en/counterterrorism/legal-instruments.shtml>.

<sup>15</sup> For a survey of those treaties see A Gioia, 'Terrorismo internazionale', in A Cassese (ed.), *Dizionario di diritto pubblico* (vol VI, Giuffr , 2006) 5914, 5916–7; B Saul, *Defining Terrorism in International Law* (OUP, 2006) 130–42.

<sup>16</sup> Convention on the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002), art 2(1)(b).

<sup>17</sup> See the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, adopted 2 February 1971, 1438 UNTS 191 (entered into force 16 October 1973) ('OAS Convention'); SAARC Regional Convention on Suppression of Terrorism, opened for signature 4 November 1987 (entered into force 22 August 1988). European Convention on the Suppression of Terrorism, adopted 27 January 1977, 1137 UNTS 93 (entered into force 4 August 1978) ('European Terrorism Convention') simply aims at defining a series of crimes not subject to the political offence exception in extradition procedures.

<sup>18</sup> See Arab Convention on the Suppression of Terrorism, adopted 22 April 1998 (entered into force 7 May 1999) art 1(1), art 2(3) ('Arab Convention'); Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, opened for signature 4 June 1999 (entered into force 4 June 1999) art 1(1); *Shanghai Cooperation Organization (SCO) Convention on the Fight against Terrorism, Splittism and Extremism*, signed 15 June 2001, art 1. See also OAU Convention on the Prevention and Combating of Terrorism, adopted 14 July 1999, 2219 UNTS 179 (entered into force 6 December 2002) art 1(3)(b); Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted 1 July 1999 (entered into force 7 November 2002) art 1(2)-(3) ('OIC Convention'). See also the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014 (not yet in force) art 28G. As for the EU legal framework, see the *Common Position No 2001/931/CSFP on the application of specific measures to combat terrorism* [2001] OJ L344/93; *Framework Decision of the Council No 2002/475/JHA on combating terrorism* [2002] OJ L164/3.

<sup>19</sup> See the Protocol to the OAU Convention on the Prevention and Combating of Terrorism, adopted 8 July 2004 (not yet in force).

<sup>20</sup> See the *Protocol amending the European Convention on the Suppression of Terrorism*, adopted 15 May 2003, ETS No 190 (not yet in force); Council of Europe Convention on the Prevention of Terrorism, adopted 16 May 2005, CETS 196 (entered into force 1 June 2007) ('Council of Europe Convention').

States (OAS),<sup>21</sup> and South Asian Association for Regional Cooperation (SAARC)<sup>22</sup> have adopted new treaties, the contents of which are not, however, particularly instructive for definitional purposes.

An ambitious effort to overcome this state of affairs is currently being made in UN quarters. Two subsidiary bodies of the General Assembly<sup>23</sup> have been examining in the last two decades a draft comprehensive convention, originally presented by India in 1996,<sup>24</sup> concerning the repression of terrorist activities in general terms. At the end of 2002 the discussions were at an advanced stage, though some crucial issues were still outstanding (particularly the activities of national liberation movements, certain violence in armed conflicts, ‘state terrorism’, and the relationship with the sectoral treaties).<sup>25</sup> Subsequent meetings between 2003 and 2019, alas, did not record any substantial progress.<sup>26</sup> It is worth noting that the draft gives a quite broad definition of terrorism.<sup>27</sup>

This brief survey of international legislation indicates a lack of coherence in the definition of terrorism, with two main aspects giving rise to different solutions: the listing of protected goods or interests; and the definition of one or more special intentions (*dolus specialis*). As for the first aspect, while the UN Financing Convention adopts a lowest common denominator approach, limiting its own scope to acts striking at an individual’s life and physical integrity, recent regional conventions broaden the notion by increasing the number of public interests

<sup>21</sup> See the Inter-American Convention Against Terrorism, adopted 3 June 2002, OAS Treaty A-66 (entered into force on 10 July 2003). The Convention applies to offences established in the universal sectoral conventions.

<sup>22</sup> See the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, adopted 6 January 2004 (entered into force 12 January 2006).

