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DROIT INTERNATIONAL PUBLIC

Defining terrorism in international law so as to foster the protection of human rights¹

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Résumé :

Chacun de nous a déjà employé le mot « terrorisme ». Mais qu'est-ce que le terrorisme ? Bien que ce soit un phénomène très ancien, il n'y a pas au niveau international de définition du terrorisme. Ce vide juridique a fait qu'au lendemain des attaques du 11 septembre 2001 le Conseil de Sécurité des Nations Unies a pu adopter des résolutions portant force de droit incitant les Etats à combattre le terrorisme par « tous les moyens ». Cette approche jusqu'au-boutiste a été lourde de conséquences sur la protection du droit international des droits de l'homme au niveau national et international.

Cet article a pour objectif de démontrer qu'aux fins d'éviter que la différence entre le contreterrorisme et le terrorisme ne demeure qu'une question de point de vue, il est primordial non seulement que la communauté internationale s'accorde sur une définition unique et universellement contraignante du terrorisme, mais également qu'elle réaffirme que la lutte contre le terrorisme ne peut se faire que dans le respect plein et entier du droit international des droits de l'homme.

Summary:

Each and every one of us has spoken the word "terrorism". But what does it mean? Despite the fact that it's a very old phenomenon, there is no definition of terrorism at the international level. This legal black hole has enabled the United Nations Security Council in the aftermath of the 11 September 2001 attacks to adopt resolutions urging States to combat terrorism "by all means". This hard-line approach was fraught with consequences on the protection of international human rights at both national and international level.

The aim of this article is to demonstrate that, so as to that the difference between terrorism and counterterrorism be merely a matter of perspective, it is of the utmost importance that the international community clearly and unequivocally define terrorism and counterterrorism all the while reasserting their intertwinement with human rights.

“The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set

¹ Cet article a été extrait du mémoire de recherche du Master II Droit - Relations internationales : Europe-Océan Indien de l'auteur, daté de septembre 2011.

out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed. Some, daunted by the difficulties and dangers along the way, give up, often declaring the quest meaningless. Others return claiming victory, proudly bearing an object they insist is the real thing but which to everyone else looks more like the same old used cup, perhaps re-decorated in a slightly original way”¹

“Human rights are not a luxury only for good times. They must be upheld always, including in times of terror and insecurity”²

Osama Bin Laden was killed on 13 May 2011 in Pakistan by American forces. He is the man at the origin of the event that marked the beginning of the 21st century and who brought terrorism to the forefront of international attention, making the word “terrorism” part of our everyday vocabulary. Yet, even though everyone has been listening to, speaking about or reading the word “terrorism” on a daily basis for over a decade now, no one really knows what it means. Journalists, by labeling regular criminal acts or even acts that are lawful under international humanitarian law as “terrorist”, cast further shadow on this already elusive phenomenon.

Terrorism however, is not a new phenomenon. Its origin can be traced back to Antiquity, when the Zealots during the first century and the Hashshashins from the 11th to the 13th century murdered their enemies and spread fear to achieve their goals³. Scholars agree that modern terrorism was born during *La Terreur*, the period of the French Revolution between mid 1793 and July 1794 when the ruling Jacobin faction, headed by Robespierre, executed anyone considered a threat to their regime. As a result, the first meaning of the word “terrorism” as recorded by the *Académie Française* in 1798, was “*system or rule of terror*”⁴. “Terrorism” is thus a widely used term, multifaceted in reach and scope, so much so that even the international community has not agreed on a fully functional comprehensive definition of terrorism yet.

This legal black hole led to the international “War on terror” subsequent to the 11 September 2001 attacks being waged in a way that was disruptive to human rights. This human rights-abusive international “War on terror” was launched by the United Nations Security Council (SC) on the impulse of the United States with

¹ G. LEVITT, « Is ‘Terrorism’ Worth Defining? », *ONULR*, 1986, vol. 13, p. 97.

² M. SHARMA, *Human Rights in a Globalised World: an Indian Diary*, New Delhi, Sage Publications, 2010, p. 7.

³ *Encyclopedia Of World History: Crisis and Achievement 1900 to 1950*, vol V, Golson Books, 2008, xxv.

⁴ For more information on the history of terrorism, read A. BLIN, G. CHALIAND, *Histoire du terrorisme : de l’antiquité à Al Qaida*, Paris, Bayard, 2006, 718 p.

SC Res 1368¹ and 1373², which recognized that acts of terrorism were “threat[s] to international peace and security” that needed to be fought “by all means”, including military intervention through the “inherent right of individual or collective self-defense”. The gravity of the threat posed by terrorism in the aftermath of 9/11 was no excuse for the international community to part from public international law because it was considered inconvenient. The deviation of the boundary between law enforcement and armed conflict while dealing with terrorism has had lots of consequences as regards human rights protection³. It has been made possible by the absence of an internationally recognized and binding definition of terrorism, despite the international community’s efforts since 1937⁴.

So as to avoid that the difference between terrorism and counterterrorism be merely a matter of perspective, it is of the utmost importance that the international community clearly and unequivocally define terrorism and counterterrorism all the while reasserting their intertwinement with human rights.

A study of the theoretical approach to defining terrorism (I) is interesting because not only does it highlight the intertwinement of terrorism and human rights, but also because it sets the framework for a study of the shortcomings of legal definitions of terrorism (II).

I.- Theoretical definition of terrorism

The International Covenant on Civil and Political Rights (ICCPR) recognizes in its preamble that “*the ideal of free human beings [is to enjoy] civil and political freedom and freedom from fear [...]*”⁵. Terrorism, relying on the instilling of fear is thus antithetical with the theological interpretation of the ICCPR. Furthermore, terrorists jeopardize several human rights protected in various international human rights conventions.

Terrorism has been part of the international agenda for nearly a decade, but there is still no consensus on an internationally recognized and unequivocal definition of the term. In order to further the reflection on the issue of defining

¹ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

² UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

³ For commentaries on this shift from the law-enforcement to the armed conflict paradigms, see F. MÉGRET, « ‘War’? Legal Semantics and the Move to Violence », *EJIL* 2002, vol.13, n° 2, p. 361-399 ; S. SCHORLEMER, « Human Rights: Substantive and Institutional Implications of the War Against Terrorism », *EJIL* 2003, vol. 14, n° 2, p. 265-282 ; J. FITZPATRICK, « Speaking Law to Power : The war Against Terrorism and Human Rights », *EJIL* 2003, vol. 14, p. 241-264 ; A. CASSESE, « Terrorism is Also Disrupting Some Crucial Legal Categories of International Law », *EJIL* 2001, vol.12, n° 5, p. 993-1001.

⁴ See *infra*, part II-B.

⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), emphasis added.

terrorism, it is interesting to study what are the avenues that have been under the scrutiny of legal scholars (A) before studying what the very substance of terrorism is; in other words the extent to which it violates human rights (B).

A.- Formal approach

Scholars have been working on a definition of terrorism for decades now. Schmidt and Jongman in 1988 referenced 109 definitions of terrorism¹. The first thing that comes to mind is the important number of definitions that have been cataloged in 1988. Levitt in 1986 commented: “*The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed*”².

As a matter of fact, legally defining terrorism is far from being an easy task. Even though everyone has a vague idea of what terrorism is, one has much trouble outlining what it is exactly. There is no question whether the 9/11 attacks against the United States of America were terrorist attacks; yet fully grasping the notion “terrorism” is very difficult.

1/ Inductive vs. deductive definition

Levitt identified two different ways of defining terrorism: the “*deductive method*” and “*the inductive method*”. On the one hand, deductive definitions of terrorism have three elements: (1) a substantive element (enumeration of deeds considered acts of terrorism), (2) the intent element (explicit mention that the act was intended) and (3) the jurisdictional element (towards whom the terrorist act is directed)³. On the other hand, the inductive method “*relies upon a relatively precise description of the conduct constituting the substantive element and omits the political intent element that characterized the deductive approach*”⁴. In other words, while inductive definitions aim at defining what a terrorist act is, deductive definitions try to answer the broader question of what terrorism is. The substantive element almost always refers to the use of violence and force. In their 1988 study, Schmidt and Jongman found that violence and force appear in 83.5% of the 109 definitions of terrorism, being by far the most recurrent theme⁵. The international community has endorsed the inductive method by focusing merely on the

¹ A. SCHMIDT, A.J. JONGMAN, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, New Brunswick, Transaction books, 1988, p. 5-6.

² G. LEVITT, « Is ‘Terrorism’ Worth Defining? », *ONULR* 1986, vol. 13, p. 97.

³ Amongst the documents having adopted a deductive definition of terrorism, Levitt cites the 1937 League of Nations Convention for the Prevention and Suppression of Terrorism and the 1972 U.S. Draft Convention on Terrorism.

⁴ *Id.* p. 109

⁵ A. SCHMIDT, A.J. JONGMAN, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, New Brunswick, Transaction books, 1988, p. 5-6.

substantive and jurisdictional element. This resulted in the adoption of sectoral conventions on terrorism.

To this date there are thirteen sectoral international conventions on terrorism focusing on specific acts of terrorism,¹ among which the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, or the 1997 International Convention for the Suppression of Terrorist Bombings. Art.1.1 of the aforementioned 1973 Convention is the jurisdictional element referred to by Levitt, as it states against whom the terrorist act in question (i.e. crime against internationally protected persons) is directed, and Art.2.1 describes the offenses considered as terrorist crimes. Likewise, Articles 2 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism and of the 1997 International Convention for the Suppression of Terrorist Bombings set forth the offenses targeted in the conventions².

