LEGAL ASPECTS OF TRANSNATIONAL TERRORISM

CLAUDE EMANUELLI *

* Professor, University of Ottawa.

Summary: I. Defining terrorism. II. Does the fight against terrorism amount to a war?. III. Can terrorism justify the use of force by one State against another State? IV. Conclusions.

By way of introduction, some general observations about terrorism are useful.

- Terrorism is not a new phenomenon. The term "terrorism" originates from the Reign of Terror practiced by the Jacobins between 1793 and 1794, during the French Revolution[1]. This being said, since the 1960s, political terrorism is on the rise, and the term "terrorism" has become part of our common vocabulary.

- Terrorism is a multidimensional phenomenon. Indeed, there are different forms of terrorism. At this point, a basic distinction should be made between State terrorism, on one hand, and individual or group terrorism, on the other hand. State terrorism was practiced by the Jacobins during the French Revolution, but also by the Nazi and Stalinist regimes[2]. Today, it is still practiced by some States against their own population.

For its part, the assassination of the French King Henry IV by the monk Ravaillac in 1610 is often described as an act of individual terrorism motivated by religious and political reasons.

In turn, group terrorism can be traced back to the Middle Ages, and to a group of Moslem fanatics called the "Assassins". They used to spread terror in the form of murder and mayhem among prominent Christians and religious enemies in the Middle East[3]. Today, we find similar groups, like al Qaeda, which take advantage of technological progress to strike anywhere in the world.

The fact that terrorism is a multi-dimensional phenomenon is also illustrated by the fact that terrorism may be used for different purposes. Thus, State terrorism is generally used as an instrument of political repression and social control.

During an armed conflict, terrorism may be used as a method of warfare. So, during WWII, some cities were bombed to spread terror among civilian populations and force the enemy into submission. Again, in asymmetrical armed conflicts, such as wars of independence, in which both sides are not on an equal footing, terrorism is often used by the weaker party. Intertwined with guerilla warfare, it is intended to harass and destabilize the enemy.

In a different context, terrorism may be used as an instrument of political change. It is then used to protest against some political situation and force

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[1] See R.A. Friedlander, Terrorism, Documents of International and Local Control, vol. 1, Dobbs Ferry, New York, 1979, at p.6

[2] *Id*., at p. 6-7.

[3] *Id*., at p. 7-8.

changes by violent means[4]. Here, acts of violence may be committed to put an end to an oppressive regime, as when terrorism is used by self-determination movements against a colonial power. However, acts of terrorism may also be practiced to establish a dictatorial regime, as when the Nazis took over Germany in the 1930s.

Finally, terrorism may be used by criminal organizations, like the mafia or by warlords in failed States, to rule over some segment of the population. In this case, terrorism is mainly practiced for private ends.

Moreover, terrorism may be purely domestic, as when the IRA committed acts of terrorism in the United Kingdom. On the other hand, it may have a transnational dimension, as when al Qaeda struck the United States on 9/11.

Furthermore, acts of terrorism may take place in peacetime (here we can think of the events of 9/11) or, as mentioned before, take place during an armed conflict. Besides, when acts of terrorism take place in peacetime, they may give rise to an armed conflict: the events of 9/11 come back to mind as well as the assassination of Archduke Franz Ferdinand in 1914, which triggered the outbreak of WWI.

In the end, the previous developments show that terrorism is a complex phenomenon which can take different forms and be practiced for different purposes. We should keep this in mind when we deal with our topic.

This topic is divided in three parts:

- Part I has to do with defining terrorism;
- Part II deals with the way to approach the fight against transnational terrorism;
- Part III deals with the question to know whether the fight against terrorism can justify the use of force by one State against another State.

I. Defining terrorism

The first question we must consider when dealing with terrorism has to do with defining that phenomenon. In turn, this question raises three sub-questions:

- Is it useful to define terrorism as a separate legal concept?
- If we agree that defining terrorism as a separate legal concept is needed, what should be the constitutive elements of a general definition of terrorism?
- What are the obstacles to a comprehensive definition of terrorism?

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[4] *Id*., at p.1-2.

A) Is it useful to define terrorism as a separate legal concept? Does it serve a purpose?[5] There are two schools of thought on this question. According to one school, defining terrorism as a separate legal concept does not serve a purpose since terrorist activities are already adequately dealt with under existing criminal laws relating to murder, skyjacking, the taking of hostages, etc. So, we don't need to define terrorism as a separate legal concept. Besides, some scholars point to the fact that defining terrorism is an impossible task. Therefore, we should set it aside.

However, according to another school, we need to define terrorism as a separate legal concept for the following reasons:

- Criminalizing terrorism as such requires that it be defined. For one thing, it seems difficult to condemn terrorism and attach legal sanctions to this phenomenon if it is not defined. For another thing, the principle *nullum crimen sine lege* requires that criminal activities be precisely defined before anyone can be prosecuted or punished for such activities. Besides, defining terrorism is important for extradition purposes since most extradition treaties provide that to be extraditable; an offence must be a crime in both the requesting and the requested States[6].

- Without a definition of terrorism as a separate legal concept, there are no differences between terrorist activities and ordinary criminal activities. Therefore, the same rules may apply when a plane is hijacked by a political dissident who tries to flee an oppressive regime, and when the hijacker intends to crash the plane onto the White House in Washington. Indeed, if there are no differences between terrorist activities, on one hand, and ordinary criminal activities, on the other hand, then a skyjacking is a skyjacking. Yet, while they overlap to a certain extent, terrorist activities are different from ordinary criminal activities. Terrorist activities are intended to exert influence on government policy, or to intimidate individuals. They are considered to be more serious offences than ordinary criminal activities. As such, they attract harsher responses. In turn, those harsher responses may create a threat to individual freedoms. Therefore, we have to be careful not to assimilate terrorist activities with ordinary criminal activities. Instead, we should define terrorism as a separate legal concept in order to limit the scope of sanctions applicable to terrorist activities and therefore limit the capacity of States to infringe on fundamental freedoms. To be sure, in many countries, the fight against terrorism has led to the adoption of measures[7]

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[5] B. Golder/G. Williams, ''What is 'terrorism'? Problems of Legal Definition'', (2004) 27 (2) *UNSW Law Journal* 270.