<sup>23</sup> Namely, an Ad Hoc Committee set up by UN General Assembly Res 51/210 (17 December 1996: hereinafter, Ad Hoc Committee) and a Working Group established each year by the Sixth Committee during the works of the annual session of the General Assembly.

<sup>24</sup> Draft international convention on the suppression of terrorism, Annex to UN Doc A/C.6/51/6 (11 November 1996). In 2000 India presented an amended version: Draft comprehensive convention on international terrorism: working document submitted by India, UN Doc A/C.6/55/1 (28 August 2000).

<sup>25</sup> See the *Report of the Ad Hoc Committee, 6th session*, UN Doc A/57/37 (28 January–1 February 2002); *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc A/C.6/57/L.9 (16 October 2002).

<sup>26</sup> See, for instance, *Report of the Ad Hoc Committee, 7th session*, UN Doc A/58/37 (31 March–2 April 2003); *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc A/C.6/58/L.10 (10 October 2003); *Report of the Ad Hoc Committee, 8th session*, UN Doc A/59/37 (28 June–2 July 2004); *Measures to Eliminate International Terrorism: Report of the Working Group*, UN Doc A/C.6/60/L.6 (14 October 2005); *Report of the Ad Hoc Committee, 10th session*, UN Doc A/61/37 (27 February–3 March 2006); *Summary Record of the 21st meeting: 6th Committee, held at Headquarters, New York, on Thursday, 9 November 2006, General Assembly, 61st session*, UN Doc A/C.6/61/SR.21 (27 November 2006); *Report of the Ad Hoc Committee, 11th Session*, UN Doc A/62/37 (5, 6 and 15 February 2007); *Report of the Ad Hoc Committee, Sixteenth session*, UN Doc A/68/37 (8 to 12 April 2013); *Summary record of the 28th meeting: 6th Committee, held at Headquarters, New York, on Friday, 3 November 2017, General Assembly, 68st session*, UN Doc A/C.6/72/SR.28 (17 November 2017). For an account of negotiations see M Hmoud, ‘Negotiating the draft comprehensive convention on international terrorism: Major bones of contention’ (2006) 4 *Journal of International Criminal Justice* 1031; N Singh, *The United Nations’ Efforts at Combatting International Terrorism*, FICHL Policy Brief Series No. 81 (2017) 3–4. See also Chapter 9 in this book.

<sup>27</sup> See art 2 of the Draft elaborated by the Committee: *Report of the Ad Hoc Committee, 6th session*, UN Doc A/57/37 (28 January–1 February 2002) Annex II, 6.

protected by the relevant offences, namely infrastructure, private property or goods, computer facilities, the environment, and so on.

Taking a closer look at the issue of the special intention (strictly linked with the political dimension of terrorism), a close examination of situations in which a general definition of terrorism is given usefully indicates that a political element is not always an essential requisite. For instance, Article 2 of the UN Financing Convention applies to violent conduct where the aim of the act, because of its nature or context, is to intimidate a population *or* to force a government or international organization to carry out, or abstain from carrying out, a certain activity. Thus, the crime can be realized solely on the ground of a particular intent to spread terror among the population. However, the picture is quite complicated, for the political element is still contemplated as an alternative *dolus specialis* (compelling a government) and the victims can be both private individuals and state agents, inasmuch as they do not actively participate in an armed conflict.<sup>28</sup> A sort of ‘humanitarian’ perspective is present, but is not exclusive.

The UN Draft Comprehensive Convention<sup>29</sup> and the recent regional instruments<sup>30</sup> 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 prejudice to the stability of political institutions. Yet the complications 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, both public and private. Again, rather than a common definition, we are faced with a set of possible definitions, each with its own contours.

