Defining Terrorism in National and International Law

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> "We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."[2]

In these words Richard Baxter in 1974 expressed a general unease about the use of terrorism as a concept of law. And more recently, in 1997, Rosalyn Higgins, in the conclusion to the introduction to the book "Terrorism and International Law" wrote: "Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."[3] These two remarks by eminent international lawyers lead to the first central question concerning legal approaches to terrorism: Should terrorism really be used as a legal concept or wouldn't it be preferable to define the criminal acts that are part of terrorist activities and refrain from the painstaking task of trying to define terrorism as such? Do we really need a legal definition of what constitutes terrorism?

Indeed, on the level of international law, and also in some national legal orders, it was possible to circumvent the definition problem for quite some time. One relied on defining certain acts and avoided to label them as 'terrorism'. However, it seems that this approach has come to its limits given the overwhelming pressure to take action against international terrorism, not only after the events of September 11, 2001, but certainly since then[4]. Currently, on the international level, negotiations on the conclusion of a Draft Comprehensive Convention against international terrorism are going on, and the overview that has been provided by the country reports which we have received, signals that a number of countries have adopted definitions of terrorism or added precision to already existing concepts[5]. Therefore, in contrast to some earlier approaches "terrorism" is more and more used as a legal concept and not only as a way of political stigmatisation. Given these developments I will not discuss the question, whether terrorism *should* be used

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[2] *R.R. Baxter*, A Sceptical Look at the Concept of Terrorism, Arkon Law Review 7 (19973/74), 380 ff. (380).

[3] *R. Higgins*, The general international law of terrorism, in: R. Higgins/M. Flory, International Law and Terrorism, London 1997, 13 (28).

[4] *E. Hugues*, La notion de terrorisme en droit international: en quête d'une définition juridique, Journal de droit international 2002, 753 ff. (763 ff.).

[5] *W. Laqueur*, Reflections on Terrorism, Foreign Affairs 65 (1986), 86 ff. (88): 109 Definitions between 1936 and 1981.

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as a legal concept[6], but start from the assumption that this is done and inquire into the content of the definitions given. Lawyers need abstract definitions – the famous definition of "pornography" by Justice Potter Stewart of the U.S. Supreme Court[7] being the exception which confirms the rule. The rule is, unfortunately, that we have to know it, *before* we see it. Therefore, although we may all agree with the Representative of the United Kingdom to the United Nations that "what looks, smells and kills like terrorism is terrorism."[8], as lawyers we still have to work on an abstract definition of what should legally constitute terrorism.

The idea of the country reports was to get input about the action taken by national legislators in various countries, which have been selected on the basis of their involvement in anti-terrorist measures. I will therefore start with efforts of defining terrorism on the national level and then turn to the sphere of international law. It should be noted, however, that processes of cross-fertilisation in both directions are going on. Not only does national law contribute to the evolution of an international law definition of terrorism, but also the reverse occurs. It is noteworthy, in this respect, that for instance Canadian law, which for a long time has refrained from giving an express definition of terrorism, did develop a definition in order to comply with the most recent international conventions on the suppression of international terrorism, i.e. the *International Convention for the Suppression of Terrorist Bombings* (1997), and the *International Convention for the Suppression of the Financing of Terrorism* (1999)[9].

I. Defining terrorism in national law

The input received through the country reports may be systematised under several aspects. Almost all countries included in the study have a long history of dealing with national terrorism. However, the Russian

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6 See in this respect for instance, *Y. Sandoz*, Lutte contre le terrorisme et droit international: risque et opportunités, SZIER 2002, 319 ff. (328 et seq.).

7 "I could never succeed in intelligibly doing so [i.e. defining hard-core pornography, C.W.]. But I know it when I see it [...]."Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964).

8 Statement by the Permanent Representative of the UK to the United Nations in the General Assembly Debate on Terrorism, 1 October 2001.

9 M. Wagner, Country Report on Canada, 4 et seq.

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example shows that the problem of terrorism may be a rather recent phenomenon in some countries[10]. Also, for those countries with a tradition of fight against terrorism, the international element may be new. For instance the Italian anti-terrorist legislation was only extended to international terrorism after the events of September 11, 2001[11]. The same holds true for Spain, where, however, until now no formal extension of the existing legislation has been enacted in order to specifically address *international* terrorism[12].

From a typological perspective, it is possible to discern two types of terrorist groups. There are those groups which employ terrorist means in order to pursue, at least in their own perspective, a specific form of freedom fight for part of a country's population. This is true for the ETA in Spain, the IRA in Northern Ireland, the PKK in Turkey, the Palestinians terrorist groups in Israel and so on. Apart from that, there are those forms of terrorism which merely pursue a political concept without a link to specific parts of a country's population. This holds true for the *brigate rosse* in Italy and the RAF in Germany in the 1970s. This typological distinction has no corresponding criterion in the definition of terrorism in national laws. However, it has had in the past and continues to have enormous impact on the deliberation of an international definition of terrorism. I will address this issue in the second part of the presentation.