[6] See C.F. Diaz-Paniagua, *Negotiating terrorism: the negotiation dynamics of four UN counter-terrorism treaties*, 1997-2005, City University of New York (2008), pp. 46-7.

[7] See for instance, the *USA Patriot Act* (Pub. L. 107-56, 2001), the Canadian *Anti-Terrorism Act* (S.C. 2001, c. 41), the British *Terrorism Act 2006* (2006 c. 11), the *Counter-Terrorism Act* 2008 (2008 c. 28), the French anti-terrorism legislation of 2005 (Loino. 2006-64, 23/1/2006), the existence of which was extended in 2008.

criticized by human rights organizations: they involve increased expansive security and surveillance powers; 'secret' trials; they allow phone tapping, extended periods of interrogation, extended periods of confinement without charge, secret evidence in terrorism prosecution, increase in prison sentences, etc.

- Because terrorism is a complex, multidimensional phenomenon, responses to terrorism often go beyond those intended to deal with criminal activities. They may involve military operations, trade and financial sanctions against States supporting terrorist activities, diplomatic measures, etc. So, treating terrorism as a separate legal phenomenon should allow the international community to better coordinate those responses under one heading and fight terrorism more efficiently;

- A universally accepted definition of terrorism would have strong moral and political weight. It would tell terrorist organizations that the entire international community finally agrees on what it condemns as terrorism. Instead, today, the international community condemns terrorism, but does not agree on a definition of terrorism.

b) This being said, if we agree that defining terrorism as a separate legal concept is needed, what should be the constitutive elements of a general definition of terrorism?

Based on the *modus operandi* of terrorist organizations, the following elements seem to be relevant to give a general definition of terrorism:

- Terrorism is a form of violence which is intended to cause harm to people, to property, to a system, or to all three;

- Terrorism is politically, religiously or ideologically motivated;

- Terrorism is intended to coerce a group of people, a government or an international organization to adopt a certain conduct through intimidation, or to intimidate some population.

These various elements are already included in some domestic definitions of terrorism, such as those found in the Canadian Criminal Code[8] and the British *Terrorism Act 2000*[9]. However, many other domestic definitions of terrorism do not refer to motivation.[10] Such is also the case for definitions found in international instruments: for instance, in the *International Convention for the Suppression of the Financing of Terrorism*[11] and in the *Draft Comprehensive*

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[8] LRC 1985, c. C-46, s. 83.01.

[9] 2000, c. 11, s. 1.

[10] See, for instance, Title 18 of the United States Code, s. 2331(1); French Penal Code, Part I, Book 4, Title II, Chapter I, Art. 421-1.

[11] (1997) 2178 *ILM* 229.

Convention on International Terrorism[12]. Some definitions even expressly refuse to consider motivation as a relevant constitutive element of a general definition of terrorism. Thus, UNSC Resolution 1566 (2004) emphasizes that terrorist acts ''are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.'' So, depending on the definition, motivation is not necessarily an element to take into consideration to give a general definition of terrorism. Yet, it seems quite relevant to distinguish terrorist activities from other criminal activities.

Apart from those relating to motivation, other differences exist among the more than 100 definitions of terrorism adopted at both the international and the domestic levels. Those differences are indicative of the fact that adopting a universally accepted general definition of terrorism is a very difficult task. In fact, it has proved to be impossible so far. Since 2000, the United Nations General Assembly has been working on a proposed Comprehensive Convention on International Terrorism. However, to this day, its efforts have been unsuccessful because States cannot agree on a general definition of terrorism.

c) What are the obstacles to a universally accepted general definition of terrorism?

Those obstacles have to do with the fact that the concept of terrorism is politically and emotionally charged. This idea is reflected in two ways: the first one involves the distinction between State terrorism, on one hand, and individual or group terrorism, on the other hand.

Some States believe that a definition of terrorism should focus on acts of political violence committed by individuals or groups against a State. Under this approach, a definition of group terrorism may emphasize the following elements:

- the victim is chosen at random: on a bus in Tel Aviv, on the subway in Paris, on a train in Madrid, etc.;
- the real target is somebody else: a government, an international organization;
- the goal is not so much to kill the victim as it is to force the target to change its policy: thus, the attack on the train station in Madrid in 2006 was meant to force Spain to withdraw its troops from Iraq. In this particular case, the goal was reached: following the attack, Spain did withdraw its troops from Iraq;
- the method used is intimidation through violence.

This being said, other States regard State terrorism as the most harmful and deadly form of terrorism. Under this approach, a definition of State terrorism

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[12] UNGA Res. A/59/894, Appendix II; <http:www.ilsa.org/jessup/jessup08/basicmats/unterrorism.pdf>.

includes, among other things[13], terror inflicted on whole populations for purposes of domination or interference in their internal affairs. Proponents of this approach consider that the only response available to the victims of State terrorism is counterterrorism[14]. As a result, individual and group terrorism are not necessarily reprehensible activities.