### 3 DOMESTIC STATUTES AND CASE LAW

On the national level, normative and policy responses have been 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. This explains why some states ignored terrorism for a long time, and why others focused their domestic statutes around a political element, usually a subversive one, and often made reference to a climate of terror caused by violent action against private persons, public figures, common goods or state infrastructure. If some common trends are identifiable, they concern the violent nature of the acts, the emphasis on specific intentions (a political justification, or the will to create panic among the population or public authorities, or both), and the identification of certain targets (civilians, public figures, environment, or public infrastructure). However, the variations are practically infinite and it is virtually impossible to extrapolate a common denominator.

After the 9/11 events and the impetus given by UN and other international agencies, many states introduced specific provisions on terrorism, or modified their previous legislation. In some instances, this provoked the drafting of overreaching definitions of terrorist activities,

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<sup>28</sup> For a different view see E David, ‘Les Nations Unies et la lutte contre le terrorisme international’, in JP Cot et al. (eds), *La Charte des Nations Unies. Commentaire article par article* (Economica, 2005) 163, 184–5: in his opinion, the wording of art 2 implies the impossibility of qualifying as terrorist any act directed in peacetime against military personnel.

<sup>29</sup> *Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996: 6th session*, UN Doc A/57/37 (28 January–1 February 2002) Annex II.

<sup>30</sup> Article 1 of the EU *Framework Decision of the Council No 2002/475/JHA on combating terrorism* [2002] OJ L164/3 is a good example.

raising doubts about their compatibility with the rule of law,<sup>31</sup> the right to dissent, and civil protest.<sup>32</sup> However, some practice highlights another trend, which is perhaps more interesting from the perspective of enunciating an international notion: namely, a growing concern for the victims and the civilian population, in some way reducing the classical preferential emphasis on the political purpose of the perpetrators.<sup>33</sup> It does not seem hazardous to say that national legislation, although not homogeneous, reflects an overall readiness to accept a meaning of terrorism which can be linked to a ‘humanitarian’ notion. The states which still qualify the political element as a prerequisite 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 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 (such as in extradition law, immigration and refugee law, and criminal law itself), a sort of minimal definition of terrorism, which is felt to be universally shared by civilized nations and is focused on the indiscriminate use of violence against civilians and the intention to create a sense of fear and insecurity.<sup>34</sup> Moreover, such case law usually denies recognition to the political purpose (refusing to qualify it as a constitutive element) and goes even further, rejecting any material relevance.

#### 4 OTHER INTERNATIONAL PRACTICE

Recent international practice shows a gradual accumulation of support for a ‘humanitarian’ approach, although the indications are not unequivocal. The reactions by states and international organizations following 9/11 confirm that attacks on civilian populations are unanimously condemned as an offence against the whole international community. Particularly interesting are some later steps taken by states, such as the emphasis on the unacceptability of terrorist violence directed against civilians contained in the Declaration attached to Security

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<sup>31</sup> See M Scheinin, *Report of the Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc E/CN.4/2006/98 (28 September 2005) [26]–[27].

<sup>32</sup> See *inter alia* Golder and Williams, above n 9, 289–91; Hennebel and Lewkowicz, ‘Le problème de la définition du terrorisme’, in L Hennebel and D Vandermeersch (eds), *Juger le terrorisme dans l’état de droit* (Bruylant, 2009) 17, 44; S Setty, ‘What’s in a name? How nations define terrorism ten years after 9/11’ (2011) 33 *University of Pennsylvania Journal of International Law* 1, 57–61.

<sup>33</sup> For a brief survey which confirms such an impression see S Schmahl, ‘Specific methods of prosecuting terrorists in national law’ in C Walter et al. (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2004) 86–7; C Walter, ‘Defining terrorism in national and international law’ in C Walter et al. (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2004) 28–30; Di Filippo, above n 8, 558–9; B Saul, *Terrorism as a Legal Concept* (Sydney Law School Research Paper No. 15/85, 2015) 13–18. See also the African Model Anti-Terrorism Law, endorsed by the 17th Ordinary Session of the Assembly of the African Union (Malabo, 30 June–1 July 2011), § 4(xxxix).