Concerning national laws, I will first address the elements of definition used in the different legal orders, then inquire into the question of whether the definitions vary according to the purpose for which they are used, and, finally, try to pinpoint some specific characteristics of more recent definitions.

1. Elements of Definition

On a first level the elements of definition may be systematised following their objective or subjective character. Generally speaking, terrorism requires am objective element, i.e. a crime of a certain scale, and a sub-

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10 T. Beknazar, Country Report on Russia, 7.

11 K. Oellers-Frahm, Country Report on Italy, 3.

12 J. Martínez Soria, Country Report on Spain, 6 et seq.

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jective element, i.e. a certain motivation or intention on the part of the perpetrators.

a. The objective element: commission of a crime

The most uncontroversial element of definition is certainly the use of serious violence against persons as a means of terrorist action. It constitutes indeed the classical form of terrorism to which most examples relate that we have in mind when thinking of terrorism. However, the consensus only refers to violence against persons as a *sufficient* criterion in order to fulfil the objective element of terrorism. There is no consensus on whether we *necessarily* need violence against persons in order to speak of terrorism[13]. For instance, the UK Terrorism Act 2000 also covers threats of serious disruption or damage to computer installations and public utilities[14]. A similar broad concept is used in the Canadian definition of terrorism in Bill C-36, which was adopted after the events of September, 11, 2001[15], and in the definition given in the Framework Decision of the Council of the European Union of 13 June 2002 which lists among the criminal acts that may constitute terrorism, "intentional acts […] causing extensive destruction to a Government facility, a transport system, an infrastructure facility, including an information system […] likely to endanger human life or result in major economic loss." Similarly, the anti-terrorist provisions in the United States the Immigration and Nationality Act a "terrorist activity" also refers to "substantial damage to property"[16]. Generally, there seems to be a de-

[13] Older Definitions tend to be confined to violence against human beings, see for instance the description in *J.A. Frowein*, The Present State of Research, in; Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, The Legal Aspects of International Terrorism, 1988, 56 f.; but see the 1937 Draft Convention for the Prevention and Punishment of Terrorism, which, however, never entered into force, where "wilful destruction of, or damage to, public property" was included among the elements of definition (League of Nations Doc. C.546.M383.1937.V (1937)). The excerpt is also quoted by *G. Levitt*, Is "Terrorism" Worth Defining?, Ohio Northern University Law Review, 13 (1986), 97 (98); see also *K. Skubiszewski*, Definition of Terrorism, Israeli Yearbook on Human Rights 19 (1989), 39 (43).

[14] *R. Grote*, Country Report on the United Kingdom, 4.

[15] *Wagner*, Country Report Canada, (note 9), 5 et seq.

[16] 8 U.S.C. § 1182 (a) (3) (B.).

velopment that broadens existing definitions of terrorism into a direction of including violent and non violent but nevertheless destructive action against public facilities. This development in modern definitions entails the dangers that excesses of otherwise legal forms of public protest (for instance large scale demonstrations with violent excesses) may be labelled as terrorism. Canada has had an intensive debate on the issue which resulted in the following restriction in the wording: [A terrorist act is an act which] causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, *other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)* [which refer to life endangering acts].

b. Subjective element: Motives and intention of the perpetrators

A traditional element of defining terrorism that can be traced back to the roots of the term terrorism in the French Revolution is that of the creation of a climate of terror and fear within the population or parts of the population[17]. This element can be found in almost all definitions of terrorism used in national law. The definitions do not require it to be objectively present, but merely refer to the intentions of the authors. An exception is the Italian approach, which generally relies on anti-mafia legislation in order to fight international terrorism, and merely requires that violence is used with the aim of "eliminating the democratic order". The definition given by the Spanish Constitutional Court refers to "to the aim of causing [...] feelings of insecurity within the society"[18], thus also addressing the issue of terror and fear within the population.

With respect to modern definitions of terrorism it can be said – as with the use of force against persons – that the element of fear and insecurity is only used as a sufficient subjective element, but not as a necessary requirement. The definitions given by the UK Terrorism Act 2000, the Canadian Bill C-36 and in the Framework Decision of the Council of the European Union use the intention to create fear among the population and the purpose of influencing or compelling the Government or an international organisation alternatively. This implies, in principle, that if the intention of intimidating the population is present, the inten-

[17] *Hugues*, note 4, 755 f.