Violence is once again present in both conventions against terrorism, validating Schmidt and Jongman's study. As a matter of fact, all of the thirteen international conventions on terrorism listed by the United Nations connect terrorism with the use or threat of use of force and violence³. By thus focusing on violence as an outstanding feature of terrorism, this approach enables States to find consensus by avoiding the political aspect of terrorism. The important advantage of the inductive method is that *"it avoids political conflict over basic definitional principles [...], permitting textual agreement to be reached"*⁴.

2/ Prominence of motive

John Dugard⁵ considered in 1974 that an ideal definition of terrorism *"should expressly state that motive is irrelevant in determining whether an act of terrorism has been committed"*⁶. What mattered by then and throughout the 1970s was the nature of the act, and who the targets were. Most scholars have now shifted position on the issue, considering that a workable definition of terrorism

¹ For the list of those conventions, see http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG.

² Art. 2-1 of both conventions reads *"Any person commits an offence within the meaning of this convention if that person [...]"*.

³ See for example Art. 2.1.a of the International Convention for the Suppression of Acts of Nuclear Terrorism : *"Possesses radioactive material or makes or possesses a device:*
(i) *With the intent to cause death or serious bodily injury; or*
(ii) *With the intent to cause substantial damage to property or to the environment"*.

⁴ A. SCHMIDT, A.J. JONGMAN, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, New Brunswick, Transaction books, 1988, p. 102.

⁵ Currently a South African professor of international law, John Dugard has served as Judge ad hoc on the International Court of Justice and as a Special Rapporteur for both the former United Nation Commission on Human Rights and the International Law Commission.

⁶ J. DUGARD, « International Terrorism: Problems of Definition », *RIIA* 1974, vol. 50, n° 1, p. 80.

should comprise the motive element. The absence of the motive element in international conventions is, as mentioned earlier, due to the need to reach consensus. States did not however discard deductive definitions of terrorism, as many of them use such definitions at the national level¹.

Boaz Ganor considers that including the motive element in the definition of terrorism is of prime importance², as a “*violent activity against civilians that has no political aim is, at most, an act of criminal delinquency, a felony, or simply an act of insanity unrelated to terrorism*”³. As for the author of *Defining Terrorism in International Law*, he uses the phrase “*public motive*” instead of “*political aim*” in his definition of terrorism: “*a terrorist act is committed not only where it has a political purpose, but wherever there is a public motive, aim, objective, or purpose broadly defined: political, ideological, religious, ethnic or philosophical*”⁴.

The use of “*public motive*” better fits terrorism in the sense that terrorists resort to terrorism not only to gain political power, but also to achieve other goals like imposing their ideology upon a population. The question of motive is one of the reasons for which the adoption of a universally recognized definition of terrorism has been stalled for years, despite the United Nations’ continuous efforts to elaborate the Comprehensive Convention on International Terrorism since 1996⁵.

3/ Types of terrorism

Scholars have identified three different kinds of terrorism, depending on whether it is sponsored (b) or performed by a State (a) or a sub-State entity (c).

a/ State terrorism

Most of the scholarly work on terrorism deals with what the former Special Rapporteur to the Commission on Human Rights calls “*sub-State*” terrorism, and

¹ Some national definitions of terrorism will be studied in Part II-A. The United States’ 1978 Foreign Intelligence Surveillance Act (codified and amended at 50 USC §1801, 1982) is a perfect example of deductive method. Paragraph 1 makes up the substantive element, paragraph 2 the intent element and paragraph 3 the jurisdictional element.

² Boaz Ganor was the founder of the International Institute for Counter-Terrorism (I.C.T.) in 1996. Located in Israel, the “*ICT is an independent think tank providing expertise in terrorism, counter-terrorism, homeland security, threat vulnerability and risk assessment, intelligence analysis and national security and defense policy*”: <http://www.ict.org.il/AboutICT/AboutUs/tabid/55/Default.aspx>, accessed on Apr. 12, 2011.

³ B. GANOR, « *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?* », *PPR* 2002, vol. 3, n° 4, p. 294.

⁴ B. SAUL, *Defining Terrorism in International Law*, Oxford Monographs in International Law, 2006, p. 61.

⁵ See Part II-B for more information on the Comprehensive Convention on International Terrorism.

so do conventions on terrorism, eluding the question of “*State terrorism*”. Nonetheless the first occurrence of terrorism was organized by the State¹.

The 2001 report of the Commission on Human Rights gives examples of regimes of terror, amongst which the Stalinist regime in the Soviet Union between 1929 and 1946, and Hitler’s Nazi Germany that orchestrated “*the genocide of the Jews and Gypsies and the mass slaughter of Slavic people between 1933 and 1945*”². According to the Special Rapporteur, regimes of terror are “*characterized by such actions as the kidnapping and assassination of political opponent of the government by the police [...]; systems of imprisonment without trial [...]*”³. Governments of terror therefore rely on human rights violations to assert their authority. Terror is planned and operated through human rights violations by the National State on its own territory and population.

b/ State-sponsored terrorism

State-sponsored terrorism is different from State terrorism in that the State resorts to terrorism “*to achieve strategic ends in circumstances where the use of conventional armed forces is deemed inappropriate, ineffective, too risky, or too difficult*”⁴. In other words, State-sponsored terrorism is sometimes used to circumvent *jus ad bellum*. State-sponsored terrorism can be classified into two categories according to their level of involvement in terrorism⁵.

On the one side, “*States supporting terrorism*”⁶ provide “*financial aid, ideological support, military or operational assistance*”⁷. The U.S. Department of State’s 2009 Country Report on Terrorism incriminates Cuba, Iran, Sudan and Syria of supporting terrorists. This report considers Iran as the most active sponsor of terrorism: “*Iran’s financial, material, and logistic support for terrorist and militant groups throughout the Middle East and Central Asia had a direct impact on international efforts to promote peace, threatened economic stability in the Gulf and undermined the growth of democracy*”⁸.

¹ UNCHR (Sub-Commission), « Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights », UN Doc E/CN.4/Sub.2/2001/31 (2001).

² *Id.* para. 42.

³ *Id.* para.43

⁴ R.S. CLINE, A. YONAH, *Terrorism as State Sponsored Covert Warfare*, Hero Books, 1986, p. 164, *qtd. in* “Countering State-Sponsored Terrorism”, *ICT Papers*, 2007, n° 1, available at <http://www.ict.org.il/Articles/tabid/66/Articlsid/701/currentpage/34/Default.aspx>

⁵ Ganor actually distinguishes three different kinds of State-sponsored terrorism. We shall however only bring up two of those categories, since the difference he sets forth between “*States operating terrorism*” and “*States perpetrating terrorism*” is minimal.

⁶ This appellation is also employed by the U.S. Department of Defense, *in* Joint Publication 3-07.2, *Antiterrorism*, April 2006, p. 35.

⁷ B. GANOR, « Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter? », *PPR* 2002, vol. 3, n° 4, p. 299.

⁸ United States Department of State, *Country Reports on Terrorism 2009*, “Chapter 3: State Sponsors of Terrorism”, 2010, p. 191-196, available at <http://www.state.gov/documents/organization/141114.pdf>.

On the other side, “States perpetrating terrorism” carry terrorist acts “*abroad through their own official bodies – members of their security forces or their intelligence services, or their direct agents. In other words, this refers to States intentionally attacking civilians in other countries in order to achieve political aims without declaring war*”¹.

This kind of terrorism is qualified as State-directed by the United States Department of Defense (DOD), which it describes as “*a terrorist group that operates as an agent of a government, receiving substantial intelligence, logistic, and operational support from the sponsoring government; e.g., Hezbollah organization*”². In the end, the main difference between State terrorism and State-perpetrated terrorism stands in the location of said act: at home on its own population for State terrorism, or on foreign soil for State-perpetrated terrorism.

c/ Sub-State terrorism

Sub-State terrorism is carried out by private actors, as opposed to the public actors in State terrorism. Sub-state terrorism fosters on publicity for its cause, while State-sponsored terrorism avoids it. The U.S. Department of Defense calls it “*non-State-supported*” terrorism, namely “*a terrorist group that operates autonomously, receiving no significant support from any government*”³. Nevertheless, the number of affiliates to a group does not matter, since even a single individual can take part in sub-State terrorism. From then on when the word “terrorism” will be used in this article, the reader shall understand “*sub-State*” terrorism.

B.- Substantial approach

The 1999 preliminary report of the Commission on Human Rights entitled *Terrorism and human rights* noted that “[l]ittle, if any, attention has been given to the link between terrorism and human rights”⁴. Yet, this link is undeniable since the very essence of terrorism is to jeopardize human rights. Numerous international instruments aiming at the protection of human rights exist;⁵ this allows human rights to exist by themselves, thus entitling States to protect a right that has acquired the character of customary norm of international law, without necessarily being a party to a treaty.

¹ *Ibid.*

² *Joint Publication 3-07.2, Antiterrorism*, United States Department of Defense 2006, p. 35, available at <http://file.wikileaks.info/leak/us-antiterrorism-jp3-07-2-2006.pdf>

³ *Ibid.*

⁴ UNCHR (Sub-Commission), « Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights », UN Doc E/CN.4/Sub.2/1999/27 (1999), cons. 16.