<sup>34</sup> See *Madan Singh v State of Bihar*, Appeal (crl.) 1285/2003 (2 April 2004) (Supreme Court of India); Cour de cassation (Belgium), *E.H.L.*, No P.05.1594.F (15 February 2006) 4; *R v F* [2007] EWCA Crim 243, [26]–[27], [29]; Corte di Cassazione (Italy), No 12252 (23 February 2012) 42–43. For additional references, see Di Filippo, above n 8, 559–61.

Council Resolution 1456 (2003) and in Resolution 1566 (2004), as well as the consistent line of condemnation expressed by African and Islamic countries, whose stance has at other times been more ambiguous,<sup>35</sup> even if there are still disagreements in the drafting of the UN comprehensive convention. The stance expressed by the international community after the attacks in France (2015 and 2016) and in Belgium (2016) points in the same direction.

In 2011 the Appeals Chamber of the UN Special Tribunal for Lebanon (STL) declared that a customary rule of international law regarding terrorism, at least in time of peace, has emerged. Although the STL decision dwells on terrorism as a discrete international crime under customary law and not a definition *per se* of terrorism, its findings are undoubtedly interesting as an element of international practice. In spite of serious issues with the STL's approach,<sup>36</sup> the decision has re-launched the international debate on the definition of terrorism and underlined recent practice that deserves attention (especially the dispensable character of a political purpose), in the elaboration of a notion of terrorism shared by the international community at large.

## 5 LEGAL LITERATURE

Turning to international law scholarship,<sup>37</sup> several years ago one leading commentator, in singling out a common feature of terrorist crimes, proposed an analogy with war crimes, by evoking the employment of cruel offensive methods and the attacking of targets which are either innocent or lack military value.<sup>38</sup> 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 also evident in research carried out by US and (then) Soviet experts between 1988 and 1990.<sup>39</sup> Those cues deserve appreciation, in that they spell out some features, common to a line of acts, reputed

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<sup>35</sup> For other references, see Di Filippo, above n 8, 557, n 98 and n 101. See also Chapters 44 and 45 in this book.

<sup>36</sup> See Chapters 2 and 40 in this book.

<sup>37</sup> Given the nature of the present volume and the space limits it is not possible to give an account (even brief) of the orientations of the criminal law doctrine in a comparative perspective.

<sup>38</sup> See the definition proposed by E David, 'Le terrorisme en droit international (définition, incrimination, répression)' in *Colloque de l'Université libre de Bruxelles. Réflexions sur la définition et la répression du terrorisme* (Editions de l'Université de Bruxelles 1974) 103, 125. This concept was later picked up by other authors: see, e.g., F Francioni, 'Crimini internazionali' (1989) IV *Digesto discipline pubblicistiche* 464, 474; K Skubiszewski, 'Definition of Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 39, 42; JF Murphy, 'The need for international cooperation in combating terrorism' (1990) 13 *Terrorism: An International Journal* 381; D Cumin, 'Tentative de définition du terrorisme à partir du jus in bello' (2004) *Revue de science criminelle et de droit pénal comparé* 11, 29–30; M Sassòli, 'Terrorism and War' (2006) 4 *Journal of International Criminal Justice* 959, 979–80; H van der Wilt and I Braber, *The case for inclusion of terrorism in the jurisdiction of the International Criminal Court* (Amsterdam Law School Legal Studies Research Paper No. 2014-26, 2014) 13–22. It should be stressed that, more recently, Professor David elaborated a partly different notion, according to an overall assessment of the international practice: see David in JP Cot et al. (eds), above n 28, 191.