[18] *Martínez Soria, Country* Report Spain, (note 12), 3.

tion of coercing the government is not a necessary additional requirement. Although the two issues are very often closely linked in terrorist acts, because the intimidation of the population is intended to serve as a means of coercing the government, the modern approach separates the issues. This has practical consequences. The example of the attacks by the sniper in the United States, who – apparently without following any political or other ideological cause – succeeded in creating an atmosphere of enormous insecurity and fear among the population, illustrates the issue: Without requiring a political motive, these acts would constitute terrorism, while most of the traditional definitions would exclude such acts from the ambit of terrorism.

This raises the general question of political motives of terrorists. Is it necessary, in order to speak of terrorism, that the perpetrators advance a political, religious or other ideological cause? The approaches vary. Older concepts tend not to require such an element. For instance Art. 1 of the 1948 Israeli Prevention of Terror Ordinance merely requires "violent measures which might cause the death of a person, or his injury" without addressing the purpose of the perpetrators. Similarly, German criminal law, which addresses terrorism in the context of other forms of organised crime[19], does not require any specific ideological purpose. Neither is this necessary under the definition given by the Spanish Constitutional Court, although the Spanish Criminal Code speaks of "disturbing the constitutional order or public peace" and thus at least presupposes the existence of some political and ideological motive[20]. Similarly, the Department of Defence and the Department of Justice of the United States refer to "political, religious or ideological goals" or the "furtherance of political objectives"[21] and the same is true for the definition used by the German Federal Office for the Protection of the Constitution[22].

Of the three detailed modern definitions (UK, EU and Canada), the UK Terrorist Act 2000 and the Canadian Bill C-36 solve the problem by additionally requiring the "advancing political, religious or ideological cause"[23] or "political, religious or ideological purpose"[24] respec-

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19 *M. Rau*, Country Report on Germany, 11 et seq.

20 Report Spain, 4.

21 *Martínez Soria, Country* Report Spain, (note 12), 3 et seq..

22 *Rau*, Country Report Germany, (note 19), 12.

23 *Grote*, Country Report United Kingdom, (note 14), 3.

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tively. This leaves the EU Framework Decision as the broadest concept which, in principle, also includes forms of violence without any political, ideological or religious motivation.

It is interesting in this context to note, that the UK legislator merely requires the aim of "*influencing* the Government" – in contrast to the originally proposed wording of "coercion"[25], while the Framework Decision speaks of "compelling" thus using stronger language than the Terrorist Act 2000 in the UK. Similarly, the 1996 U.S. Iran-Libya Sanctions Act, which also addresses the issue of influencing the Government, requires the intention to "influence the policy of a Government by intimidation or coercion"[26], and thus uses a more restrictive wording than the one used in the UK. On the other hand, the approach of the 1997 Russian Criminal Code is similar to that of the British legislator. The Russian Criminal Code speaks of "frightening the populace or exerting influence on decision-making of the government authorities"[27]. With respect to the element of coercion, the Canadian definition goes beyond the other definitions in that it not only refers to coercing public authorities but also private individuals. This extension, remarkable as it may be[28], is to some extent tempered by the express requirement of political, ideological or religious motivation in the Canadian definition.

Generally speaking, modern definitions are more precise concerning the intentions perpetrators must have in order to be considered terrorists. While the intention of creating terror and fear within the population is an uncontroversial element of definition, the degree of influence on government decision-making, which is necessary in order to speak of terrorism, varies. Here, a restrictive approach which requires intention to "coerce" rather than merely "influence" seems in place, since otherwise accepted forms of public protest against government policies, such as large scale demonstrations, may too easily be labelled as terrorism. Under the Framework Decision of the European Union a certain corrective is included since the definition given there only refers to "undue" compelling, thus allowing for an interpretation which views ac-

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[24] "in whole or in part for a political, religious or ideological purpose, objective or cause", *Wagner*, Country Report Canada, (note 9), 5 et seq.

[25] *Grote*, Country Report United Kingdom, (note 14), 3 et seq.

[26] *P. Minnerop*, Legal Status of State Sponsors of Terrorism in US Law, in this volume, 28 (note 125).

[27] Beknazar, Country Report Russia, (note 10), 3.

[28] Rightly emphasised by Wagner, Country Report Canada (note 9), 8.

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cepted forms of public protest – even where they result in the commission of certain crimes – not as an "undue" attempt of compelling the Government[29].

c. Number of Perpetrators

The definitions vary as to the number of persons who must collaborate in order to be qualified as terrorists. While the German, Spanish, Israeli and Italian definitions require at least some sort of collective action, the definition in France[30] expressly includes individual action, while those used in the United States, the United Kingdom, Russia, Turkey and the EU Framework Decision do not specifically address the issue and are thus open to an interpretation which does not require that more than one persons acts.