The fact that the concept of terrorism is politically and emotionally charged is also reflected in the disagreement about the possible exclusion of certain activities from the definition of terrorism. The disagreement focuses mainly on whether the activities of self-determination movements or those of armed forces fighting self-determination movements should be excluded from a definition of terrorism. Many States consider that activities conducted by self-determination movements should not be excluded from the definition of terrorism. They also consider that activities of armed forces should be excluded from a definition of terrorism if they comply with International Humanitarian Law (IHL). However, the new South African anti-terrorism legislation excludes from its definition of terrorism, acts committed in furtherance of a people's "legitimate right to national liberation, self-determination and independence […] in accordance with the principles of international law."[15]

More generally, it is usually considered that some activities should be excluded from the definition of terrorism. Indeed, while they fit the description of terrorism, some activities are generally not considered as terrorist activities: a student protest against the government raising university fees; a nurses' strike which may endanger the health system of a country, and more specifically the health of some patients; a demonstration by angry citizens against austerity measures adopted by the government, bread riots, etc. Even if they turn violent, and give rise to illegal acts, such activities are not, as a rule, considered as acts of terrorism. As a result, they should be excluded from any definition of terrorism. Some domestic definitions of terrorism reflect this idea. Such is the case for the definitions found in the Canadian and Australian Criminal Codes, in the New Zealand *Terrorism Suppression Act 2002*[16] as well as in the 2004 South African anti-terrorism legislation[17]. On the other hand, neither the British nor the American definitions of terrorism include exceptions. Besides, among those definitions which exclude certain activities from the definition of terrorism, differences exist. Thus, under the South African anti-terrorism legislation, acts "committed in pursuance of any advocacy, protest, dissent or industrial action"[18], which cause "any major economic loss or extensive destabilization of an

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[13] See *Report of the ad hoc UN Committee on international terrorism*, General Assembly Official Records: Twenty-eight session, supplement No. 28 (A/9028), UN, New York, 1973; Friedlander, *supra*, note 1, at p. 337.

[14] See Report of the Ad Hoc Committee on International Terrorism, *supra*, note 13.

[15] *Protection of Constitutional Democracy against Terrorism and Related Activities*, Act No 33, 2004, Chapter 1, s. 1(4).

[16] 2002, No. 34, s. 5 (5).

[17] *Supra*, note 15, Chapter 1, s. 1 (3).

[18] *Ibid*.

economic system or substantial devastation of the national economy of a country"[19] may, in some cases, be excluded from the definition of terrorism. On the other hand, this type of exception is not provided by the Canadian definition of terrorism.[20]

In the end, many differences exist among domestic and international definitions of terrorism. Some are fundamental, some others are marginal, but all in all, those differences have so far prevented the adoption of a general definition of terrorism.

To sidestep obstacles to a comprehensive definition of terrorism, the international community has adopted a piecemeal approach to dealing with terrorist activities. Under this approach, twelve international conventions have been adopted to criminalize specific acts of violence associated with terrorism. They include, among others, the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*[21]*;* the *International Convention against the Taking of Hostages*[22]*;* the *International Convention for the Suppression of Terrorist Bombings*[23], etc. The problem with these conventions is that they do not distinguish terrorist activities from other criminal activities, which brings us back to the problems which were mentioned before. However, the distinction may be made at the domestic level when member States adopt implementing legislation and their judicial system is involved in its application.

As a result, the distinction between a terrorist activity and a nurses' strike is likely to be made by domestic courts when they are called upon to apply the contentious treaty provisions, but this is not guaranteed. It may depend on the political and social mood of the time, as well as on the legal culture of the country where the provisions are applied.

II. Does the fight against terrorism amount to a war?

The second set of legal problems we need to solve when dealing with terrorism has to do with the way we approach the fight against terrorism: should that fight be governed by the idea that it amounts to a war, or should we consider that it is a fight against criminal activities, and what are the consequences of that choice?[24]

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19 *Id*., Chapter 1, s. 1 (1) (XXV) (a) (vii).
20 *Supra*, note 8.
21 (1973), 1035 UNTS 167.
22 (1979), 1316 UNTS 205.
23 (1997), 2149 UNTS 284.
24 See C. Emanuelli, ''Faut-il parler d'une 'guerre' contre le terrorisme?'' (2008) *Canadian Yearbook of International Law* 415.

Following the events of September 11, 2001, the United States declared war on terrorism. This declaration of war was followed by the American invasion of Afghanistan, the transfer of hundreds of suspected terrorists to Guantanamo and the adoption of measures which were strongly criticized by human rights organizations.

Close to ten years later, the fight against al Qaeda and other terrorist organizations goes on in many parts of the world. Does it amount to a war? The expression "war against terrorism" is still used by the media, but in other circles, it has lost momentum. Today, neither the American nor the British government officially uses the expression "war against terrorism" anymore. The Americans, for instance, prefer to speak of "overseas contingency operations".[25]

In fact, the expression "war against terrorism" was decried by some from the beginning. Thus, after the London bombings of July 7, 2005, the Director of Public Prosecutions and Head of the Crown Prosecution Service in the United Kingdom said this:

> "London is not a battlefield. These innocents who were murdered … were not victims of war. And the men who killed them were not … 'soldier(s)'. […] They were criminals […] On the streets of London, there is no such thing as a war on terror. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringements."[26]

Indeed, the question whether the fight against terrorism amounts to a war raises other questions[27], including the following one: what rules apply to the fight against terrorism? If that fight amounts to a war, then it should logically be governed by the Law of Armed Conflicts, also known as IHL. On the other hand, if it is a fight against criminal activities, criminal law should apply. Which is the right approach? To decide, we should look at the arguments which are used in support of each approach.

Proponents of the view that the fight against terrorism amounts to a war (the Bush doctrine) use the following arguments[28]:

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[25] See Scott Wilson and Al Kamem, "Global War on Terror is given a New Name", *Washington Post*, March 25, 2009, at p. A04.