<sup>39</sup> See I Beliaev and J Marks (eds), *Common Ground on Terrorism. Soviet American Cooperation Against the Politics of Terror* (Norton, 1991) 169, 177.



to be intolerable by any state, in the light of the emergence of some basic values of the whole international community.<sup>40</sup>

It is equally true that most prominent authors, even recently, include in their definition of terrorist crimes the pursuit of a political or ideological purpose.<sup>41</sup> In particular, terrorist groups are described as having political aims that may be considered subversive or ideological, whereas ordinary criminal agents pursue profit or other material benefits. In another variant, it is often said (or implied in the proposed definition) that the political element consists in the fact that violence aims to coerce public authorities, irrespective of the presence of an ideological or political project to be developed on a larger scale.<sup>42</sup> Sometimes, this ‘political coercion’ ingredient is mentioned as an alternative to the intention to provoke terror among the population or part of it.<sup>43</sup> In other versions, the political motives are listed among the constitutive elements of the definition together with the element of coercion of public authorities or of intention to create a climate of panic.<sup>44</sup>

Some commentators have not contemplated a political inspiration among the constitutive elements of terrorism and instead have broadly referred to actions against human life or health, without distinction based on the nature of the target.<sup>45</sup> Others have submitted that the conduct should harm the life of civilians or even the economic interests of the affected state.<sup>46</sup>

The wide range of opinions advanced by commentators confirms the possible co-existence of several definitions of terrorism. This lack of convergence, however, must not be taken as an insurmountable obstacle to a theoretical effort around a possible definition: rather, it proves the urgency of a shift of paradigm.

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<sup>40</sup> See JM Sorel, ‘Existe-t-il une définition universelle de terrorisme?’ in K Bannelier et al. (eds), *Le droit international face au terrorisme* (Pedone, 2002) 68 (terrorism is a disturbance of international public order); PA Fernandez Sanchez, ‘Universal Jurisdiction and Terrorism’ (2018) 6 *Groningen Journal of International Law* 24, 47 (terrorism constitutes assaults not only on individual victims, affecting a collective victim, say the international community).

<sup>41</sup> See, amongst others, MC Bassiouni (ed.), *International Terrorism: Multilateral Conventions* (Transnational Publisher, 2001) 16; Bassiouni, above n 7, 710; Y Alexander, ‘Terrorism: A definitional focus’, in Y Alexander and E Brenner (eds), *Terrorism and the Law* (Transnational Publisher, 2002) 3, 7; Sorel, above n 40, 68; A Paust, ‘Terrorism as an international crime’, in G Nesi (ed.), *International Cooperation in Counter-Terrorism* (Ashgate, 2006) 27; A Cassese, ‘The multifaceted criminal notion of terrorism in international law’ (2006) 4 *Journal of International Criminal Justice* 933, 937–43; Saul, above n 15, 38–45, 60–61; Saul, above n 9, 9–11; A Richards, *Conceptualizing Terrorism* (Oxford University Press, 2015) 145–6.

<sup>42</sup> See Sorel, above n 40, 68; Begorre-Bret, above n 10, 1995.

<sup>43</sup> See Young, above n 11, 64; Roach, above n 9; Hennebel and Lewkowicz, above n 32, 48–9. See also Ambos and Timmermann, Chapter 2 in this book.

<sup>44</sup> See E Greppi, ‘Terrorism and rogue states: Some reflections on international law issues’ (2005) 60 *La Comunità internazionale* 231, 232–4; Saul, above n 9, 3–14; S Margariti, *Defining International Terrorism: Between State Sovereignty and Cosmopolitanism* (Springer, 2017) 180.

<sup>45</sup> See, e.g., G Guillaume, ‘Terrorism and international law’ (2004) 53 *International and Comparative Law Quarterly* 537, 540.

<sup>46</sup> Young, above n 11, 57–8, 64. See also A Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?* (Intersentia, 2009), 125, 127.

## 6 THE POSSIBLE CONTOURS OF A CORE DEFINITION OF TERRORISM, SUITABLE FOR INTERNATIONAL CO-OPERATION

The variety so far encountered stimulates the search for an approach able to rationalize such diversity and delineate a multilevel method for defining terrorism in juridical settings. As a starting point, it must be accepted that the search for a unitary or all-encompassing legal notion of terrorism constantly risks being incomplete or too advanced, because of the different underlying policy choices. A more pragmatic approach is 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 of respect.<sup>47</sup> This chapter will concentrate on the possibility of elaborating a notion of terrorism which is workable in international (that is, inter-state) co-operation, is likely to reach a wide consensus among the whole international community, and is equipped with a 'core' content, and which would not prevent the possibility of elaborating other notions shared by more restricted groups of states or envisaged by single countries in their respective domestic laws.