2. Number of definitions in a given legal order

One might assume, at first sight, that each state has adopted a single definition of what should be understood by terrorism in its national legal order. However, this is not the case. While those states which – like Italy – confine their action to criminalising terrorist acts, work with a single definition in their criminal codes, other states use more than one definition. The most important example are the various definitions used in U.S. legislation and practice. The reasons for using more than one definition vary. In the case of Spain, the reason is the use of the term terrorism in the Constitution with respect to specific restrictions concerning human rights. The reasons in the United States are more complex. They must be seen in the different purposes of the various activities by the legislator. Here, the criminal law aspect is only one among several others. Most importantly, the Antiterrorism and Effective Death Penalty Act of 1996 introduces the concept of "foreign terrorist organisation". It authorises the Secretary of State, in conjunction with the Attorney General and the Treasury to designate which organisations shall be considered "foreign terrorist organisations". The definition given – any organisation that engages in terrorist activities that threat-

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29 *N. Vennemann*, Country Report on the European Union, 21.

30 See UN Doc. S/2001/1274, 3.

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ens the Security of U.S. nationals or U.S. national security – gives broad discretion to the authorities and it is unclear whether the definitions for "terrorism" or "terrorist acts" used elsewhere in U.S. legislation can be applied to reduce this discretion[31].

One might think of applying different concepts as to the questions of defining terrorism for the purpose of criminal law and for purposes of preventive action in national and international contexts. However, I fail to see, why these different forms of combating terrorism could require different definitions. If the reasons for introducing a concept of terrorism into national and international law are the dangers inherent in the crime – and I think this can be the only sound justification – then the elements of definition should be the same, regardless of the preventive or repressive character of the measures taken. To my mind, the main reason for slightly different definitions is not a decision on the purpose by the legislator, but rather the adoption of different measures at different times and a corresponding lack of co-ordination. For the purpose of clarity and legal certainty it would be desirable to adopt as much as possible a single definition of "terrorism" within any given legal order.

3. Summary: Is there a development with respect to defining terrorism in recent years?

To sum up the section on defining terrorism in national law, I would like to ask the question of whether there has been a development in the definition of "terrorism" in recent years. The answer to that question is "yes". The definitions used in recent pieces of legislation are more precise than older approaches which either tended to circumvent the issue of definition (Canada, Germany)[32] or used broad terminology with the purpose of protecting the state and its organs (Italy, Spain, Israel). However, the recent efforts with respect to defining terrorism do not necessarily result in a restrictive concepts of terrorism. Rather, in some areas the approaches taken are very broad and tend to stretch the notion beyond what has previously been considered to constitute terrorism. This is especially true with respect to destructive attacks on objects

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[31] *S. Less*, Country Report on the United States, 10 f.

[32] For further references see *J.F. Murphy*, Defining International Terrorism: A Way out of the Quagmire, Israeli Yearbook on Human Rights 19 (1989), 13 (22 ff.).

rather than persons. Here, it is not excluded that the express circumscription of a broad concept, which may be found in some modern definitions may have doubtful consequences on the exercise of otherwise accepted forms of public protest. The debates in Canada illustrate the issue. Where under the imprecise broad concepts of older definitions a restrictive interpretation was possible, this is more difficult when the wording clearly demands the contrary. This aspect overshadows to some extent the generally positive aspects of clear definitions in modern approaches to terrorism. Also, the development towards multiple definitions in one and the same legal order should be stopped to the extent possible, because of its negative consequences for legal certainty.

II. Defining Terrorism in International law

During the period of de-colonisation the famous sentence that "one man's terrorist is another man's freedom fighter" was particularly relevant. That is why the approach of international law towards terrorism – with the early exception of the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism[33], which never entered into force – was characterised for a long time by avoiding a general definition and addressing specific issues instead[34]. One may mention the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the 1973 New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, and the 1979 New York Convention Against the Taking of Hostages.

This inductive, bottom-up approach has received a lot of praise for a long time. In an article written in 1986 entitled "Is Terrorism Worth Defining?" the author concluded: "The evident conclusion is that a deductive legal definition is not really necessary. Indeed, it is not clear that such a definition would even be beneficial. In the international context,

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[33] League of Nations Doc. C.546.M383.1937.V (1937); see in this respect *Th.M. Franck/B.B. Lockwood*, Preliminary Thoughts Towards an International Convention on Terrorism, AJIL 68 (1974), 69 ff. (70).