[26] "There is no War on Terror in the UK, says DPP", *The Times*, January 24, 2007, at p. 12.

[27] See F. Mégret, "'War'? Legal Semantics and the Move to Violence", (2002) *European Journal of International Law* 13, p. 361; M.E. O'Connell, "When is War Not a War: The Myth of the Global War on Terror", (2005) 12 *ILSA Journal of International and Comparative Law*, at pp. 535, 537.

[28] See ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", (2004) 853 *International Review of the Red Cross* 213, at pp. 245, 265-66.

- terrorist attacks in New York, London, Madrid, Bali, Mumbai, etc., show that we are dealing with a new global phenomenon which threatens the international community as a whole. This phenomenon involves armed attacks led by an organized network of cells which can strike anywhere in the world;

- the magnitude of terrorist attacks qualifies them as acts of war rather than as plain criminal acts. They create a threat to international peace and security[29];

- criminal law is inadequate to deal with terrorist threats. It is geared towards punitive rather than preventive action. This is not helpful because we need to be able to strike terrorists before they strike us. Besides, criminal law is too slow; standards of evidence required in criminal proceedings are too strict. They protect criminals.

These arguments lead those who use them to say that we are dealing with a new kind of armed conflict (a war, to claim a right of self defense[30] under international law and exorbitant powers at the domestic level[31]). That new kind of armed conflict does not fit the traditional categorization of armed conflicts: it is not an international armed conflict because it does not set States against each other. It is not either a non-international armed conflict because it is not confined to the territory of a single State.

As a result, the traditional rules governing armed conflicts such as the Geneva Conventions of 1949 are not applicable. We need new rules[32]. Those rules should be developed through the practice of States. In turn, that practice should be informed by a tough approach which limits the legal protection of those suspected of belonging to a terrorist group. Under that approach, terrorists are unlawful combatants. Several consequences result from that characterization of suspected terrorists:

1) as combatants, they are legitimate military targets. We can strike them whenever we can and wherever they are, including by way of preventive attacks and abductions[33];

2) as irregular combatants, they are not entitled to the status and treatment of prisoners of war (POW) in case of capture. As a result, they may be subjected to harsh methods of interrogation and they may be detained for ever without having the right to challenge their detention. In other words, they are not entitled to the protection of IHL even though they are a party to an armed conflict.

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[29] See also UNSC Resolutions 1368 (2001) and 1373 (2001).

[30] See C. Greenwood, ''War, Terrorism and International Law'', (2003) 56 *Current Legal Problems* 505, at pp. 513 et seq.

[31] See the *USA Patriot Act*, *supra*, note 7, and the *Authorization for use of Military Force against Terrorists Act* (2001), Pub. L. 107-40, 115 Stat. 224.

[32] See M. Hoffman, ''Rescuing the Law of War: A Way Forward in an Era of Global Terrorism'', (2005) 34(2) *Parameters*, at p. 18.

[33] See A. Plaw, *Targeting Terrorists. A Licence to Kill?* Aldershot, Ashgate, 2008, at pp. 190 *et seq*.

For its parts, Human rights law is not applicable because it must yield to IHL which, in the event of an armed conflict, is the *lex specialis*. Yet, as we saw before, suspected terrorists are not entitled to the protection of IHL. So, in the end, they are left without any legal protection.

Finally, proponents of a tough approach which limits the protection of would be terrorists to almost nothing justify their position by emphasizing the necessity of ensuring State security.

On the other hand, opponents to the view that the fight against terrorism amounts to a war use the following arguments[34]:

- terrorism is not a new phenomenon. Indeed, as mentioned before, the term "terrorism" originates in the Reign of Terror practiced by the Jacobins, during the French Revolution[35];

- the transnational dimension of terrorism as it is practiced by al Qaeda or other groups does not turn the fight against terrorism into an armed conflict. Anyway, this dimension is not new: already, in the 1970s, Palestinian terrorist groups cooperated with German, Italian and Irish terrorist groups. All of them were supported by the former USSR. For its part, the United States supported the *contras* which used terrorist methods in their fight against the Sandinista regime in Nicaragua[36];

- traditionally, terrorism is dealt with as a criminal activity which falls under the jurisdiction of regular domestic courts. This is evidenced by the criminal laws of most States and by the various international conventions relating to terrorism[37]. According, to those conventions, specific acts such as hijacking or the taking of hostages are criminal offences, which must be dealt with by contracting parties under the formula *aut dedere aut punire*.

- More seriously perhaps, the idea of a war against terrorism governed by new tougher rules is dangerous. It is a threat to individual freedoms. It justifies practices which are unlawful under international law: torture, extrajudicial killings, detention without application of judicial guarantees. It is a step backwards in terms of human rights and threatens anybody suspected of being a terrorist, whether this is true or not.

Besides, the same approach challenges the principle of equality of combatants under IHL. Under this principle, all combatants enjoy an equal right to be protected by IHL, whether they are on the right or the wrong side of an armed

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[34] See ICRC, ''International humanitarian law and the challenges of contemporary armed conflicts'', *supra*, note 28, at pp. 232 *et seq*.

[35] See R.A. Friedlander, *supra*, note 1, at p.6.

[36] See Military *and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) (*Nicaragua Case*), (1986) ICJ Reports 14.