⁵ <http://www2.ohchr.org/english/law/>

A customary norm of international law emerges when a provision “*has generated a rule which has passed into the general corpus of international law, and is now accepted as such by the opinio juris*” and has “*become binding even for countries which have never, and do not, become parties to a given Convention*”¹. Such norms are recognized by Art.38 para.1 of the Statute of the International Court of Justice. Nevertheless, a customary norm of international law cannot serve as a legitimization for human rights violations, as Art.5 para.2 of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides²: “*There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent*”³. This paragraph entails the supremacy of human rights since, would a customary human right enter in conflict with any other customary norm, the customary human right would prevail.

Individuals are not subjects of general international law; therefore the International Bill of Rights and the core Human Rights Treaties do not legally bind them. Art. 10 of the United Nation Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides: “*No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so*”⁴. The vocabulary used in this article is clearly addressed to individuals who have an obligation – even though that obligation is not legal as individuals are not subjects of international law – to abstain from participating in human rights and fundamental freedom violations. Common Art.5, para.1 of the ICCPR and ICESCR, which is very similar to Art.30 of the UDHR⁵, stipulates: “*[n]othing in the present Covenant may be interpreted as implying for any State, group or person⁶ any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant*”.

While the aforementioned Declaration pertains to “*soft law*”, Art. 5 is part of the internationally recognized Covenant, which is a step further towards a

¹ M.K. SINHA, *Implementation of Basic Human Rights*, Delhi, Manak Publications, 2002, p. 28.

² Art 5 para. 2 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) is almost identical to this article and meaning, only the wording is different.

³ Emphasis added.

⁴ Emphasis added.

⁵ Art. 19 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms UN Doc A/RES/53/144 (1999) is identical to art.30 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

⁶ Emphasis added.

customization of the individual responsibility through international human rights instruments. There is an international individual liability as regards the “*most serious crimes*” established by the International Criminal Court (ICC)¹. The ICC however is to be used in complement with “*national criminal jurisdictions*”, which means that States have a duty to enforce human rights and prosecute any violator through their own jurisdictions.

It is therefore relevant to study human rights violations by terrorists in the light of the international human rights instruments because of the “*drip-down effect*” and their impact on national criminal law.

1/ Violation of universally recognized non derogable rights

Most international instruments protecting human rights contain derogation clauses that enable State parties to derogate from their obligations during a state of emergency or during war. Art.4 of the International Covenant on Civil and Political Rights (ICCPR) “*permits State parties to derogate from 18 articles in times of officially proclaimed emergencies*”². General Comment No. 29 of the Human Rights Committee³ gives two conditions before States can invoke the state of emergency: “*the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency*”⁴.

Paragraphs 3 and 4 of General Comment No. 29 further provide respectively that “[*n*]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation” and that the derogations have to be “*strictly required by the exigencies of the situation*”⁵. Art.4(2) of the ICCPR does not admit any derogation with regard to “*the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; the right not to be imprisoned on the ground of inability to fulfill a contractual obligation; right against an ex post facto law; the right to recognition everywhere as a person before the law, and the*

¹ Art. 5 of the Rome Statute establishing the ICC provides: “*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:*

(a) *The crime of genocide;*

(b) *The Crimes against humanity;*

(c) *War crimes;*

(d) *The crime of aggression*”.

² M.K. SINHA, « Respect of Human Rights in Time of State of Emergency: International and National Perspectives », *IJIL*, 2007, vol. 47, p. 226.

³ UNHRC, « General Comment 29 on Article 4, International Covenant on Civil and Political Rights », U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

⁴ *Id.*, para.1.

⁵ *Ibid.*

right to freedom of thought, conscience and religion”¹. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)² and the American Convention on Human Rights³ contain similar provisions protecting the “*irreducible core rights*”, also known as “*fundamental rights*”. Those fundamental rights are also protected under national constitutions. Part III (Articles 12 to 35) of the Indian Constitution is dedicated to the fundamental rights. Likewise, the American Bill of Rights, which is part of the American Constitution, protects those fundamental rights.

Notwithstanding the customary character of Art. 4 ICCPR and the obligation it imposes upon States, the Human Rights Committee in General Comment 29 stated that the non-derogable nature of those rights make them similar to, but not identical with peremptory norms of international law; norms “*from which no derogation is permitted*”⁴. However, “*the category of peremptory norms extends beyond the list of non derogable provisions as given in article 4, paragraph 2*”⁵. The Human Rights Committee asserted that the following additional rights cannot legitimately be derogated from in any circumstance: “*all persons deprived of their liberty [are to] be treated with humanity and with respect for the inherent dignity of the human person*”⁶; “*taking of hostages, abductions or unacknowledged detentions*” are prohibited; “*the rights of persons belonging to minorities*” are to be protected; “*deportation or forcible transfer of population without grounds permitted under international law*” is prohibited; “*propaganda for war, [...] advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence*” by a State is prohibited⁷; and judicial guarantees have to be protected. This points to Art. 6 in connection with Art.14 and 15 of the ICCPR⁸.

¹ Articles 6, 7, 8(1) and (2), 11, 15, 16 and 18 respectively ; M.K. SINHA, « Respect of Human Rights in Time of State of Emergency: International and National Perspectives », *IJIL*, 2007, vol. 47, p.p. 228-229.

² Art.15 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950) provides: “*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*”.

³ Art. 27(1) of the American Convention on Human Rights (22 November 1969) provides: “*In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin*”.

⁴ Art. 53 of the Vienna Convention on Treaties (adopted 23 May 1969, entered into force 27 January 1980)

United Nations, *Treaty Series*, vol. 1155, 1969, p. 331.

⁵ M.K. SINHA, *Implementation of Basic Human Rights*, Delhi, Manak Publications, 2002, p. 28.

⁶ UNHRC, « General Comment 29 on Article 4, International Covenant on Civil and Political Rights », U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.13 (a).

⁷ *Id.* para. 13 (b) to (e).

⁸ *Id.* para.15.

The 1969 Vienna Convention on the Law of Treaties introduces the notion of “*peremptory norms of international law*”. Art.53 of the same convention provides that “[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted [...]”.

This raises the question whether violations of *jus cogens* by non-state actors place a duty upon States, or merely give them “*certain rights to proceed against perpetrators of such crimes*”¹. In other words, does the concept of *obligatio erga omnes* carry with it a legal-binding obligation? Authors have agreed that “*the implication of jus cogens are those of a duty and not of optional rights, otherwise jus cogens would not constitute a peremptory norm of international law*”². Art. 2 para.1 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms³ provides that “[e]ach State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms”. Since the violation of peremptory norms of international law leads to *jus cogens crimes* imposing a duty upon States to seek the prosecution of the violator and that art. 5 of the ICCPR and the ICESCR give no right to “*group[s] or person[s]*” to conduct human rights violations, there is evidence on the relevance to conduct a study on the most flagrant violations of human rights by terrorists as regards non-derogable rights.

a/ The right to life

The terrorists’ primary weapon is the arbitrary killing of people, like during the attacks on the World Trade Center on 11 September 2001⁴, or the all too common suicide bombings in various parts of the world. The 1948 Universal Declaration of Human Rights (UDHR) proclaims, “[e]veryone has the right to life, liberty and security of person”⁵. The right to life, which the Committee has recalled, “*should not be interpreted narrowly*”⁶, is the “*supreme*” right from which no derogation is possible⁷, and it is “*basic to all human rights*”⁸. Subsequently to the adoption of the UDHR, a large “*array of conventions were [...] adopted under*

¹ C. BASSIOUNI, « International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’ », *LCP*, 1996, vol. 59, n° 4, p. 65.

² *Ibid.*

³ UN Doc A/RES/53/144 (1999)

⁴ Those attacks killed almost 3000 people. See <http://www.9-11heroes.us/victims-world-trade-center.php>

⁵ Article 3, Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/>

⁶ UNHRC, « General Comment 29 on Article 4, International Covenant on Civil and Political Rights », U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.1.

⁷ UNHRC, « General Comment 06 on Article 6, International Covenant on Civil and Political Rights », para.1.

⁸ UNHRC, « General Comment 14 on Article 6, International Covenant on Civil and Political Rights », Art.6.

*the auspices of the United Nations [...] to guarantee different facets of the right to life*¹ or to guarantee the right to life to certain groups (racial and ethnic minorities, children, women...). Art. 6 of the ICCPR also lays down the non-derogable right to life: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

Art. 6 para. 1 ICCPR encourages States to adopt appropriate legislation to prevent the commission of criminal acts susceptible of endangering the right to life. Art. 3 of the Human Rights Committee’s (HRC) General Comment N° 06 uses a more determined language: “States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces”. States therefore have a positive obligation to confront the issue of terrorism in order to prevent and punish attacks that kill people under their territorial jurisdiction. Terrorists also resort to hostage taking, which can arguably amount to a violation of the right to life. As a matter of fact, para.4 of General Comment No. 06 provides: “States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life”².

b/ Torture and other cruel, inhuman or degrading treatment or punishment

The international conventions on torture place obligations upon States to refrain from resorting to torture and to impede agents under their authority to do so. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³ (CAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”⁴.

¹ Y. MURTHY, *Human Rights Handbook*, New Delhi, Lexis Nexis, 2007, p. 28.

² Emphasis added.

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), UNGA Res 39/46.

⁴ *Id.* Art.1 para.1

Unlike the Convention Against Torture, which requires that pain be inflicted “with the consent or acquiescence of a public official or other person acting in an official capacity”¹, the Rome Statute of the International Criminal Court’s definition has no reference to official involvement². For the purpose of this discussion, we shall use the definition of the ICC Statute since it attributes personal, rather than state responsibility.