[34] *C. Tomuschat*, Der 11. September und seine rechtlichen Konsequenzen, EuGRZ 2002, 535 ff. (536 f.).

given the intractable conceptual and political differences among states on this issue, it would be at best a watered-down, papered-over, exception-ridden orphan whose main practical result would provide a further basis for dispute and invective at the United Nations. In the U.S. context, it would in the penal area add little if anything to the federal prosecutor's arsenal, severely complicate the prosecutorial task, and be useless in securing international extradition; and in the foreign policy area, would only restrict needed executive branch flexibility and engender sterile debates over formulas instead of substance."[35]

Are these evaluations still valid? In the following part of the presentation I want to outline certain changes that have been taking place within the United Nations system over the years. There is a rather recent trend to solve the problem of freedom fighters and state terrorism by using norms of international humanitarian law as tools of distinction. This approach, which seems an obvious solution to the main problems of defining terrorism, is fundamentally flawed in that it links principles from different bodies of law which serve different purposes.

1. The Emerging Consensus on Certain Elements of Definition

It was the Convention on the Suppression of Financing of Terrorism which was signed in New York on 9 December 1999, which attempted for the first time a definition of international terrorism. It consists of two elements. The first relies on the success of prohibiting specific action in the Conventions that where brought about from the 1960s to the 1980s. Art. 2, para. 1 a) of the Convention simply refers to these specific conventions and declares as terrorism acts which are mentioned in these conventions. The second element is the first abstract definition of terrorism in international law, which is contained in Art. 2, para 1. b) of the Convention. The provision refers to "any [...] other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act."

Building on the comparative analysis of national definitions in the first part of the presentation several remarks concerning this definition are in

[35] *Levitt*, note 13, 115.

place: *First*, the definition requires physical violence directed against human beings. In contrast to some of the more recent national definitions mentioned above, violence against objects is not sufficient. Conversely, it is interesting to note in this context that the draft definition of terrorism which is currently debated at the negotiations on a Draft Comprehensive Convention on international terrorism includes the wording "serious damage to public or private property, including a place of public use, a State or government facility, a transportation system, an infrastructure facility or the environment"[36]. Therefore, there seems to be a tendency in international law to extend the notion of terrorism to destructive violence against objects, which corresponds to the recent development in national legal orders described above. *Second*, as in the more recent definitions the requirements of fear and intimidation of the population and the intention to compel a government or an international organisation to do or refrain from doing any act, are used alternatively, thus not requiring the element of "terror" if the government is otherwise compelled to act as the terrorists wish. *Third*, in contrast to the modern definitions in the UK and Canada, but similar to the EU Framework Decision, the definition does not require a political, religious or ideological motivation on the part of the terrorists[37], nor does it require that several persons act collectively. The comparison with the approaches present in national law reveals that the definition refers to the minimum requirements which are present in all national definitions, while those elements of national definitions which vary between the different countries, notably the use of violence against objects is not included.

2. The perpetual causes of dissent in defining international terrorism: freedom fighters and state terrorism

A look into the historical development of UN action against terrorism reveals that freedom fighters and the question of whether or not the official forces of a State can commit terrorist offences has always rendered debates on defining terrorism very difficult.

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[36] Draft Art. 2, reprinted in UN Doc. A/57/37, Annex II.

[37] See in this respect *J.A. Frowein*, Der Terrorismus als Herausforderung für das Völkerrecht, ZaöRV 62 (2002), 879 ff. (882); *S. Oeter*, Terrorismus, Ein völkerrechtliches Verbrechen, Die Friedenswarte 76 (2001), 21 f.

a. The Development from 1972 to 1994

The United Nations General Assembly adopted its first resolution on the subject of international terrorism in 1972[38]. Professor Tomuschat has recently pointed out that already the title of this Resolution indicates the extent to which the world community was divided over the subject. Resolution 3034 (XXVII) of 18 December 1972 is entitled: "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and *which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes*"[39]. Operative paragraph four of the resolution even goes further in expressly condemning "the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms". The qualification of acts by "colonial, racist and alien regimes" as "terrorist" underlines the strong presence of de-colonisation issues in the debate on terrorism. The General Assembly kept the title until 1989, and only changed it - after a pause of one year (1990) during which no resolution on the issue of terrorism was adopted – in 1991 to the short title "Measures to eliminate international terrorism"; however, the relationship between terrorism, colonialism and liberation movements was kept in its 14th preambular paragraph[40].

A further step of reducing the tensions created by the different views on the relationship between terrorism and colonialism was taken on 9 December 1994, when the General Assembly adopted a "Declaration on

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[38] See in this respect, *J. Dugard*, Towards the Definition of International Terrorism, Proceedings of the American Society of International Law 67 (1973), 94 ff. (96); *Franck/Lockwood*, note 33, 71 ff.

[39] Italics added by the author.

[40] GA Res. 46/51 of 9 December 1991: "Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and foreign occupation, and upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations".