This being said, the first (and well-known) question is whether terrorist activities deserve an autonomous legal definition and a dedicated criminal offence, or whether they cannot be satisfactorily distinguished from 'ordinary' violent acts.

As mentioned earlier, terrorist groups are currently described as having political aims that may be considered subversive or ideological. In another variant, the 'political' element consists in the fact that violence is put into practice to coerce public authorities (states or international organizations). As already demonstrated, this first attempt at classification (which would require spelling out a political purpose element in the legal definition) is not fully warranted by international practice. Additionally, it is not completely satisfactory: the motivations of the perpetrators may be no more than a policy rationale for the legal drafting of an offence (the content of which need not recognize those motivations as proper elements of the crime), while only in some cases is it necessary to define them as a psychological element proper, that is, a *dolus specialis*.<sup>48</sup> The political dimension of terrorism is not *per se* a good reason for systematically drafting legal rules which refer to it: obviously, a correct understanding of the socio-political humus, of the personal motives and of the ultimate purposes of a violent course of action, is fundamental to the elaboration of an holistic strategy for preventing terrorism and eradicating the underlying causes that lead some people to choose violence over dialectical, peaceful political confrontation. But a technical definition for legal purposes is a different matter.

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<sup>47</sup> See JF Murphy, 'Defining international terrorism: A way out of the quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13, 32; C Tomuschat, 'Comment on the Presentation by Christian Walter' in Walter et al. (eds), *Terrorism As A Challenge for National and International Law: Security Versus Liberty?* (Springer, 2004) 45; Begorre-Bret, above n 10, 2000–4; R Nigro, *La definizione di terrorismo nel diritto internazionale* (Torino, Giappichelli, 2013); A Greene, 'Defining terrorism: one size fits all?' (2017) 66 *International and Comparative Law Quarterly* 411.

<sup>48</sup> For similar reasoning, see K Ambos, 'Judicial creativity at the Special Tribunal for Lebanon: Is there a crime of terrorism under international law?' (2011) 24 *Leiden Journal of International Law* 655, 674–5.

Another criterion which deserves attention is the *modus operandi*. While ordinary criminal groups normally use violent methods only against those who directly obstruct their activities, terrorist groups utilize tactics aimed at creating wider terror and insecurity among the civil population and public authorities. This result is often sought by striking at single targets (persons or goods) with a symbolic value or at publicly frequented places, possibly involving innocent victims.

Following this reasoning, however, a critical point is 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 to call them terrorism and distinguish them from ordinary criminality is less clear. The risk of circularity, subjectivity, or abuse is high, while the need to work on the basis of the elements shared by the international community at large could require the adoption of a minimalist approach.

In my opinion, neither the aim pursued by the perpetrator (or the motives inspiring him or her) nor the methods employed – notwithstanding their relevance – can *per se* conclusively or reliably guide evaluation of the content of an international notion of terrorism. A preliminary step must be to examine two elements, namely the juridical interest undermined by the violent actions and the unacceptability of such violence to the community of states, according to the prevailing values in general international law. Only after such elements are examined does it become possible to explore the room to elaborate an international definition of terrorism 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.<sup>49</sup> But, 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 certain state agents (political leaders, diplomats, police and military personnel, security services)<sup>50</sup> are apparently not.<sup>51</sup>

Examination of the values at stake reveals the potential content of a common international notion of terrorism. Terrorism entails conduct putting at special risk the essential rights of civilians. Special legal treatment can be based upon the intention to spread a climate of panic or extreme fear among the population, leaving the actual motivations or the ultimate purposes 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 special stigmatization is the protection of a universally recognized value against a particularly heinous form of attack. On this perspective, the repeatedly debated question of the treatment of freedom

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<sup>49</sup> A victim-oriented approach has already been advocated in legal literature: see, for instance, L Green, ‘The nature and control of international terrorism’ (1974) 4 *Israel Yearbook on Human Rights* 134, 164; AM Slaughter and W Burke White, ‘An international constitutional moment’ (2002) 43 *Harvard International Law Journal* 1, 11–12; S Johnson, *Peace Without Justice. Hegemonic Instability or International Criminal Law?* (Ashgate, 2003) 67.