Torture can, according to the ICC, be either “physical or mental”³. The nature of terrorist acts is multifaceted, ranging from bombings, cyber-terrorism, hostage taking, plane crashes and so on. Hostage-taking by terrorists can amount to torture under certain conditions. Indeed Pierre Legrand, Daniel Larribe, Thierry Dol and Marc Furrer, four French citizens are being held hostage since September 2010 in Nigeria by Al-Qaida in the Islamic Maghreb (AQIM)⁴, with constant fear of assassination (which is legitimate if we remember previous hostage taking by AQIM)⁵. Arguably, this can be read in the light of the “death row phenomenon, which is caused by prolonged detention on death row thereby causing great mental distress, raising a number of issues relating to Art. 7⁶ of the ICCPR”⁷. While at first the HRC did not consider the death row phenomenon as a breach of Art. 7⁸, it eventually shifted position recognizing the possibility of regarding it as torture: “It now seems that the HRC accepts that detention in a “death cell” after the issue of a warrant for execution does amount to a breach of article 7 if it is deemed unreasonably long. [...] The imminence of anticipated execution, and the consequent increase in anxiety, distinguishes such instances from ordinary cases of the death row phenomenon”⁹.

c/ Freedom of thought, conscience and religion

This freedom is non-derogable and protected by Art.18 of the ICCPR, which provides:

¹ *Ibid.*

² Art.7 para.2 (e) provides: “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

³ *Ibid.*

⁴ Al-Qaida in the Islamic Maghreb is a terrorist organization independent from the “mother” Al-Qaida. Nonetheless, it pledged allegiance to Osama Bin Laden. Its area of influence spreads from Mauritania to the Chad, encompassing by Mali, Algeria, Niger and Nigeria.

⁵ See this article about Michel Germaneau’s assassination by AQIM: <http://info.france2.fr/france/otage-executeaqmi-assure-avoir-negocie-avec-paris-64296014.html>

⁶ Art. 7 ICCPR provides: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

⁷ Y. MURTHY, *Human Rights Handbook*, New Delhi, Lexis Nexis, 2007, p. 28.

⁸ *Barrett and Sutcliffe v Jamaica* UN Doc CCPR/C/44/D/271/1988 (1992).

⁹ *Pennant v Jamaica* UN Doc CCPR/C/64/D/647/1995 (1998).

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

Terrorism, especially that practiced by extremist religious groups such as Aum Shinrikyo¹ or more recently Islamist groups such as Al-Qaida jeopardize the freedom of thought, conscience and religion. Extremist religious groups center their rhetoric on religious differences and target people that do not share their religious views, thus violating Art.18 of the ICCPR.

2/ Violation of other non-derogable rights

a/ Hostage taking, abductions or unacknowledged detention

Two examples have been given previously showing how the terrorists' hostage taking could violate the inherent human right to life and could also be considered as a violation of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment. General Comment 29 on the non-derogable rights nevertheless asserted the non-derogable nature of “[t]he prohibitions against taking hostages, abductions or unacknowledged detention [...]. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law”².

The phrase “[t]heir status as norms of general international law” refers to the numerous sectoral treaties on terrorism prohibiting hostage taking. Hostage taking can be linked with other ICCPR provisions than Art. 6 and Art. 7. For example, it is contrary to the right protected by Art.9 para.1 of the ICCPR, which

¹ Aum Shinrikyo, also known as A.I.C. is a Japanese extremist religious group responsible for the March 1995 attack in “several Tokyo subway trains, killing 12 people and causing up to 6,000 to seek medical treatment”. United States Department of State, *Country Reports on Terrorism 2009*, p. 244-245.

² UNHRC, « General Comment 29 on Article 4, International Covenant on Civil and Political Rights », U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13(b).

provides: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

b/ Propaganda for war, advocacy of national, racial or religious hatred

Osama Bin Laden’s “Declaration of War Against the Americans Occupying the Land of the Two Holy Places” is a flagrant example of propaganda for war and of advocacy of national hatred: “[T]here is no more important duty than pushing the American enemy out of the holy land. [...] Utmost effort should be made to prepare and instigate the Ummah against the enemy¹, the American/Israeli alliance occupying the country of the two Holy Places. [...] Therefore efforts should be concentrated on destroying, fighting, and killing the enemy until, by the Grace of Allah, it is completely defeated”².

This 10,000 word-long declaration undoubtedly violates Art. 20 of the ICCPR³. Bin Laden’s declaration violates at once all the provisions of this article, whether it be propaganda for war (“Declaration of War Against the Americans[...]”), advocacy of national hatred (“the American enemy”) or advocacy of religious hatred (the word “Zionist” appears seventeen times in the declaration). This declaration also violates Art. 18 of the ICCPR, notably with sentences like “If I survive, Allah willing, I will expel the Jews and the Christians out of the Arab Peninsula”. Finally, a violation of Art.19 ICCPR can be invoked, for Bin Laden did not abide by the duties and responsibilities inherent to the freedom of opinion⁴.

¹ The Ummah is the community of muslims.

² Emphasis added.

³ Art. 20 provides:

“1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

⁴ Art. 19 provides:

“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals”.

II.- Legal definitions of terrorism

Legal definitions of terrorism differ from theoretical definitions in the sense that they are confronted with reality. While theoretical definitions are driven by the scholars' own ideologies, the States' political interests drive national definitions (A). This multiplicity of national interests is even more consequential on the international attempts at defining terrorism (B).

A.- National definitions driven by political interests

The different definitions adopted by States reflect their approach to terrorism, and the political issues at stake. Some States have multiple definitions of terrorism, depending on which administration is dealing with the phenomenon. The United States is a very good example of this multiplicity of definitions.

1/ Guaranteeing security

The United States is a federal State, and as such each of the fifty American States can adopt its own legislation on terrorism, which renders a homogeneous interpretation of the notion difficult. However, even at the federal level various administrations have adopted their own definition, depending mainly on the role and objectives of said administration. Here, politics play their biggest role.

a/ The United States judiciary's definition

The United States Code (USC) is the codification by subject matter of the general and permanent laws. It is divided by subjects into 50 titles, out of which only 23 have been enacted into statutory (positive) law. The text titles enacted into positive law are "*legal evidence of the law*", whereas titles that have not been enacted into positive law "*are only prima facie evidence of the law*"¹. Title 18 (relative to crimes and criminal procedure), whence the following definition of international is extracted has been enacted into statutory law² :

“(1) the term “international terrorism” means activities that-

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended-

¹ http://www.gpo.gov/help/about_united_states_code.htm

² Title 18, Part I, Chapter 113B, §2331.

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; [...]"

This definition is almost the same as the 1978 Foreign Intelligence Surveillance Act's, which made terrorism a criminal offence. There is some confusion about the nature of terrorism, which is at once a criminal offense and an act of war¹. This shift is attributable to G.W. Bush's administration in response to the events of 9/11 to fit the context of the "*War on Terror*". When international terrorism was a crime, the United States "*applied legal means as the primary tool to fight it*"². Since the shift from "crime" to "act of war" however, "*the United States has moved away from reactive counter-terrorism law enforcement methods towards more proactive techniques to fight international terrorism*"³.

The revised version of the 1978 Foreign Intelligence Surveillance Act is a good example of deductive definition, with "*subsection (1) containing the substantive element, (2) the intent element, and (3) the jurisdictional element*"⁴. Yet, the original substantive element was quite broad, leaving too much room to interpretation. This has been corrected by subsequent additions to Chapter 113B, with §2332 entitled "*Criminal penalties*", providing a list of the offenses constituting terrorism.

The definition of international terrorism provided by Title 18, Chapter 113B USC is the one applied by federal courts. However the Federal Bureau of Investigation (FBI)⁵, which depends on the Department of Justice, uses a different definition of terrorism, that of Title 22 USC utilized by the agencies and departments related to the National Counterterrorism Center (NCTC).

¹ The aforementioned legislation provides :

"(4) the term "act of war" means any act occurring in the course of-

(a) declared war;

(b) armed conflict, whether or not war has been declared, between two or more nations; or

(c) armed conflict between military forces of any origin"

² T. RAIMO, "Winning at the Expense of Law : The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas", *AM.U.INT'L.L.REV.*, 1999 p. 74, *qtd. in*, S. TIEFENBRUN S., "A Semiotic Approach to a Legal Definition of Terrorism", *ILSA J., Int'l & Comp. L.*, 2002, vol.9, p. 357.

³ *Ibid.*

⁴ G. LEVITT, « Is 'Terrorism' Worth Defining? », *ONULR* 1986, vol. 13, p. 104.

⁵ "*The mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners; and to perform these responsibilities in a manner that is responsive to the needs of the public and is faithful to the Constitution of the United States*": <http://www.fbi.gov/about-us/quick-facts>.

b/ The United States administrations' definitions

The United State's administrations and agencies define terrorism differently according to the mission they are assigned. The Department of Defense's fight against terrorism on foreign grounds is based on a much broader definition of terrorism (ii) than that of the agencies pertaining to the National Counterterrorism Center (i) because of the exigencies of its missions.