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Measures to Eliminate International Terrorism"[41]. In this declaration the General Assembly not only condemned "all acts, methods and practices of terrorism" by adding the formula "wherever and by whoever committed" but even more specifically pointed out that "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes *are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*"[42] This formulation expressly excludes "good causes" as justification for terrorist activities. And, conversely, in using the formula "by whomever committed" a solutions to the problem of so-called state-terrorism seemed to have been found. In combining the two elements, the Declaration attempts to establish that a person committing certain criminal acts may (or even: must) be considered everyone's terrorists even if he or she is someone's freedom fighter or someone else's law-enforcement agent. This tendency is not without fall-backs which are mainly due to the situation in the Middle-East and last until today. The summary of the discussions in the Ad-hoc Committee of the General Assembly in 2000 states that "several delegations stressed a need to differentiate between terrorism and the legitimate right of peoples to resist foreign occupation."[43]

b. The Approach in Recent Negotiations on Anti-Terrorist Conventions under the Auspices of the United Nations

What is the solution of the Conventions on combating international terrorism to the issue? The Convention on the Suppression of Financing of Terrorism expressly excludes reference to political motives as a justification for terrorist acts[44] and thus clearly states that even noble causes cannot justify the use of terrorist means. However, the Convention does not address the issue of state terrorism. The definition given makes no reference to possible perpetrators and, additionally, the preamble takes up the wording of the 1996 GA Resolution, condemning terrorist acts by whomever committed. This leads to the conclusion, that in principle, states are under an obligation to apply the provisions

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41 GA Res. 49/60 of 17 February 1995, Annex.

42 3rd operative paragraph.

43 UN Doc. A/55/37 No. 16.

44 Art. 6 Convention on the Suppression of Financing of Terrorism.

concerning the drying out of financial resources also with respect to state-terrorism, if it has the "international" element required by Art. 3 and 7 of the Convention (which is very doubtful in the classical situation of state-terrorism against parts of a state's own population).

More interesting with respect to the issues of freedom fighters and state-terrorism is the current debate which is going on during the negotiations on the adoption of a Draft Comprehensive Convention against Terrorism in the Ad-hoc Committee of the General Assembly. The Discussion Paper on the preamble and article 1 of the draft comprehensive convention for discussion in the Sixth Committee at the fifty-seventh session of the General Assembly[45] takes up the wording of the 1994 Declaration which has already been mentioned, reaffirming that "all acts, methods, and practices of terrorism" are "criminal and unjustifiable, wherever and by whomever committed". Here, the Co-ordinator of the last session has circulated a draft which takes up the wording used in Art. 19, para. 2 of the Convention for the Suppression of Terrorist Bombings and thus reflects a compromise which at that time was also acceptable for countries in the Arab world. However, the Member States of the Organisation of the Islamic Conference have now proposed a different wording. The proposal by the Co-ordinator reads:

> "2. The activities of *armed forces during an armed conflict*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
>
> 3. The activities undertaken by *the military forces of a State in the exercise of their official duties*, inasmuch as they are governed by other rules of international law, are not governed by this Convention.[46]

The wording presented by the Member States of the Organisation of the Islamic Conference is as follows:

> "2. The activities of the *parties during an armed conflict, including in situations of foreign occupation*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

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[45] UN Doc. A/57/37 Annex I.

[46] UN Doc. A/57/37 Annex IV (italics added by the author).

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they *are in conformity with international law*, are not governed by this Convention."[47]

The two proposals differ in two respects: first, the text proposed by the Member States of the Organisation of the Islamic Conference speaks of *parties* to an armed conflict instead of using the term "armed forces" proposed by the Co-ordinator, and second, their proposal – as opposed to that of the Co-ordinator – requires activities by military forces of a State to be *in conformity* with international law and not only to be governed by international law.

It has rightly been stressed that the wording "parties to an armed conflict" is more general than the wording "armed forces", and serves the intention to potentially exempt organisations like Hamas, Islamic Jihad and Hezbollah from the scope of application of the Convention[48]. However, the main question is whether the words "armed forces, as those terms are understood under international humanitarian law" only refer to the official military forces of a state or if they also comprise what the Second Protocol to the Geneva Conventions refers to as "dissident armed forces or other organised armed groups". It seems clear that the wording "armed forces" as used in Art. 18, para. 2 of the Draft Convention cannot be interpreted as only referring to official armed forces of a State. First, it should be noted that the term "armed forces" is expressly used in common Art. 3 of the Geneva Conventions in a way that applies to all parties of an internal conflict within its scope of application[49]. Second, and more importantly from a systematic point of view, the Draft Comprehensive Convention (and the text of Art. 19, para. 2 of the Convention against Terrorist Bombings) contains two exceptions. The first refers to "armed forces", the second speaks of "military forces of a state". There must be a difference between the two terms. The most obvious solution is to interpret the former as being more comprehensive than the latter. Therefore, a close look reveals that also the text proposed by the Co-ordinator (and the one used in Art. 19, para. 2 of the Convention against Terrorist Bombings) includes non-

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[47] UN Doc. A/57/37 Annex IV (italics added by the author).