[37] See Part I, ''Defining terrorism''.

conflict[38]. This is because IHL is not concerned with the reasons behind an armed conflict; it is only concerned with protecting the victims of armed conflicts. In this respect, the principle of equality of combatants is a fundamental principle. Without this principle, IHL cannot exist. Indeed, without it, each side could decide that it is on the right side on an armed conflict, while the enemy is not, so that the other side does not deserve to be protected by IHL. This is the position adopted by some States in their fight against terrorism[39]. It is a dangerous approach as far as IHL is concerned because it challenges its very foundations. To be sure, it suggests that we should revisit those foundations and reduce the protection IHL affords to deal with the threat of terrorism. Adopting this approach may create a precedent which in turn may be followed in other cases having nothing to do with terrorism. Therefore, adopting this approach is to step on a slippery slope.

In the end, opponents to the idea of a 'war' against terrorism try to balance the need for State security with the need to respect human rights. As a result, they argue that the fight against terrorism should, for the most part, be governed by criminal law tempered by human rights law. This being said, they recognize that acts of terrorism may, in some cases, take place within the context of an armed conflict, and lead to the application of IHL[40]. Such is the case, for instance, when a party to an international armed conflict commits acts of violence which are intended to terrorize civilians. Such acts of violence are prohibited by IHL which is applicable here since we are dealing with an armed conflict. International Criminal Law is also applicable in this situation since attacks against civilians are war crimes which fall under the jurisdiction of the International Criminal Court (ICC). In this particular example, both IHL and Criminal Law are clearly relevant because their application is provided by international instruments, namely article 51(2) of Additional Protocol I[41] to the Geneva Conventions of 1949[42], and article 8(2) b)(i)(ii) of the Statute of the International Criminal Court[43]. In other instances, the applicability of IHL is not as clear. Indeed, the fight against terrorism does not, as it was mentioned before, fit the traditional categorization of

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[38] See ICRC, ''International humanitarian law and the challenges of contemporary armed conflicts'', *supra*, note 28, at pp. 234-35; H. Meyrowitz, *Le principe de légalité des belligérants devant le droit de la guerre*, Paris, Pédone, 1970.

[39] See M. Sassoli, ''Terrorism and War'', (2006) 4 *Journal of International Criminal Justice* 959, at p. 971.

[40] See ICRC, ''International humanitarian law and the challenges of contemporary armed conflicts, *supra* note 28, at pp. 233-34; M. Sassoli, ''Terrorism and War'', *supra* note 39, at pp. 964-967 *et seq*.

[41] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 3.

[42] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85; *Convention Relative to the Treatment of Prisoners of War*, 75 UNTS; *Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287.

[43] (1998), UN doc. A/CONF.183/9, 17 July 1998.

armed conflicts as they are governed by the Geneva Conventions and their additional protocols. To be sure, the term "war" is inappropriate from a legal standpoint as it applies only to armed conflicts between States[44]. For the same reason, the fight against terrorism does not amount to an international armed conflict as this type of conflict is defined by article 2 common to the four Geneva Conventions of 1949.

This being said, could it be that the fight against terrorism amounts to a non-international armed conflict? US courts had to deal with this question in *Hamdan* v. *Rumsfeld*, a case which was decided by the US Supreme Court in 2006.

In that case, Hamdan, a Yemeni national was captured in Afghanistan and then transferred to Camp Delta in Guantanamo to be tried by a military commission established after 9/11.

Hamdan challenged the jurisdiction of military commissions over his case. He claimed that under article 3 common to the four Geneva Conventions of 1949, he was entitled to be tried by a regular court offering judicial guarantees. To rule on this issue, US courts had to determine whether article 3 was applicable to the fight against al Qaeda during the American invasion of Afghanistan. This proved to be a controversial task, since article 3 does not define its scope of application, except to say that it applies to an "armed conflict not of an international character occurring in the territory of" a party to the Geneva Conventions.

Thus, in first instance, the District Court ruled that article 3 was applicable because it found that the conflict with al Qaeda in Afghanistan was not distinct from the armed conflict with the Taliban. That conflict was an international armed conflict, so that the Geneva Conventions applied. As a result, Hamdan was entitled to prisoner of war status and treatment under Geneva Convention III until it was decided otherwise[45].

The Circuit Court disagreed. It found that article 3 was not applicable for two reasons:

- the global war against terrorism is international in scope;
- the Geneva Conventions are not applicable to the fight against al Qaeda because al Qaeda is not a State and it is not a party to those Conventions. Besides, the Court said that the fight against al Qaeda in Afghanistan must be distinguished from the conflict with the Taliban.[46]

However, the Supreme Court disagreed with the Circuit Court. It ruled that common article 3 was applicable because the fight against al Qaeda in

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[44] See D. Schindler, ''The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols'', (1979-II) 163 RCADI (*Collected Courses of the Hague Academy of International Law*) 117, at p. 125.

[45] 344 F. Supp. 2d 152 (DC 2004).

[46] 415 F. 3d 33 (2005).

Afghanistan was an armed conflict not of an international character occurring in the territory of a party to the Geneva Conventions.[47] In other words, the decision of the Supreme Court was based on a litteral application of article 3.

So, on the basis of that decision, we may be tempted to characterize the fight against terrorism as a non-international armed conflict governed by article 3 common to the four Geneva Conventions. However, it must be remembered that *Hamdan* v. *Rumsfeld* dealt only with the fight against al Qaeda in Afghanistan, as it was fought in conjunction with the war against the Taliban. In this context, the fight may be characterized as an armed conflict not of an international character as the Supreme Court did. On the other hand, if we look at the global fight against terrorism, the situation is different since it is not confined to the territory of a single State. In this context, article 3 is not applicable.[48]

In the end, the proponents of a "war against terrorism" seem to be right on one point: the Geneva Conventions are not applicable to the fight against transnational terrorism. Therefore, if we persist to think of that fight in terms of armed conflicts, we must give it a new characterization and adopt new rules to govern this new type of armed conflict.