(i) The National Counterterrorism Center

The National Counterterrorism Center (NCTC) is the United States governmental organization responsible for the country's national and international counterterrorism efforts¹. Created by a Presidential Executive Order in 2004 upon a recommendation of *The 9/11 Commission Report*², the NCTC is a gathering of different agencies and organizations, amongst which are the Central Intelligence Agency (CIA), the FBI, the Department of Defense (DOD) and the Department of State (DOS)³. The mission of the NCTC is to “[l]ead [the] nation's effort to combat terrorism at home and abroad by analyzing the threat, sharing that information with [its] partners, and integrating all instruments of national power to ensure unity of effort”⁴.

Every year, the NCTC issues a Report on Terrorism to provide the Department of State with statistical information on terrorism. Both the CIA and the FBI, amongst the two most active agencies in the fight against terrorism use the NCTC's definition of terrorism, i.e. that of Title 22 § 2656f(d)(2) USC⁵. The definitions Title 22 gives of “*international terrorism*” and “*terrorism*” are as subject to interpretation as they are short:

“(d) Definitions

As used in this section-

(1) the term “international terrorism” means terrorism involving citizens or the territory of more than 1 country;

(2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; [...]”

¹ For more information on the NCTC, see http://www.nctc.gov/about_us/about_nctc.html.

² National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report, Executive Summary*, available at <http://www.c-span.org/pdf/911/finalreportexecsum.pdf>

³ For a complete list of the partner agencies, see http://www.nctc.gov/about_us/key_partners.html.

⁴ http://www.nctc.gov/about_us/about_nctc.html

⁵ It is noteworthy that Title 22 of the USC has not been enacted into positive law and as such, only is *prima facie* evidence of the law.

This overly broad definition of terrorism raises three issues as regards human rights. First, the agencies relating to the aforementioned definition of terrorism are left with the discretionary power to qualify anyone as a terrorist, depending on the agency's needs on a case-by-case scenario, thus violating the principle of legality, which can lead to human rights violations such as, *inter alia*, the prohibition of discrimination based on race.

Second, the omission of the intent element can result in non-terrorist organizations being labeled as terrorist¹. According to the definition given by Title 22, if Greenpeace was to try and force a German tanker to stop off the coasts of France and that *accidentally* said tanker would collide with the Greenpeace ship², breaching the tanker and resulting in an oil spill, Greenpeace would be considered an international terrorist group. The “*violence*” would be “*politically motivated*” (raise public awareness on the harmful effects of oil), “*perpetrated against noncombatant targets*” (the tanker, a commerce ship, sometimes state-owned) by a “*subnational group*”, in this case members of Greenpeace, a non-governmental organization (NGO).

Last but not least, the most important difference between the definition of terrorism of Title 18 USC and that of Title 22 USC is the shift from “*civilian population*” to “*noncombatant targets*”. Considering terrorism as an “*act of war*” rather than a mere crime is one of the most prominent example of the G.W. Bush administration's toughened policy, which will have numerous consequences on human rights, and especially International Humanitarian Law (IHL)³.

(ii) The Department of Defense

The Department of Defense's mission is to “*provide the military [with the] forces needed to deter war and to protect the security*” of the United States⁴. The Secretary of Defense is the principal defense policy advisor of the President, who is the “*Commander in Chief of the Army and Navy of the United States*”⁵. The DOD has adopted its own definition of terrorism. Wikileaks has leaked the Department of Defense Joint Publication 3-07.2 entitled Antiterrorism and dated

¹ One might argue that “*premeditated*” equates with “*intended to*”. To the author of this article, “*Premeditated*” means “*planned in advance*”, while “*intend*” means “*to have a plan, result or purpose in your mind when you do something*”. While “*premeditated*” refers to the means, “*intend*” refers to the end.

² Emphasis added.

³ For more information on the impacts of US counterterrorism on international human rights law, see T. MERTUS, T. SAJJAD, « Human Rights and Human Insecurity: The Contributions of US Counterterrorism », *JHR* 2008, vol. 7, p. 1-24 ; J. FITZPATRICK, “Jurisdiction of Military Commissions and the ambiguous war on terrorism”, *AJIL*, 2002, vol. 96, p. 345-354 ; J. FITZPATRICK, « Speaking Law to power: The war Against Terrorism and Human Rights », *EJIL*, 2003, vol. 14, p. 241-264 ; D.A. MUNDIS, « The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts », *AJIL*, 2002, vol. 96, p. 320-328.

⁴ <http://www.defense.gov/about/>

⁵ Art.2 section 2 para.1 of the Constitution of the United States.

of 14 April 2006, which “provides doctrine on how to organize, plan, train for, and conduct joint antiterrorism operations”¹. In this document that was kept secret and that was “for official use only”, a terrorist is “[a]n individual who commits an act or acts of violence or threatens violence in pursuit of political, religious, or ideological objectives”². This definition is by far the shortest and broadest amongst the definitions used in the United States and studied above. It is however not limitative, since the preface of this joint publication reads: “It is not the intent of this publication to restrict the authority of the JFC [Joint Force Commander], from organizing the force and executing the mission in a manner the JFC deems most appropriate to ensure unity of effort in the accomplishment of the overall objective”³. As such, there is virtually no limit to the DOD’s interpretation of this already broad definition of a terrorist.

The three issues raised by the NCTC’s definition of terrorism as regards human rights are even more vivid with the DOD’s⁴. It demonstrates that the role of politics and lobbies is unquestionable.

2/ Preserving national unity

India’s definitions of terrorism are aimed at preserving national unity. India is a continent in itself, with an extraordinary variety of landscapes, peoples, religions and ethnic groups. This diversity makes not one India, but many “Indias”. As a consequence to this diversity, the country is filled with movements demanding independence or autonomy. Those often are radical movements related to political parties using force and terrorism to tip the scales in their favor in times of elections. The first legal definition of terrorism in India can be found in the 1987 Terrorist and Disruptive Activities (Prevention) Act (TADA)⁵, of which the main and immediate purpose was to tackle the Khalistan Movement. This act, despite the fact that it contained a more detailed definition than the legislations studied above, has served as ground for extensive violations of human rights⁶,

¹ *Joint Publication 3-07.2, Antiterrorism*, United States Department of Defense 2006, p. i.

² *Id.* p. 224

³ *Id.* p. i.

⁴ *Ibid.*

⁵ Part II, Section 3, sub-section 1 of this act provides: “Whoever with the intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act”.

⁶ For a thorough study of POTA’s impact on human rights protection, see P. VERMA, *The Terror of POTA and Other Security Legislations in India*, New Delhi, Human Rights Law Network, 2004, 629 p.

which resulted in its repeal in 1995. TADA was replaced by the Prevention of Terrorism Act (POTA) in 2002. POTA's definition of terrorism is very similar to that of TADA. It contains a few additional provisions along with a reference to the Unlawful Activities (Prevention) Act, 1967. POTA's definition of terrorism is worth delving into because it is representative of India's stance on the issue. Chapter 2, Section 3, sub-section (1) of POTA provides:

“(1) *Whoever,-*

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation. -For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism”.

Para. (a) of the POTA definition is almost identical with TADA's definition of terrorism. The reference to the threat to “*the unity, integrity, security or sovereignty of India*” reflects India's long struggle against separatist groups. As a matter of fact, India's great diversity in terms of ethnic groups, cultures, languages, religions, geography, has led a few times to violent separatist struggles. TADA's mention of “*any supplies or services essential to the life of the community*” has been modified in POTA to “*any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies*”. This modification is more precise, and contains an explicit reference to the military. POTA clearly targets violent acts against military forces, in the same vein as Title

22 USC's shift from "civilian population" to "noncombatant targets" with similar implications as regards international humanitarian law.

The main difference between TADA and POTA however, is the latter's addition of the reference to the 1967 Unlawful Activities (Prevention) Act (UAPA). This very broad act gives extraordinary powers to the Central Government to virtually suppress any kind of dissent. Repelled in 2004 because it led to extensive human rights abuse, POTA was replaced by an amended version of the 1967 UAPA.

3/ Suppressing dissent

The legal definition of terrorism can also be elaborated so as to silence opposition, as it does in China (a) and Syria (b).

a/ China

China, with its 1.3 billion inhabitants is the fastest growing economy in the world. This economic growth has been made possible thanks to the economic liberalization instituted by the Communist party of the past years, to such extent that some don't consider China a Communist country anymore. This economic liberalization has not been followed by a development of freedoms and human rights, as is usually the pattern. Indeed, many examples show that China has not opened up to the development of human rights. Liu Xia Bo's empty chair at the Nobel peace prize ceremony in 2010 is one of the most striking images of China's authoritative regime.

China has resorted to its anti-terrorism legislation to suppress dissent through the imprisonment and killing of political opponents in the Xing Xiang province, in Tibet and many other places. While Art. 120 of the Criminal Law of the People's Republic of China criminalizes terrorism¹, it does not give an actual definition of terrorism. The lack of definition of terrorism thus infers that authorities are given the discretionary power of charging anyone with a terrorist offence. As Amnesty International puts it, there is concern that "*the provisions of Article 120 make it a criminal offence to be a member, leader or organiser of a 'terrorist organization' even if the individual does not commit any other illegal*

¹ This article provides: "*Whoever forms, leads or actively participates in a terrorist organization shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance.*

Whoever, in addition to the crime mentioned in the preceding paragraph, commits other crimes of homicide, explosion or kidnap shall be punished in accordance with the provisions on combined punishment for several crimes".

act. The term ‘terrorist organisation’ is not defined in the law and could be interpreted as referring to peaceful political opposition or religious groups”¹.

