

# Special Reference to the Victims of Terrorism

## Victims of Terrorism and International Law: From Ignorance to Recognition

The answer of international law to terrorism has been, for a long time, very weak. Consequently, until recently, interest has not been shown nor has attention been paid by the international community to victims of terrorism. The proof of this is the fact that until the 1993 Vienna World Conference on Human Rights the relationship between terrorism and human rights did not attract the attention of the United Nations.<sup>1</sup> Since 1994, the UN General Assembly's resolutions concerning terrorism appear under the title "human rights and terrorism."<sup>2</sup> At the same time, the resolutions adopted on the matter are characterized by the affirmation "that the most essential and basic human right is the right to life" and by the General Assembly's concern "at the gross violations of human rights perpetrated by terrorist groups."<sup>3</sup> They also declare the General Assembly's solidarity with victims of terrorism and request the Secretary-General of the UN to seek the views of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism as well as for ways and means to rehabilitate the victims of terrorism and to reintegrate them into society.

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<sup>1</sup> From 1972 to 1991, the General Assembly examined this matter under the title: "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes."

<sup>2</sup> The starting point was A/RES/49/185 of 23 December 1994.

<sup>3</sup> There are a lot of General Assembly resolutions qualifying terrorism as a violation of human rights, see A/RES/48/122 of 20 December 1993; A/RES/49/185 of 23 December 1994; A/RES/50/186 of 22 December 1995; A/RES/52/133 of 12 December 1997; A/RES/54/164 of 17 December 1999 and A/RES/56/160 of 19 February 2001. See Fernández de Casadevante Romani and Jiménez García (2005), 116 et seq.

From 1994 onwards, the UN Human Rights Commission also began to adopt resolutions under the title “human rights and terrorism”; resolutions containing references to victims of terrorism.<sup>4</sup> It also requested the Sub-Commission on the Promotion and Protection of Human Rights to undertake a study on the issue of terrorism and human rights in the context of its procedures. The Special Rapporteur stated in this respect,

102. Terrorist acts, whether committed by States or non-State actors, may affect the right to life, the right to freedom from torture and arbitrary detention, women’s rights, children’s rights, health, subsistence (food), democratic order, peace and security, the right to non-discrimination, and any number of other protected human rights norms. Actually, there is probably not a single human right exempt from the impact of terrorism.<sup>5</sup>

The same connection between terrorism and human rights is made by the High Commissioner for Human Rights in his report to the General Assembly according to Resolution 48/142 entitled “Human rights: a unity framework report.”<sup>6</sup> It states that terrorism “is a threat to the most fundamental human right, the right to life” and that “the essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.”<sup>7</sup>

By now it is clearly established that terrorism is a violation of human rights. In this context, it must be added that terrorism is not an ordinary violation of human rights. On the contrary, it is an *international crime*.<sup>8</sup> This is why victims of terrorism request the inclusion of this crime among the crimes coming under the jurisdiction of the ICC or, as another alternative, to judge its most serious aspects (murder, torture, enforced disappearance of persons, persecution and other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health) as crimes against humanity. This course of action is possible, because as underlined by the President of the ICC, although the

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<sup>4</sup> The UN Commission on Human Rights has also qualified terrorism as a violation of human rights (see resolutions 1994/46, 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35 and 2003/37). Also, the Sub-Commission on the Promotion and Protection of Human Rights (see resolutions 1994/18, 1996/20 and 1997/39). In 1993, the Sub-Commission had even condemned “the violations of human rights by the terrorist groups Sendero Luminoso and Movimiento Revolucionario Tupac Amaru” in Peru (resolution 1993/23).

<sup>5</sup> Doc. E/CN.4/Sub.2/2001/31 of 27 June 2001, 46. The Special Rapporteur drafted a preliminary report (Doc. E/CN.4/Sub.2/1999/27 of 7 June 1999), a progress report (Doc. E/CN.4/Sub.2/2001/31 of 27 June 2001), a second progress report (Doc. E/CN.4/Sub.2/2002/35 of 17 July 2002), an additional progress report with two addenda (Doc. E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2 of 8 August 2003) and a final report (Doc. E/CN.4/Sub.2/2004/40 of 25 June 2004). In fact, a lot of rights are infringed by terrorism: the right to liberty and security, the right to family life, the right to movement, the right to information, the right to a fair trial, etc.