First of all, the characterization of the fight against transnational terrorism as an armed conflict must take into account the following elements:

- the fight against transnational terrorism is neither an international nor a non-international armed conflict as those types of armed conflicts are defined by the Geneva Conventions;
- it sets States against a transnational network of armed cells;
- those cells use terrorism as a method of warfare;
- military operations against terrorists take place simultaneously in several States.

Thus, the fight against transnational terrorism could be characterized as an atypical armed conflict setting States against a transnational network of terrorist cells, which takes place on several fronts. As to the rules applicable to such a conflict, they can be developed through the practice of States. However, contrary to what proponents of a 'war' against terrorism argue, such a practice should not lead to depriving terrorists of all legal protection. Indeed, State practice intended to develop new rules of IHL should comply with the principle of humanity which underlies all rules of IHL, even when those rules relate to terrorism. Among these

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[47] 126 S. Ct 2749 (2006).

[48] However, see M. Sassoli, ''Terrorism and War'', *supra* note 39, at pp. 964-65, and 971.

rules, we find the Martens Clause[49]. The Martens Clause was adopted within the framework of the first Peace Conference which took place in The Hague in 1899. According to the Clause, in the absence of specific rules of IHL:

> "populations and belligerants remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."[50]

Since 1899, the Martens Clause was reaffirmed on several occasions. It is found in a more modern form in the Preamble to Additional Protocol II to the Geneva Conventions of 1949[51] and was applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreskic Case*[52]. In that case, the Martens Clause was used by the ICTY to decide that the prohibition of reprisals against civilians is customary in spite of a dearth of practice supporting this finding.

In 1899, the Clause was adopted to fill the gap left by the lack of legal protection afforded to partisans captured in territories occupied by the enemy[53]. Today, it should be used to fill the gap left by the lack of legal protection afforded to those involved in the fight against terrorism.

Now, under the Martens Clause, torture, extrajudicial killings, abductions, detention without judicial guarantees are unlawful because they violate "the laws of humanity and the requirements of the public conscience".

Besides, it is well established under international law that the prohibitions of torture[54] and of extra judicial killings[55] are part of *jus cogens*.

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[49] See Shigeki Miyazaki, ''The Martens Clause and International Humanitarian Law'', in C. Swinarski (ed.), *Studies and essays on international humanitarian Law and Red Cross principles in honour of Jean Pictet*, Geneva/The Hague, ICRC/Martinus Nijhoff, 1984, at p. 433.

[50] *Hague Convention (II) with Respect to the Laws and Customs of War on Land* (1899), in D. Schindler and J. Toman, *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Leiden/Boston, Martinus Nijhoff, 204, at p. 55.

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609.

[52] *Prosecutor* v. *Kupreskic*, IT-95-16, Judgment, 14 January 2000, ICTY (T.Ch.), at para. 527.

[53] See F. Kalshoven, *Constraints on the Waging of War*, Geneva, ICRC, 1987, at p. 14.

[54] see *Prosecutor* v. *Furundzija*, IT-95-17/1, Judgment, 21 July 2000, ICTY (A.Ch.), at para. 153; *Prosecutor* v. *Kunarac et al*., IT-96-23 & IT-96-23/1, Judgment, 12 June 2002, ICTY (A.ch.), at para. 466; *Al-Adsani* v. *United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, (2002) 34 *EHRR* 11, at para. 61.

Therefore, the prohibitions which are found in IHL also apply under Human Rights Law. Indeed, under that branch of International Law, there is a core of non-derogable rights which may not be suspended in time of national emergency[56]. They include the right to life and rights resulting from the prohibition of torture. They temper the application of Criminal Law.

So, in the end, whether the fight against transnational terrorism is characterized as a war or as a fight against criminal activities, the same basic principles apply. None of them supports the idea that suspected terrorists are deprived of all legal protection, contrary to what proponents of a "war against terrorism" claim. That claim is based on the fallacious argument that transnational terrorism is a new phenomenon which does not fit existing legal rules. The argument seems to be intended to bypass the application of positive law in favour of new, harsher rules developed by States[57]. In fact, it seems that the fight against transnational terrorism fits existing rules regardless of its characterization. Those rules may be further developed by States, but they should comply with basic principles protecting individual rights and freedoms.

III. Can terrorism justify the use of force by one State against another State?

In the name of the fight against terrorism, the United States invaded Afghanistan in 2001, and Iraq in 2003[58]. Recently, the United States also mounted a covert military operation in Pakistan to either kill or capture Ossama Ben Laden. Was it justified to act as it did?

To answer the question, some basic principles of International Law must be taken into consideration:

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[55] They violate the right of an individual not to be arbitrarily deprived of his/her life. This right is enshrined in article 6 of the *International Covenant on Civil and Political Rights* (1966), in article 2 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), in article 4 of the American Convention on Human Rights (1969) and in article 4 of the African *Charter on Human and Peoples' Rights* (1981).

[56] See article 4 of the *International Covenant on Civil and Political Rights*; article 15 of the European Convention on Human Rights; article 27 of the American Convention on Human Rights. Under the African Charter, protected rights cannot be suspended.

[57] See C. Emanuelli, ''Faut-il parler d'une 'guerre' contre le terrorisme?'', *supra* note 24, at pp. 429-30.

[58] At first, the invasion of Iraq was explained by the fact that Iraq was creating a threat to international peace and security by developing weapons of mass destruction. However, when such weapons were not found, the United States offered other explanations. One of them had to do with the fact that Iraq had close ties with al Qaeda. That argument also proved to be wrong.

a) A State must not allow activities to take place within its territory if they may harm another State[59]. If it does allow such activities to take place within its territory, a State violates International Law. As a result, it incurs liability for damage caused to the victim. It may also face sanctions adopted by the international community.