Amnesty International’s fear that peaceful political opposition be considered terrorist was legitimate: the people who were arrested because they were peacefully demonstrating during the 2008 Olympics were charged under Art. 120 of the Chinese Criminal Code.

b/ Syria

The Arab Convention for the Suppression of Terrorism served as the basis for the Syrian anti-terrorism legislation. The Arab Convention for the Suppression of Terrorism defines terrorism as “[a]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources”².

This definition of terrorism is too far-reaching for three reasons. First of all, “*violence*” is the only substantive element of the definition, which is just too vague to be the only element of reference³. Secondly, violence can either be actual or hypothetical, in the sense that even threat can serve as ground for convicting a terrorist (“[a]ny act or threat [...]”). Finally, this definition clearly states that motive is irrelevant (“*whatever its motives or purposes*”), which can result in any crime being considered a terrorist attack.

State parties to the Arab Convention for the Suppression of Terrorism (ACST) have been advocating on the international stage for a definition of terrorism that would differentiate terrorism and fights for liberation. This has resulted in a radical opposition between mostly, the western states on the one side and the “Arabian states” on the other side, thus blocking the adoption of a comprehensive convention on terrorism. Art.2 para.(a) of the ACST advocates for the acknowledgement of fights for national liberation. It provides: “*All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State*”.

¹ Amnesty International, « People’s Republic of China: China’s anti-terrorism legislation and repression in the Xinjiang Uighur », available at <http://www.amnesty.org/en/library/asset/ASA17/010/2002/en/feb1b2bb-d873-11dd-9df8-936c90684588/asa170102002en.html>.

² Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice. Cairo, April 1998. Emphasis added.

³ The act referred to in the international conventions mentioned in Art.1 para.3 are also regarded as terrorist offences, provided those conventions have been ratified by the States parties to the Arab Convention for the Suppression of Terrorism.

The last sentence of this provision however, makes fights for national liberation unlawful if they happen on a state party to the ACST. This sets a double standard, allowing for violence as long as it is directed towards a non-Arabian State. Bin Laden's "Declaration of War Against the Americans Occupying the Land of the Two Holy Places"¹ is lawful, whereas the Syrian population's struggle to free itself from the authoritarian regime of Bachar El Assad is not.

4/ Protecting human rights

The European Union's definition of terrorism is particularly interesting because it is the farthest-reaching regional effort towards the protection of human rights while combating terrorism. The Council of the European Union has adopted the Council Framework Decision on combating terrorism² (CFDCT) to replace the twenty-four year old European Convention on the Suppression of Terrorism³. Framework decisions adopted by the Council of the European Union are binding upon Member States and aim at harmonizing their laws and regulations⁴. The CFDCT "*provid[es] a uniform legal framework for prosecuting terrorist acts,[...] institutes a common definition of terrorist offences, as well as rules of competence and of legal cooperation between Member States for the prosecution of persons having committed terrorist acts*"⁵.

Art.1 para.1 of the CFDCT is entitled "*Terrorist offences and fundamental rights and principles*"⁶. This article being the first in the Framework Decision

¹ O. BIN LADEN, « Declaration of War Against the Americans Occupying the Land of the Two Holy Places », available at http://www.terrorismfiles.org/individuals/declaration_of_jihad1.html , visited on Feb. 25, 2011.

² (2002/475/JHA) signed at Luxembourg on 13 June 2002.

³ European Convention on the Suppression of Terrorism, signed at Strasbourg on 27 January 1977, available at <http://conventions.coe.int/>

⁴ Art. 34 (2)(b) TEU provides:

"The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: [...]

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect [...]"

⁵ E. DUMITRIU, « The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism», *GLJ*, 2004, vol. 5, n° 5, p. 590.

⁶ Art. 1 para.1 provides:

"Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- *seriously intimidating a population, or*
- *unduly compelling a Government or international organisation to perform or abstain from performing any act, or*
- *seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,*

represents the acknowledgement of the importance of linking terrorism and human rights. Art. 1 para.1 lists the acts that shall be deemed to be terrorist offences (substantial element).

For an act to be qualified as a terrorist offence under the Framework Decision, three conditions must be met: (1), the act at stake has to be incriminated under national law; (2), the attack has to be directed against a population, a country or an international organization (jurisdictional element); (3), the offense must have been committed with the intent of violating either (1) or (2) or both (intent element)¹.

Art. 1 para. 2 is quite uncommon in the sense that it is one of the rare instances when a definition of terrorism contains the equivalent of a non-derogability clause as regards the protection of human rights. It reads: “*this Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*”. Art.6 section 1 of the Treaty on European Union provides that the European Union Fundamental Rights Charter of 7 December 2000 has the same value as treaties. As such, the Fundamental Rights Charter is a higher norm than the CFDCT. As of Art.6 section 3, it stipulates that the fundamental rights, as guaranteed by the European Convention on Human Rights are part of the Union’s general principles.

This sample of definitions of terrorism is representative of the vast array of what exists at national and regional level. Notwithstanding the fact that States define terrorism so as to defend their own interests, it is interesting to see how they try to define it in a way that it encompasses as many offenses as possible, either by having a very short and imprecise definition (like China’s) or by enabling any kind

shall be deemed to be terrorist offences:

(a) attacks upon a person’s life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h)”.

¹ E. DUMITRIU, « The E.U.’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism», *GLJ*, 2004, vol. 5, n° 5, p. 592.

of offence to fall within the range of terrorism (the Arab Convention for the Suppression of Terrorism), giving way to human rights abuse.

B.- International regulations of terrorism stalled because of diverging national interests

International instances have been dealing with the issue of terrorism for decades. As early as 1937, the League of Nations adopted the Convention for the Prevention and Punishment of Terrorism¹ as a response to the assassination of King Alexander of Yugoslavia and of the French foreign minister Louis Barthou by a Croatian assassin in France on October 9, 1934². However, this convention never entered into force because States did not agree on a definition of terrorism. The international community's first attempt at defining terrorism thus failed because of diverging national interests. As a consequence, the definition of terrorism remained a prerogative of the States in order to avoid the politicization of the debate on the international stage. This negative consensus resulted in the adoption of several sectoral treaties determining what acts constituted terrorism.

In the meantime, the United Nations continued to work on the issue of terrorism³. The General Assembly's Sixth (legal) Committee has long been working on a Comprehensive Convention on Terrorism that would finally define terrorism (1). As for the Security Council, its position on the issue has evolved positively, shifting from a hard-line policy to a more human-rights friendly approach (2).

1/ The General Assembly's Sixth Committee's unwavering will

In the 1990s, the United Nations (UN) adopted a number of documents intended at setting international standards while dealing with international terrorism. In the 1994 Declaration on Measures to Eliminate International Terrorism annexed to Resolution 49/60⁴, the United Nations "*encouraged Member States to urgently review the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter*"⁵.

¹ LN Doc. C.546(I).M.383(I)/1937.V

² *Encyclopedia Of World History: Crisis and Achievement 1900 to 1950*, vol.V, Golson Books, 2008, p. xxv.

³ For a detailed history of the United Nations' work on terrorism until 1999, see UNCHR (Sub-Commission), « Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights », UN Doc E/CN.4/Sub.2/1999/ no27 (1999), para. 6 to 15. For the history of international effort to deal with terrorism between 1999 and 2001, see UNCHR (Sub-Commission), « Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights », UN Doc E/CN.4/Sub.2/2001/31 (2001).

⁴ UN DOC A/RES/49/60 adopted at the 84th plenary meeting of the UNGA on 9 December 1994.

⁵ Draft Convention on International Terrorism, *available at* <http://cns.miis.edu/inventory/pdfs/intlterr.pdf>.

This declaration was followed by General Assembly resolution 51/210 of 17 December 1996¹, which created an Ad Hoc Committee to supervise the negotiations towards the adoption of a Comprehensive² Convention on International Terrorism. India has played a leading role in the elaboration of the Draft Comprehensive Convention on International Terrorism by providing texts that served as a basis for discussion³. These negotiations take place under the auspices of the Sixth (legal) Committee.

a/ Sources of legal argument regarding the Comprehensive Convention on terrorism

At the close of its eighth session in 2004, the Ad Hoc Committee on terrorism “*observed that negotiations on the draft comprehensive convention were almost complete [and urged] delegates to show flexibility and compromise to expedite the resolution of outstanding issues*”⁴.

(i) Demands for a clear legal definition

The “*outstanding issues*” that need to be solved are double and are worth mentioning. First, there is the question of the need to have a clear legal definition of terrorism. This issue has been contentious ever since the creation of the *Ad Hoc* Committee, as some delegations advocated that the existing sectoral conventions were sufficient to combat terrorism. Furthermore, those delegations have raised the question of the relationship between the draft Comprehensive Convention and the sectoral conventions, which might result in a legal overlap. While some States considered that the “*‘last in time’ rule should be applied and, therefore, the Comprehensive Convention would supersede previous conventions to the extent that it would overlap in substance with those conventions*”, others argued that “*the existing sectoral conventions would be viewed as *lex specialis* and would therefore remain applicable in cases where the acts in question fell within their respective purviews*”⁵. The Committee answered that the second option should prevail, stressing the interrelation of the Comprehensive Convention and the existing (and future) sectoral treaties.

¹ UN DOC A/RES/51/210 adopted at the 88th plenary meeting of the UNGA on 17 December 1996.

² “*Comprehensive*” means “*including all, or almost all, the items, details, facts, information, etc., that may be concerned*”. *Oxford Advanced Learner’s Dictionary*, Oxford University Press, 7th ed., 2005, p. 311.