<sup>6</sup> Doc. E/CN.4/2002/18 of 27 February 2002, paras 3 and 4.

<sup>7</sup> *Ibid.*, paras 2 and 5.

<sup>8</sup> Cf. P. Kirsch, “Terrorisme, crimes contre l’humanité et Cour pénale internationale”, in: SOS Attentats, see note 6, 111.

Statute of the ICC does not include terrorism among the crimes within the jurisdiction of the Court, this crime could be considered a crime against humanity of the type of those envisaged in Article 7 of the Statute of the ICC so that, *a priori*, nothing hinders the ICC from taking them up if the other elements guiding the jurisdiction of this international court are present.<sup>9</sup>

The fact of not dealing with terrorism either as an independent crime or as a type of crime against humanity leads to impunity and denies victims of terrorism their effective right to justice when the State will not or cannot guarantee it.<sup>10</sup> In consequence, it is the responsibility of the United Nations itself to urge and promote international norms recognizing and guaranteeing victims of terrorism the effective enjoyment of their human rights. This is especially true for their effective right to justice and to redress. This is why victims of terrorism call for such actions.<sup>11</sup>

In short, although the Commission on Human Rights has reiterated “its unequivocal condemnation of all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever, whenever and by whoever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy”<sup>12</sup> and although bearing in mind that “the most essential and basic human right is the right to life”,<sup>13</sup> as well as “profoundly deploring the large number of civilians killed, massacred and maimed by terrorists in indiscriminate and random acts of violence and terror, which cannot be justified under any circumstances,<sup>14</sup> what is true is that in contrast to the Council of Europe<sup>15</sup> United Nations has paid far less attention to victims of terrorism. Also that this attention

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<sup>9</sup>The High Commissioner on Human Rights states that terrorism is a crime against humanity in para. 4 of his Report to the General Assembly according to Resolution 48/142 entitled “Human rights: a unity framework report” (Doc. E/CN.4/2002/18 of 27 February 2002).

<sup>10</sup>This is the case, for example, when the crime of terrorism has been amnestied or has been prescribed according to domestic law and the prescription has taken place as a consequence of the passivity of the State to investigate the crime or in the instruction of the indictment. Impunity also takes place, e.g. in case of failed States. The causes are many and all lead to impunity.

<sup>11</sup>See Bou Franch and Fernández de Casadevante Romani (2009).

<sup>12</sup>For example, in resolutions 2002/35 and 2004/44 about “Human Rights and Terrorism” and in resolutions 2003/68 and 2004/87 about “Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.”

<sup>13</sup>So, for example, in resolutions 2002/35 and 2004/44 entitled “Human Rights and Terrorism” and in resolutions 2003/68 and 2004/87 about “Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.” see *ut supra* note 4.

<sup>14</sup>*Ibid.*

<sup>15</sup>The attention of the Council of Europe to victims of terrorism is specified in its Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers on 2 March 2005. It contains measures and services that are granted independent of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They concern emergency and continuing assistance, investigation and prosecution, effective access to law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the dignity and the security of victims of terrorist acts, information for victims of terrorist acts, specific training for persons responsible for assisting victims of terrorist acts and the

has been limited to expression of mere courtesy deprived of any legal obligation.<sup>16</sup> More precisely, what is true for the General Assembly is also true for the Security Council<sup>17</sup> and the Commission on Human Rights.<sup>18</sup>

So, although terrorism is an international crime that seriously violates human rights, the paradox is that, unlike other categories of victims, no international norm on victims of terrorism and their rights has yet been adopted inside the UN.