This principle and the rules it underlies were applied by the International Court of Justice (ICJ) in the case dealing with the takeover of the US embassy in Tehran[60]. The case was decided in 1980 in relation to events that took place in 1979. That year, the US embassy in Tehran was overrun by several hundred armed demonstrators. The premises of the embassy were occupied, the documents and archives were ransacked and the diplomatic personnel were taken hostage. This situation gave rise to a case which was brought before the ICJ by the United States against Iran. The Court found that the militants who attacked the US embassy were not acting on behalf of Iran. Thus, Iran was not held responsible for the attack[61]. However, Iran was found to be responsible for failing to protect the US embassy. It did not take appropriate steps to prevent the attack or to stop it. Moreover, after the attack was completed, Iran did not take steps to free the hostages. In fact, Iranian authorities endorsed the takeover of the embassy[62]. As a result, the ICJ found that Iran had violated its obligations under the Vienna Convention on Diplomatic Relations towards the United States[63]. It also decided that Iran must immediately release the hostages and that it was under an obligation to make reparation. Iran did not comply with the Court's decision but, eventually, the hostages were released in 1981 as a result of a negotiated settlement with the United States.

Now, when it comes to terrorism, several resolutions adopted by the UN Security Council provide, in the same vein, that States must refrain from allowing organized activities within their territory that are directed towards the commission of terrorist acts (for instance, Resolution 1373, 2001). Also, Resolution 1368 (2001) adopted after the events of 9/11 provides that those who harbour the perpetrators of acts of terrorism will be held accountable.

b) The use of armed force in international relations is prohibited under article 2(4) of the United Nations Charter. However, there are two exceptions:

- under article 51 of the UN Charter, a State can use armed force in response to an armed attack until the Security Council takes over (principle of self-defence);

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[59] See UNGA Resolutions 2625 (XXV) (Declaration of Principles of Friendly Relations), and 3314 (XXIX) (Definition of Agression).

[60] *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), I.C.J. Reports 1980, p.3.

[61] *Id*., at para. 58.

[62] *Id*., at para. 63 *et seq*.

[63] *Id*., at para. 76 *et seq*.

- under Chapter VII of the UN Charter, the Security Council may allow member States to use armed force to respond to a threat to international peace and security, if all other means have failed.

Do these exceptions apply if the original armed attack is a terrorist attack?

Let us start with self-defence. Here, the first question is this: can a terrorist attack constitute an armed attack giving rise to the application of the principle of self-defence? Some scholars argue that it can, provided that if the terrorist attack was conducted by a State, it would be considered an armed attack[64]. However, in its advisory opinion on the *Construction of a Wall in the Palestinian Occupied Territory*, the ICJ said that self-defence is only available against an aggression by a State[65]. On the other hand, UN Security Council Resolutions 1368 and 1373 (2001) adopted in the wake of 9/11 recognized that the terrorist attacks against the United States gave rise to a right of self-defence. In the same vein, NATO[66] and the OAS[67] equated the terrorist attacks of 9/11 with armed attacks. However, neither UN Security Council Resolutions nor statements made by other organizations allowed the United States to use armed force in response to the events of 9/11. One of the reasons for this may have to do with the fact that under article 51 of the UN Charter, self-defence is available when the armed attack occurs, not after it has passed. If military force is used after, it may be characterized as an armed reprisal rather than as an act of self-defence. However, some scholars argue that if an attack is part of a series of attacks, then preventive self-defence is available[68]. However, this is a controversial argument. In the *Nicaragua Case*, the ICJ suggested that preventive self-defence is not available[69].

The next question is this: if armed force can be used in response to a terrorist attack, against who should it be directed? The answer is obvious: the use of armed force should be directed against the terrorists responsible for the attack and against those who harbour them[70]. After 9/11, the rule applied to al Qaeda in Afghanistan and to the Taliban who refused to surrender Osama Ben Laden to the United States.

Finally, what are the limits on armed force used in response to a terrorist attack? Under the principle of self-defence, if it is available, the use of armed

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[64] See C. Greenwood, ‘’War, Terrorism and International Law’’, *supra*, note 30, at pp. 513 *et seq*.

[65] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports, 2004, p. 136, at para. 139.

[66] See Press Release (2001), North Atlantic Council (12 September 2001), (2001) 40 *I.L.M*. 1267.

[67] See (2001) *I.L.M*. 1273.

[68] See C. Greenwood, ‘’War, Terrorism and International Law, *supra*, note 30, at pp. 515 *et seq*.

[69] *Nicaragua Case*, *supra*, note 36, at para. 176.

[70] See also C. Greenwood, ‘’War, Terrorism and International Law’’, *supra*, note 30, at pp. 517 *et seq*.

force must be limited to what is necessary to meet the threat and must be proportionate to it[71]. Whether the United States complied with this rule, when it invaded Afghanistan after 9/11 is far from being clear[72]. Indeed, the United States went beyond destroying al Qaeda's bases in Afghanistan. It overthrew the Taliban to replace it with a friendlier regime. In contrast, in 1916, when Pancho Villa, the famous revolutionary leader, was regularly crossing the US/Mexican border to conduct raids against American interests, the United States sent an expeditionary force into Mexico to either kill or capture him[73]. The Americans felt justified to take this course of action since Mexican authorities were unable to arrest Pancho Villa. However, the United States did not take action against Mexican authorities. Eventually, Pancho Villa was wounded by American forces and later on killed by one of his men. In the same way, the Americans tried to capture Ossama Ben Laden in Afghanistan, but failed. Did they further have to invade Afghanistan and topple its regime? This radical solution is questionable, particularly from the standpoint of International Law. Eventually, the United States mounted a covert military operation in Pakistan and killed Ossama Ben Laden. In this case, the United States justified its covert operation by saying that it suspected some Pakistani authorities of protecting Ossama Ben Laden. From a legal standpoint, the operation was a violation of the sovereignty of Pakistan and may well constitute an act of aggression[74].