³ For more information, see P. GOODENOUGH, “India Challenges Non-Aligned Countries to Condemn Terrorism ‘Unequivocally’”, *available at* <http://cnsnews.com/news/article/india-challenges-non-aligned-countries-condemn-terrorism-unequivocally>

⁴ Commentary on the Draft Comprehensive Convention on International Terrorism, *available at* <http://cns.miis.edu/inventory/pdfs/intlterr.pdf>.

⁵ *Ibid.*

(ii) The activities of State armed forces in armed conflicts and in exercise of their official duties

The question whether the activities of States' armed forces should be exempted from the scope of the convention or not was another source of discord. The activities of State armed forces at stake are not only those during an armed conflict, but also the activities in exercise of their official duties. IHL governs the activities of States' armed forces in armed conflict. As such, those activities should be excluded from the scope of the Comprehensive Convention on Terrorism¹. Making this distinction is a great achievement for IHL in the sense that it maintains the *lex specialis* character of this set of rules.

Human Rights law however is not really promoted by the Comprehensive Convention on Terrorism. Indeed, as of 3 November 2010 the Working Group in charge of drafting the Comprehensive Convention on International Terrorism has adopted the view that the activities of State armed forces in exercise of their official duties should not fall under the scope of the Comprehensive Convention "*inasmuch as they are governed by other rules of international law*"². State terrorism was thus removed from the scope of the convention, while some delegations believed that "*the definition of terrorism must necessarily cover acts of State-sponsored terrorism as well as acts of State terrorism*"³. Other delegations however considered that while State-sponsored terrorism could fall under the scope of the Convention, State terrorism on the other hand "*fell under different legal norms, namely the UN Charter*"⁴.

It should be pointed out that there are only two cautious mentions of international human rights law in the Comprehensive Convention⁵, when this convention would have been the perfect place to reassert the prevalence of human rights.

(iii) The relationship between terrorism and anti-colonial and national liberation movements

The debate surrounding the distinction between "*freedom fighters*" and "*terrorists*" revolves around the phrase "*one man's terrorist is another man's freedom fighter*". This phrase typifies the subjective character of the definition of terrorism. The attempts to entangle fights for national liberation and terrorism

¹ UNGA, "Measures to eliminate international terrorism" (2010) UN Doc A/C.6/65/L.10 p. 17

Draft art. 3 para.2 provides:

"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".

² Draft art.3 para.3, UNGA, "Measures to eliminate international terrorism" (2010) UN Doc A/C.6/65/L.10 p. 17.

³ *Ibid.*

⁴ *Ibid.*

⁵ Art. 9 and 14, UNGA, "Measures to eliminate international terrorism" (2010) UN Doc A/C.6/65/L.

originate mostly from the Arab world with the Arab Convention for the Suppression of Terrorism (*see supra*). This standpoint however is older than that and can be traced back to 1987 during the fifth Islamic summit meeting in Kuwait, which stated: “*The conference reiterates its absolute faith in the need to distinguish the brutal and unlawful terrorist activities perpetrated by individuals, by groups, or by states, from the legitimate struggle of the oppressed and subjugated nations against foreign occupation of any kind. This struggle is sanctioned by heavenly law, by human values, and by international conventions*”¹. One cannot read this statement without linking it to the Palestinian struggle against the Israeli occupation. The Center for Nonproliferation Studies has identified this issue (namely the relationship between terrorism and anti-colonial and national liberation movements) as one of the factors that dissuaded States from adopting a comprehensive approach on terrorism².

Boaz Ganor extensively dealt with this issue in an article entitled “Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?” in which he argues that “*an objective definition of terrorism is not only possible; it is also indispensable to any serious attempt to combat terrorism*”³. The solution to prevent this confusion according to the author of this article would be to operate a clear distinction between guerilla fighters and terrorists by paralleling IHL’s distinction between military and civilian targets in war. As a matter of fact, Ganor considers that the goal of terrorists and guerilla fighters is the same (i.e. attain public⁴ goals); whereas the means to achieve that goal is different: “*The guerilla fighter’s targets are military ones, while the terrorist deliberately targets civilians*”⁵. As such, the legitimacy of the fight for national liberation does not matter and any organization that targets civilians would be labeled terrorist. Guerilla fighters on the other hand (let’s take for example the Syrian rebels, or the Libyan National Transitional Committee) would be considered as legitimate combatants protected by the Geneva Conventions provided they respect the laws and rules of war. Bringing terrorists to abide by the rules of war and respect the sacrosanct principle of distinction “*would be a great achievement for Counter-Terrorism*”⁶. Ganor’s standpoint is very interesting, in the sense that it could answer some delegations’ need that the comprehensive convention need to “*distinguish[terrorism] from the legitimate struggle of peoples in the exercise of*

¹ AL-ANBA’A, *The Fifth Islamic Summit Convention Decisions*, Kuwait, *qtd. in* B. GANOR, « Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter? », *PPR*, 2002, vol. 3, n° 4. Emphasis added.

² The other two being (1) the legal definition of terrorism and (2) the activities of State armed forces in armed conflicts and in exercise of their official duties.

³ B. GANOR, « Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter? », *PPR*, 2002, vol. 3, n° 4, p. 288.

⁴ “Public” meaning political, ideological or religious.

⁵ B. GANOR, « Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter? », *PPR*, 2002, vol. 3, n° 4, p. 288.

⁶ *Id.* p. 289

their right to self- determination from foreign occupation or colonial domination”¹.

In 2004 the Ad Hoc Committee in charge of drafting the Comprehensive Convention considered that the negotiations were almost complete, but as of July 2011 this Convention has not been opened to ratification. The three major issues slowing down this process (1- the need for a legal definition of terrorism; 2- the status of the activities of State armed forces in armed conflict and in law enforcement situation; and 3- the relationship between terrorism and anti-colonial and national liberation movements) are highly political. The aim of the Comprehensive Convention is thus to reach a common ground in order to withdraw the political character of terrorism and set a common standard for fighting terrorism.

The adoption of the Comprehensive Convention on Terrorism has been stalled for the aforementioned reasons. It is now interesting to study the definition of terrorism that has reached consensus as of this day.

b/ The Comprehensive Convention on Terrorism, an imperfect instrument

This definition of terrorism contained in Art. 2 of the draft Comprehensive Convention is similar to some of those studied in the preceding pages. It provides:

“1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or

(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

¹ UN Doc A/63/100.

4. *Any person also commits an offence if that person:*

(a) *Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or*

(b) *Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or*

(c) *Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*

(i) *Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of the present article; or*

(ii) *Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of the present article”.*

This definition is another example of a deductive definition. The intent element is alluded to through the words “*intentionally*”, “*intentional*” and “*intention*”. This clear statement that the terrorist activity has to be intended is a safeguard to prevent the incrimination of people responsible for accidental actions similar to terrorism, unlike the definition of terrorism of title 22 USC¹. The public motive and jurisdictional elements are also present, since the terrorist act has to be conducted with the purpose to “*intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act*”². The substantive element is rather broad but this comprehensive convention on terrorism has to be read along with the thirteen international sectoral treaties on terrorism, as it is provided in draft Art.4[2bis]³. This comprehensive definition of terrorism is indeed more complete than most national definitions studied before. It is more restrictive and gives less latitude to interpretation thus making it a better protection for human rights.

Nevertheless even though the protection of human rights is in the spirit of this comprehensive convention, it is not made a priority the way the European Convention for the Suppression of Terrorism does. Apart from Articles 9 and 14 mentioning the protection of international human rights, the only other reference to this set of rules is made in the preamble of the Comprehensive Convention with “*Bearing in mind the necessity of respecting human rights and international*

¹ See supra Part II-A-1.

² Draft Convention on International Terrorism, art.2 para.1 (c) available at <http://cns.miis.edu/inventory/pdfs/intlterr.pdf>.

³ Art. 4 [2bis], UNGA, “Measures to eliminate international terrorism” (2010) UN Doc A/C.6/65/L., p. 7: “*Where the present Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both the present Convention and the said treaty, the provisions of the latter shall prevail*”.

humanitarian law in the fight against terrorism"¹. Preambles are, shall it be reminded, not legally binding according to the Vienna Convention on the Law of Treaties 1969. Furthermore, the words "*Bearing in mind*" are very unassertive compared to more emphatic phrases such as "*Convinced*" or "*Reaffirming*". This unassertiveness is to be attributed to the need to reach consensus on the text. Once again, in order to reach consensus, the international community is inching towards a third-rate convention as regards human rights protection. Nevertheless, even if the Comprehensive Convention did not ensure human rights enforcement mechanisms, it did elaborate a human-rights friendly definition that is still in the making. The same cannot be said of the Security Council.

2/ The positive evolution of the Security Council's position

In the aftermath of the 9/11 attacks, protection of human rights was obliterated by the generalized fear for security (a). It would take the Security Council a few years to change its position and start taking human rights into account while fighting terrorism, all the while being more respectful with the full extent of its duties (b).

a/ When human rights sank into oblivion

The United Nations Security Council (SC) had been adopting resolutions on terrorism for a long time, but none of those resolutions defined terrorism. The absence of a definition of terrorism was not much of an issue prior to the attacks of 11 September 2001 since there was no international right or duty linked to the term "*terrorism*". SC Res 1373 however "*trigger[ed] obligations to criminalize financing of terrorism; suppress terrorist groups; deny refugee status to terrorists; prevent the movement of terrorists; bring terrorists to justice; and [...] establish terrorist acts as serious domestic crimes*"² (sic).