On the contrary, with regard to the other types of victims, several international norms have been adopted as has been shown to take into account most of the different categories of victims. To change this situation, it is urgent that in particular the United Nations, in line with the actions concerning the other categories of victims being mentioned, and like the acts carried out by the Council of Europe, promote an international norm affirming the status of victims of terrorism. That is to say, a statute made up of a catalogue of rights inherent to the condition of victims of terrorism based upon the effective right to justice and the prevention of impunity, connected to the jurisdiction of the ICC. It is the only way in which the “universal” right to justice of each victim of terrorism can be guaranteed.<sup>19</sup>

Yes, it is evident that the UN cannot remain deaf to the pleas for justice of victims of terrorism; victims who in most corners of our little planet do not have the most basic human rights<sup>20</sup> and victims who, besides, have never called for revenge. On the contrary, they have placed their trust in the state to deliver the justice that is their due.

Consequently, it is the responsibility of the UN itself to urge and promote international norms recognizing and guaranteeing victims of terrorism the effective enjoyment of their human rights. This is especially true of their effective right to

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possibility for states to increase protection of this category of victims (Council of Europe, Committee of Ministers-CM/Del/Dec(2005)917).

<sup>16</sup> Contrary to the silence of the UN with regard to victims of terrorism, it has frequently—and correctly—pointed out the obligation of states to respect human rights when combating terrorism. In this line, the Commission on Human Rights on 21 April 2005 appointed, for a period of 3 years, a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism. This shows a clear and concrete endorsement by Member States of the need to make the honouring of human rights commitments an integral part of the international fight against terrorism, <http://www.un.org/spanish/terrorism/terrorismhr.shtml>.

<sup>17</sup> See *ut supra* page 11, note 22.

<sup>18</sup> See resolution 2003/37 of the Commission on Human Rights adopted on 23 April 2003 and related to the establishing of an International Fund to compensate victims of terrorist acts.

<sup>19</sup> Without the intervention of the ICC, most victims of terrorism would lack, *de facto*—as is the situation today—their right to justice because its effective exercise depends upon the correct functioning of state structures and presently many states affected by terrorism are either failed states or states in which the effective exercise of this right is impossible because of the weakness of the existent state structures. In such conditions, the right to redress is also impossible. As a consequence, many victims of terrorism lack basic human rights.

<sup>20</sup> Among them, the effective right to justice or the right to redress. This is the case of situations described in the preceding footnote. They all lead, *de facto*, to deny victims of terrorism their effective right to justice and, as a consequence, their right to redress.

justice and to redress. This is why victims of terrorism associations call for such actions.<sup>21</sup> This is also what elementary consideration of justice demands.

Fortunately, it seems that the time for victims of terrorism in the legal field of United Nations is also coming because the objective of addressing the rights of the victims of terrorism has been included very recently in the agenda of the UN. Thus, from his first report, the new Special Rapporteur for the Promotion and the protection of human rights and fundamental freedoms while countering terrorism—Mr. Emmerson—expresses his commitment to pay special attention to the rights of direct and indirect victims of acts of terrorism as well as to the duties of States with respect to actual and potential victims.<sup>22</sup> Still more, he advances a catalogue of rights of victims of terrorism; a catalogue that is conceived as an obligation on the charge of States.

For the first time, in the framework of the United Nations it is clearly stated that “any sound, sustainable and comprehensive strategy for combating terrorism requires the recognition of the suffering of victims of terrorist acts”.<sup>23</sup> Also, that States “have important duties in this regard”.<sup>24</sup>

Moreover, also for the first time, it is underlined that the first obligation of any State is “to protect the lives of its citizens and of all individuals within its territory and subject to its jurisdiction”; an obligation that has the following consequences:

the duty to take reasonable measures, within the lawful and proportionate exercise of State powers, and in a manner consistent with the protection of human rights, to prevent the materialization of a real and immediate risk to life; the duty to conduct thorough, independent and impartial investigations when it is plausibly alleged that this primary positive obligation has been violated; the duty to investigate and bring to justice the perpetrators of acts of terrorism in a manner consistent with international standards on the protection of human rights; and the duty to afford adequate reparation to direct and indirect victims of terrorism in cases where, on inquiry, it is established that the State has failed to discharge its primary obligation to take reasonable steps to prevent violations by non-State actors of the right to life or the right to physical security.<sup>25</sup>