<sup>50</sup> As far as civil servants are concerned, they might be equated with ordinary individuals, even though it must be admitted that this aspect might be a matter of controversy.

<sup>51</sup> For an explanation of this tendency of the international social community, see Di Filippo, above n 8, 543–4.

fighters loses relevance.<sup>52</sup> The intention of spreading terror should mainly be inferred from the material features of the conduct (that is, the methods employed). Experience shows that, when civilians are indiscriminately (and possibly massively) hit in the normal course of their everyday affairs, we can speak of terrorist activities because individuals feel insecure about their lives and basic rights.<sup>53</sup>

Another distinctive feature of terrorism lies in the presence of an organization 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 than from the actions of an isolated agent.<sup>54</sup>

This approach – far from being an all-embracing one – does not passively take note of an alleged ‘*impossible dépolitisation “conceptuelle” du terrorisme*’ or of ‘intractable dilemmas’ in sorting out a viable legal notion, and tries to offer a rational way out of the lack of precision of many definitions of the objective element of a supposed crime of terrorism. It may also offer some suggestions for a possible expansion of the scope of a universal definition of terrorism.<sup>55</sup> The values protected could also embrace, together with life and the physical integrity of

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<sup>52</sup> Similarly, the core notion here proposed does not oblige to elaborate human rights oriented exceptions (namely, the protection of political dissent or freedom of expression), which are only necessary when the definition has a (too) wide scope.

<sup>53</sup> Court practice shows that this subjective element can be inferred from objective circumstances that indicate the likelihood of the acts spreading fear among the population. Consider also the case law of international or mixed criminal tribunals on the special intent to provoke a state of terror in the context of war crimes or crimes against humanity (persecution, in particular). *Prosecutor v Stanislav Galić (Appeals Chamber Judgment)* (ICTY, Case No IT-98–29-A, 30 November 2006) [104]; *Prosecutor v Dragomir Milošević (Trial Judgment)* (ICTY, Case No IT-98–29/1, 12 December 2007) [881]; *Prosecutor v Popović et al. (Trial Judgment)* (ICTY, Case No IT-05–88-T, 10 June 2010) [980], [996]–[998]. On the same view, see Special Court for Sierra Leone, *Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Chamber Judgment)* (SCSL, Case No SCSL-04–14-A, 28 May 2008) [357]; *Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial Judgment)* (SCSL, Case No SCSL-04–15-T, 2 March 2009) [120]–[121] (*RUF Case*).

<sup>54</sup> Space constraints do not allow to discuss here the contours of the notion of ‘organization’. The distinction between a series of isolated agents (or lone wolves) acting under a common ideological umbrella and soft criminal networks (responding to a minimum of common strategy, endorsement, encouragement and remote direction) tends to blur, especially in the light of the recent manifestations of Isis driven terrorist attacks. National case law will surely offer interesting insights, while in legal literature it has been convincingly suggested to take into account the achievements on the definition of criminal organization crystallized in the UN Convention on transnational organized crime, signed in Palermo in 2000: see *inter alia* A Annoni, ‘The relationship between transnational organised crime and terrorism: an international law perspective’ in S Carnevale et al. (eds), *Redefining Organised Crime: A Challenge for the European Union?* (Hart, 2017) 121, 137–41.