[48] *P. Weiss*, Terrorism, Counterterrorism and International Law, to be published in Arab Studies Quarterly, currently available at http://www.tni.org/archives/weiss/terrorism.htm.

[49] Art. 3 Nr. 1.

governmental forces which are parties to a non-international armed conflict.

aa. The relationship between international humanitarian law and anti-terrorist law

However, the approach raises a general issue of the relationship between international humanitarian law and international law against terrorism. The way in which the exception in the Convention against Terrorist Bombings and the proposal by the Co-ordinator for the Draft Comprehensive Convention are drafted suggests that anti-terrorist law does not apply where the rules of international humanitarian law reign. It establishes, so to speak, two different regimes: either the rules of international humanitarian law apply or anti-terrorist law. There is no overlapping area between the two. It is this general approach which I want to put into question. To be sure, the exclusion of situations of armed conflict from anti-terrorist laws does not imply that whatever military action is taken in situation of an armed conflict could be considered lawful. It is clear that "grave breaches" of the applicable humanitarian laws may and even must be qualified as criminal acts[50]. Nevertheless, the anti-terrorist conventions clearly exclude them from their scope of application and thus suggest that in times of an armed conflict no terrorist acts are possible by the parties to that conflict. However, with regard to the scope of the definition of terrorism given above, such a separation of spheres appears to be too rigorous. Where a direct conflict between individual rules occurs (I think, for instance, of the example of a military computer system which may be a lawful target under the rules of international humanitarian law, but could fall under an extensive definition of terrorism) the rules of international humanitarian law must prevail as *lex specialis*. Attacking a lawful target under international humanitarian law cannot result in prosecution for terrorism. It is difficult to see, however, why the Convention against Terrorist Bombings and the Draft Comprehensive Convention schematically exclude a whole set of rules without regard to the question of whether they actually contradict each other in a given case. The solution favoured here is that each body of law follows its own logic to the largest extent possible: i.e. the terrorist conventions should apply where the

[50] Art. 146 ff. of the Fourth Geneva Convention; see generally *I. Brownlie*, Principles of Public International Law, 5th ed. 1998, 567.

criteria for the definition of terrorism are fulfilled, and the rules of international humanitarian law apply whenever there is a situation of an armed conflict. Acts which must be qualified as terrorism under anti-terrorism law, are only excluded to the extent that international humanitarian law provides for a specific justification (as is the case for example with lawful targets). In all other cases there is no reason, why war crimes which match the criteria for terrorism should not be called and treated as such.

During the discussion at the symposium this suggestion has been criticised by several participants as not adding much to the existing law, while at the same time endangering important functions of international humanitarian law in that it introduces new elements of criminalisation which do not form part of the laws of war[51]. To my mind, the criticism underlines the importance of qualifying the rules of international humanitarian law as *lex specialis* prevailing in case of conflict. However, it does not require a separation of regimes as provided for in the provisions mentioned. First, the qualification of certain acts as terrorism is not legally irrelevant, even when the laws of war apply. The anti-terrorist conventions contain clauses on mutual assistance and cooperation (Art. 12 Convention against Terrorist Bombings; Art. 13 Draft Comprehensive Convention) which would otherwise not be applicable. Second, most terrorist acts would under the laws of war be punishable as war crimes anyway[52]. In fact – and in contrast to what the criticism suggests -, in the 1970s the laws of war have been used as a means of deducing elements for defining international terrorism[53] and it is still used today as an argument concerning the prohibition of the most heinous acts of terrorism[54].

The main advantage of applying the definition of terrorism also in times of war is that it adds to its consistency. The point may be illustrated by the different stages of internal conflicts. The applicability of common Art. 3 to the Geneva Conventions requires that the threshold of an "armed conflict" be transgressed. The consequence of separating anti-terrorist law and international humanitarian law is that one and the

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[51] See also the Comment by Prof. *Tomuschat*, 3.

[52] Similarly, *Oeter*, note 37, 26 f.

[53] *E. David*, Le terrorisme en droit international (définition, incrimination, repression), in: Réflexions sur la définition et la répression du terrorisme. Acte du colloque du 19 et 20 mars 1973, Bruxelles 1974, 103 ff. (127 ff.).