SC Res 1373 also called for the creation of a committee to monitor the implementation of the aforementioned duties, the UN Counter Terrorism Committee (CTC). The CTC consists in a body of experts who study and give recommendations on reports sent by States outlining their fight against terrorism³. Along with the constant review of the implementation of SC Res 1373, the Committee has been promoting closer cooperation and coordination between all the instances dealing with terrorism, be they international, regional or sub-regional.

¹ *Id.* p. 5.

² B. SAUL, *Defining Terrorism in International Law*, Oxford Monographs in International Law, 2006, p. 48.

³ The Counter Terrorism Center regularly issues reports that are available at <http://www.un.org/en/terrorism/ctitf/reportsandpubs.shtml>.

The CTC decided not to define terrorism while supervising implementation of the SC measures, in order not “*to interfere in the competence of other UN bodies by defining it or by adjudicating on specific acts*”¹. In other words, the CTC decided not to define terrorism so as to have *carte blanche* to label whatever act it subjectively considered illegal as terrorist. In addition, para.2 (e) of SC Res 1373 “*Decides [...] that all States shall take appropriate measures to establish terrorist acts as serious criminal offenses in domestic laws and regulations*”² without enjoining those States to set a legislative or human rights framework. In this Resolution, the only allusion to human rights is made in para. 3 (f) when the Security Council “[c]alls upon all States to [...] take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned facilitated or participated in the commission of terrorist acts”.

There is a strong discrepancy in terms of assertiveness between the Security Council’s mere “*Call[ing] upon States*” to take measures in conformity with international human rights before granting refugee status on the one side and its “*Deci[sion] that all States shall*” criminalize terrorism on the other side. This illustrates that the protection of human rights was clearly the least of the SC’s preoccupations at the aftermath of the attacks of September 11, 2001. The preamble of SC Res 1373 “*Reaffirm[s] the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts*” after (in order of appearance) “*Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)*”. The implications deriving from this are manifold.

Notwithstanding the fact that the recognition of the right to individual or collective self-defense as a response to the 9/11 attacks is debatable³, this placed the fight against terrorism in the armed conflict paradigm regulated by international humanitarian law (IHL)⁴. This resolution reasserts the need to comply with the obligations derived from the United Nations Charter after

¹ B. SAUL, *Defining Terrorism in International Law*, Oxford Monographs in International Law, 2006, p 49.

² UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

³ For an idea of the issues at stake, see F. MÉGRET, « 'War'? Legal Semantics and the Move to Violence », *EJIL*, 2002, vol.13, n° 2, p. 361-399 ; G. SITARAMAN, «Counterinsurgency, the War on Terror, and the Laws of War », *VLR*, 2009, vol. 95, n° 7, p. 1745-1839 ; ICRC, « How is the Term 'Armed Conflict' defined in International Humanitarian Law? », 2008, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> ; A. CONTE, B. GANOR, « Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism », *IPICT*, 2005, 44 p., available at http://www.ict.org.il/Portals/0/Articles/20471-Ganor_Conte_Human_Rights.pdf

⁴ Numerous violations of IHL in the conduct of the War on Terror have been accounted for. See ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, 30/IC/07/8.4, 68 p.

reaffirming that terrorism had to be fought by all means. Compliance with the UN Charter is thus not of paramount importance anymore.

This literal study shows that at the time of the adoption of SC Res 1373 the main objective was to fight terrorism “*by all means*”, even by means of fighting it in an armed conflict paradigm. Then comes the recommendation to respect the UN Charter, which has already been partially derogated from by the Security Council’s recognition of the right to individual and collective self-defense against the attacks of 9/11. Finally, deriving from the already diminished UN Charter comes the protection of human rights and fundamental freedoms, as prescribed by Art.1 para.3 of the Charter outlining the purposes and principles of the United Nations¹. After 9/11 the main concern of the Security Council was to protect the security of States at the expense of the protection of human rights, which was then considered a luxury no one could afford.

b/ The Security Council’s awakening

SC Res 1456 represents a turning point in the Security Council’s fight against terrorism. Adopted on January 20, 2003, it marks the moment when the SC realized that the fight against terrorism could only be conducted in accordance with the UN Charter of course, but also with the whole of international law. Para.6 of SC Res 1456 provides: “*States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law [...]*”².

This resolution sparked off the transformation of the Counter Terrorism Committee and resulted in the establishment of the Counter Terrorism Executive Directorate (CTED) with SC Res 1535³. The CTED was mandated to liaise with the Office of the United Nations High Commissioner for Human Rights (OHCHR)⁴ so as to assist the Committee in its efforts to move towards a more proactive policy on human rights. As the “*leading UN entity on human rights [and thanks to its] unique mandate provided by the international community to promote and protect all human rights for all people*”⁵, the OHCHR’s partnership with the

¹ Art. 1 para. 3 of the Charter of the United Nations provides that one of the purposes of the United Nations is: “[...] *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [...]*”.

² UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456.

³ UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535.

⁴ Presided by Navanethem Pillay, the OHCHR was established by the UNGA on 20 December 1993 and is under the authority of the UN Secretariat.

⁵ OHCHR, *Report 2010*, p. 5, available at

http://www2.ohchr.org/english/ohchrreport2010/web_version/media/pdf/0_Whole_Report.pdf

CTC was a welcome addition for the cause of human rights while countering terrorism.

Before the creation of the OHCHR the principal mechanism and international forum concerned with the promotion and protection of human rights at the United Nations level was the United Nations Commission on Human Rights (UNCHR), established on 10 December 1946 at the first meeting of the United Nations' Social and Economic Council¹. As early as 1996 (five years before 9/11 when terrorism became the United Nations' center of attention) the UNCHR's Sub-Commission on Prevention of Discrimination and Protection of Minorities became concerned by the impact of terrorism on human rights. In its resolution 1996/20 the Commission "*entrusted Ms. Kalliopi K. Koufa with the task of preparing a working paper on the question of terrorism and human rights*"². In her preliminary report entitled "Terrorism and human rights" Ms. Kalliopi wrote that "*finding an all-encompassing and generally acceptable definition of 'terrorism' is too ambitious an aim*"³, all the while recognizing that any act of terrorism was unacceptable because it aimed "*at the destruction of human rights, fundamental freedoms and democracy*"⁴.

In continuation of Kalliopi's work, the OHCHR decided in resolution 2005/80 to appoint for three years a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to foster dialogue between the UN Secretariat, the Commission on Human Rights (replaced in 2006 by United Nations Human Rights Council which is under the authority of the General Assembly) and the Security Council and its Counter-Terrorism Committee⁵. This special rapporteur, whose mandate was extended

¹ The United Nations' Economic and Social Council (ECOSOC) "*is responsible for promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms*". <http://www.un.org/en/ecosoc/about/>

² UNCHR (Sub-Commission), "Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights", UN Doc E/CN.4/Sub.2/2001/31 (2001), para.1

³ UNCHR (Sub-Commission), "Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights", UN Doc E/CN.4/Sub.2/1999/27 (1999), para.43

⁴ UNCHR (Sub-Commission), "Report by Special Rapporteur Kalliopi K. KOUFA on Terrorism and Human Rights", UN Doc E/CN.4/Sub.2/2001/31 (2001), para.1

⁵ OHCHR, "Protection of human rights and fundamental freedoms while countering terrorism", UN Doc E/CN.4/RES/2005/80. Sections (a) to (e) of art.14 outline the mandate of the special rapporteur. They provide that the special rapporteur's role is:

"(a) To make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including, at the request of States, for the provision of advisory services or technical assistance on such matters;

(b) To gather, request, receive and exchange information and communications from and with all relevant sources, including Governments, the individuals concerned, their families, their representatives and their organizations, including through country visits, with the consent of the State concerned, on alleged violations of human rights and fundamental freedoms while countering terrorism, with special attention to areas not covered by existing mandate holders;

beyond the original three-years period, therefore is the centerpiece of the United Nations' effort to link human rights and terrorism.

The study of the national legal definitions showed that States define terrorism so as to fit their political agenda, without paying much attention to human rights protection for some, in clear contradiction with said rights for the others. The Security Council was partly responsible for that because it encouraged States to toughen their anti-terrorism legislations and it gave them a free pass to do so by not setting a framework respectful of international human rights and international humanitarian law through its decision not to define terrorism.

Despite terrorism having slowly parted from the center of attention since the economic crisis and the death of Osama Bin Laden, it is still a matter that cannot be dealt with half-heartedly. If terrorism is such a concern, it is because it jeopardizes the ideal that “*free human beings [enjoy] civil and political freedom and freedom from fear [...]*”¹. The legal uncertainty surrounding the notion of terrorism is such that one cannot be sure that one's freedom from the fear of having one's rights hindered via counterterrorism will be guaranteed. What is particularly true for States like China and Syria also applies to international counterterrorism efforts. The international community has to agree on a binding Comprehensive Convention on Terrorism that stresses the importance of upholding human rights while countering terrorism. It is essential because human-rights abusive counterterrorism operations could be considered as State, State-sponsored or United Nations sponsored terrorism.

(c) *To identify, exchange and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms;*

(d) *To work in close coordination with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and other relevant United Nations bodies;*

(e) *To develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, in particular with the Counter-Terrorism Committee of the Security Council, the Office of the United Nations High Commissioner for Human Rights, the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime, human rights mandate”.*

¹ Preamble, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), emphasis added.