<sup>55</sup> For the first aspect, see E Hugues, ‘La notion de terrorisme en droit international: en quête d’une définition juridique’ (2002) 129 *Journal de droit international* 753, 765; JS Hodgson and V Tadros, ‘The impossibility of defining terrorism’ (2013) 16 *New Criminal Law Review* 494. As for the lack of precision, see, among others, Ambos, above n 48, 671–4; B Saul, *Defining Terrorism: A Conceptual Minefield* (Sydney Law School Research Paper No. 15/84, 2015) 7–8, 12. The proposal here advanced lastly tries to avoid the conceptual deadlocks deriving from the approach advanced by Begorre-Bret (above n 10, 2002–4), where the will to give account of too many supposed variants of terrorist activity leads to an excessively broad list of typologies of terrorism, totally unworkable in an international context.

individuals, those of personal freedom and dignity<sup>56</sup> whenever they are undermined by violent actions and regardless of the identity of the victims.<sup>57</sup>

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 (the environment, public or also private economic facilities or goods, and computer or communication networks), or when the condemnation of violent acts is subject to a discretionary evaluation which may be open to different results (as happens when victims are state representative or agents). It seems conceivable that violent actions against such values could receive special treatment when the perpetrators pursue a political project or aim at coercing one or more governments. Thus, focusing on criminal law, 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*. However, when pursuing such option, states must run the risk of encountering difficulties in obtaining international co-operation, due to existing or possible divergences in the evaluation of situations and actors. This option could be adopted to fight terrorist groups of a mainly local character 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.

Lastly, the emphasis put on the safeguarding of individuals' essential rights indicates that the adherence of the international community to the notion of core terrorism is not subject to aspects such as the transnational nature of the conduct.<sup>58</sup> A particularly serious violation of human rights is of common concern to the international community even though it occurs in a context which is 'purely' internal to a single state<sup>59</sup> and the need of international co-operation only arises later (due for instance to the movement of the perpetrators across borders). Moreover, in a globalized world, it is far from easy to distinguish between purely internal situations and transnational ones. Certainly, a degree of transnationality of the activities may stimulate states to conclude treaties on co-operation in the prevention and repression of terrorism,<sup>60</sup> or legitimize the intervention of international agencies and the use of special prerogatives,<sup>61</sup> but this does not mean that such element is a necessary conceptual element of a legal notion of terrorism.

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<sup>56</sup> 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.

<sup>57</sup> A push in that direction could come not only from sectoral anti-terrorism treaties on hostages taking, but also from human rights treaties and rules on crimes against humanity.

<sup>58</sup> For a different view see Cassese, above n 41, 938; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL, Case No STL-11-01/I, 16 February 2011) [85], [90]; Margariti, above n 44, 168–74.

<sup>59</sup> Such as the Beslan School hostage crisis, which took place in Russia between 1 and 3 September 2004.

<sup>60</sup> It has been aptly observed that the transnational element is not part of the offence definition 'but rather a jurisdictional rule that limits the application of the respective convention to terrorist offences with a cross-border dimension': see Ambos, above n 48, 672.

<sup>61</sup> Mention may be made of Chapter VII of the *Charter of the United Nations*, or of the jurisdiction of international or mixed criminal tribunals.

## 7 CONCLUSION

Notwithstanding the confusion in the political debate (a confusion often maliciously fed or manipulated by several actors) and the diversity of opinion surrounding the feasibility of a legal notion of terrorism in international law, 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, thus calling policymakers and rules drafters to their responsibilities. Such an approach leads to the conclusion that at least two main classes of ‘especially violent’ criminal activities can be legally conceived. One covers actions which undermine civilians’ essential rights (namely universal values, such as life, physical integrity, freedom, and dignity) in a manner likely to receive absolute condemnation by the whole international community. Another involves certain acts which receive the blame of states and other international actors: however, such disapproval is not homogeneous or only certain group of states are pooled in such stance, owing to the values involved (the essential rights of state agents; public or private goods; computer networks; or 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 the population, the latter kind of action deserves special treatment due to the fact that the actors pursue a political end and, in my personal view, might be better designated with another term, namely ‘subversion’. What is here termed core terrorism can be a useful reference tool for lawmakers, enforcement agencies, international organizations and any kind of (domestic and international) actors committed to fighting unacceptable violent activities. To use it or not appears, nowadays more than in the past, a matter of (hopefully) responsible choice.