[54] *Sandoz*, note 6, 322.

same criminal act is qualified as terrorism as long as the threshold of "armed conflict" has not been reached, however, the qualification turns doubtful in the grey area around the threshold (i.e. when it is debatable whether or not it is possible to speak of an armed conflict) and it is finally definitively excluded once the threshold has been passed. Such a variable definition should only be used in the absence of better concepts. It is submitted that applying the *lex specialis* principle when individual rules collide is such a better concept.

A final word may be said concerning the argument that Art. 18, para. 2 of the Draft Comprehensive Convention and Art. 19, para. 2 of the Convention against Terrorist Bombings do not concern the definition of terrorism but only the scope of application of the respective conventions. While this argument is certainly correct as to the legal technique used in the two provisions, it seems clear that at least in the case of the "Draft Comprehensive Convention" the scope of application of this application will, once the Draft Comprehensive Convention has been finalised and entered into force, influence the definition of terrorism. Acts to which a "comprehensive" convention does not apply will most probably not be considered to constitute terrorism. The suggestion made here avoids such inconsistencies without sacrificing the important functions of international humanitarian law.

bb. Privileging official military forces?

A different problem arises with the exception contained in Art. 18, para. 3 of the Draft Comprehensive Convention and the second exception in Art. 19, para. 2 of the Convention against Terrorist Bombings. The respective clauses exclude activities of military forces "in the exercise of their official duties" from the scope of application of the Conventions. The contrast between paragraph 2, which applies "during an armed conflict" with paragraph 3 suggests that paragraph 3 applies to activities of military forces "in the absence of an armed conflict". This results in excluding military forces of a state from the scope of application of the convention under the only condition that they act in the exercise of their “official duties” and that some rules of international law being applicable to them. Since in the absence of an armed conflict, it can be reasonably argued that activities by military forces are, *inter alia*, governed by norms of international human rights law, this exception could generally exclude "military forces of a state from the scope of ap-

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plication of the conventions[55]. That such a broad exception reintroduces the problem of "state terrorism" is regrettable given the fact that the advantage of the formula used by the General Assembly since 1994 ("wherever and by whomever committed") was precisely not to exclude official forces from the scope of application of "terrorism". Furthermore, the combination of such an express exclusion of the military with the express mentioning of acts of international terrorism "including those which are committed or supported by states" in the preamble to the Draft Comprehensive Convention appears to be somewhat contradictory[56].

III. Conclusion

The main elements of the definition used in national and international law may be summarised as follows: Terrorism requires an objective and a subjective element. The objective element is a criminal offence of a certain gravity, mainly the use of physical violence against persons. The possible offences have increasingly been stretched to include the destruction or serious damage to public (or sometimes even private) property, including infrastructure facilities. The subjective element requires, alternatively, the intention to create a climate of terror and fear within the population, or the intention to coerce (in different degrees according to the different definitions) a government or an international organisation. Where the intention to create fear within the population is sufficient, some definitions require political, religious or other ideological motives, in order to distinguish terrorism from other forms of large scale criminality, the EU Framework Decision and the International Convention for the Suppression of the Financing of Terrorism and the definition proposed for the Draft Comprehensive Convention against Terrorism being important exceptions.

The discussion of the exceptions contained in Art. 18, para. 2 and para. 3 of the Draft Comprehensive Convention and in Art. 19, para. 2 of the Convention against Terrorist Bombings lead to a concluding remark which concerns the symbolic effects of legal concepts and legal

[55] See in this respect the criticism voiced by Amnesty International and Human Rights Watch, Joint Letter, available at http://globalpolicy.org/wtc/terrorism/2002/0128aihrw.htm.

[56] See in this respect, *Weiss*, supra, note 48.

terminology, effects which are often neglected in the legal analysis. "Terrorism" is not only a convenient term for circumscribing certain activities "which are widely disapproved of"[57]. Rather, in using this terminology a community, be it a national community or the international community as a whole, expresses a strong condemnation and stigmatisation of certain acts committed by individuals or groups. It is important to state that this condemnation does not turn terrorists into "outlaws"[58] (see in this respect the papers by *Heike Krieger* and *Stefanie Schmahl*), but it is equally important to note that the symbolic effects of the condemnation depend on the moral authority behind the legal approach. The moral reasons for strongly condemning terrorism mainly lie in it turning innocent civilians into instruments for the pursuit of political goals. Such a moral reading grounds the reasons for condemning terrorism in considerations of human dignity. Any differentiation according to the authors of the acts or the situation in which they occur cannot but weaken the moral authority of the condemnation and along with it diminish the symbolic effects of "terrorism" as a legal concept and should hence be avoided to the largest extent possible.

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[57] *Higgins*, supra, note 3.

[58] Alarmingly inconsiderate in this respect *U. Häußler*, Der Schutz der Rechtsidee, ZRP 2001, 537 ff.

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