The second exception to the prohibition to use armed force in international relations has to do with Chapter VII of the UN Charter. Under this chapter, the Security Council may allow member States to use force in response to a threat to international peace and security. This power was used in a variety of situations, especially since the end of the Cold War, and mainly with a view to protecting victims of armed conflicts.[75]

When it comes to terrorism, several Security Council resolutions have characterized terrorism as a threat to international peace and security (for instance, Resolution 1368, 2011), but they did not go as far as allowing the use of armed force against terrorists or against those who protect them.

In the end, whether terrorism justifies the use of force by one State against another State under International Law is not clear cut. The answer depends largely on the circumstances surrounding each terrorist attack as well as on the response of the international community through decisions adopted by the Security Council.

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[71] See the *Nicaragua Case*, supra, note 36, at para. 194.

[72] However, see C. Greenwood, ''War, Terrorism and International Law'', *supra*, note 30, at p. 519.

[73] See Pancho Villa Expedition, <http : //www.enotes.com/topic/pancho_villa>.

[74] See U.N. GA Res. 3314 (XXIX) (Definition of agression) and the *Nicaragua Case*, *supra*, note 36, at pp. 103-4.

[75] See C. Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, Montréal, Wilson et Lafleur, 1995, at pp. 3 *et seq*.

Other more comprehensive responses to transnational terrorism were developed by the international community, such as those provided by UN Security Council Resolution 1267 (1999). Resolution 1267 condemns the Taliban for sheltering terrorists and for allowing them to train and plan terrorist activities in the territories under their control. It further considers that the failure by the Taliban to stop providing sanctuary to terrorists and to make efforts to bring them to justice, when they have been indicted, is a threat to international peace and security. Sanctions are provided by the Resolution against the Taliban:

- planes belonging to the Taliban must be denied permission to take off or land in the territory of member States, except on humanitarian grounds;

- funds and other financial resources owned or controlled by the Taliban are frozen. The application of these measures is supervised by a Committee established by Resolution 1267.

More recently, a UN General Assembly resolution was adopted (A/Res/60/288) (2006) to develop a global strategy to counter terrorism. The Resolution is accompanied by a Plan of Action. The Plan of action includes a series of measures to deal with terrorism. Some measures are meant to address the conditions conducive to the spread of terrorism, including measures to strengthen the peaceful settlement of disputes trough conflict prevention, peacekeeping, peace building, etc. Other measures are intended to create programs to promote dialogue among cultures and religions. More measures are geared towards the eradication of poverty and the promotion of economic, social and political development. A Committee was established to supervise the application of the measures provided by the Resolution.

Other measures against terrorism may also include the establishment of mixed tribunals, such as the special Tribunal to try all those involved in the "terrorist crime" which killed former Lebanese Prime Minister Rafiq Hariri[76]. The Tribunal is a mixed tribunal in which the international dimension prevails. It is modelled after the Special Court for Sierra Leone.

4. Conclusions

In the end, the previous developments lead to the following conclusions:

- Eradicating terrorism is part and parcel of promoting democracy. This being said, the way the international community fights terrorism should be reconciled with the tenets of democracy and with the rule of law;

- A universally accepted definition of terrorism is needed to allow the international community to shift its approach to fighting terrorism from a

[76] See UNSC Res. 1757 (2007).

piecemeal to a comprehensive approach. A comprehensive approach to fighting terrorism should allow a better coordination of responses to terrorist threats. In turn, this should result in fighting terrorism more efficiently.

At the same time, defining terrorism as a separate legal concept would exclude ordinary criminal activities from that definition. Therefore, it would limit the scope of what are considered as terrorist activities and by the same token limit the capacity of States to infringe on individual freedoms in the name of fighting terrorism. To distinguish terrorist activities from other criminal activities, a definition of terrorism should focus on intimidation and motives as key constitutive elements of that definition. This being said, terrorist activities may share those constitutive elements with activities which, as a rule, are not considered as terrorist activities. To avoid any possible confusion, a definition of terrorism should exclude activities which are part and parcel of democracy and which, as a rule, are not equated with terrorism, even if they give rise to illegal acts;

- Whether the fight against terrorism is characterized as a war or as a fight against criminal activities, the same basic principles govern that fight. None of them supports the idea that suspected terrorists are deprived of all legal protection. The prohibitions of torture, extrajudicial killings, detention without judicial guarantees are applicable to the fight against terrorism;

- Under International Law, States must refrain from giving sanctuary to terrorists and allowing them to prepare terrorist attacks to be conducted in the territory of other States. Contravening those prohibitions may constitute a threat to international peace and security.

This being said, under International Law, the principle of self-defence does not clearly allow a State to use armed force against another State in response to a terrorist attack facilitated by that State.

However, under Chapter VII of the United Nations Charter, the Security Council could allow States to use armed force against another State harboring terrorists, if it found that the situation creates a threat to international peace and security and gave rise to a right of self-defence. This being said, after 9/11, the Security Council did not expressly allow the United States to use armed force against the Taliban. Yet, it did not either condemn the US invasion of Afghanistan.

Other responses to counter terrorism are available. Some have already been adopted by the international community which seems to be more in line with the rule of law. They involve sanctions against States harboring terrorists, measures intended to address the conditions conducive to the spread of terrorism and the individual criminal responsibility of authors of terrorist acts.