Independent of these rights that States have with respect to “its citizens and of all individuals within its territory and subject to its jurisdiction”, the Special Rapporteur emphasizes that States also have “broader duties with respect to supporting the victims of terrorism”.<sup>26</sup> And this, “even in cases where the relevant authorities have done all that can reasonably be required of them, within the lawful and

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<sup>21</sup> Regarding this question, See Bou Franch and Fernández de Casadevante Romani (2009).

<sup>22</sup> Vid. UN General Assembly, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 18 August 2011, (A/66/310, para. 20, 5)

<sup>23</sup> *Ibid.*, 6.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, para. 21, 6.

proportionate exercise of their powers, to prevent acts of terrorism from occurring”.<sup>27</sup> That is, even without fault on their charge.

In this new approach, the Special Rapporteur considers it essential that the protection of the rights of the victims of terrorism be perceived “as a genuine legal duty resting primarily with States”<sup>28</sup>; a duty implying concrete obligations on the charge of States.

It is a new step and, at the same time, a radical change of the perspective with which the fight against terrorism was treated before: a fight where victims were not present—were invisible—and a fight where the UN and Member States always put the accent on the *voluntary basis* of the action relating to the assistance and needs of victims of terrorism. I would like to honour the success Spanish associations of victims of terrorism have had in this new approach.<sup>29</sup>

That different perspective is highlighted by the Special Rapporteur Mr. Emmerson:

Whereas the United Nations Global Counter-Terrorism Strategy makes a pledge to Member States to only “consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives”,<sup>30</sup> the Special Rapporteur considers that States are bound by an international human rights obligation to provide for such assistance to victims of terrorism, including their families.<sup>31</sup>

The importance of this change is great: we are facing an international human rights obligation to provide assistance to victims of terrorism, “including their families”—that is, direct and indirect victims—which is a broader content. Effectively, in view of the Special Rapporteur:

the obligation goes further than that and *includes, but is not limited to*, the duty to prevent acts of terrorism; the duty, if they have occurred, to properly investigate, publicly disclose the truth and bring the perpetrators to justice; the duty to investigate any allegations of culpable failure on the part of State authorities, in the lawful and proportionate exercise of their powers, to take reasonable steps to prevent acts of terrorism; legal recognition of victims of terrorism; pecuniary compensation, including for moral damages sustained; rehabilitation; provision of health care and psychosocial and legal assistance; ensuring a safe environment for the return or, if impossible, the resettlement of persons displaced by acts of terrorism or counter-terrorism measures; provision of moral support; and fostering good community relations and providing human rights education as a means of furthering tolerance.<sup>32</sup>

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, para. 23, 7.

<sup>29</sup> See Fundación Miguel Angel Blanco (2010, 2011).

<sup>30</sup> <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Statements.aspx>.

<sup>31</sup> UN General Assembly, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, *op. cit.*, para. 24, 7.

<sup>32</sup> *Ibid.*, para. 24, 7. Italics are mine.

Although included in the list quoted above, the Special Rapporteur pays special attention to the issue of reparation. It considers that reparation schemes put in place on the national level should follow certain principles and list some of them “by way of example”. According to him:

Reparation schemes should aim at full restitution and foresee individual and collective reparation for both victims of counter-terrorism measures by the State and victims of terrorist acts, and follow a participatory approach. National reparation mechanisms must be independent and provide for adequate, effective and prompt reparation, which includes their being readily accessible and their taking a gender perspective into account. Compensation must never become a substitute for bringing perpetrators to justice or for revealing the truth in compliance with applicable international human rights obligations. States may also choose to provide financial assistance to organizations supporting victims of terrorism in order to comply with their international obligations vis-à-vis victims of terrorism.<sup>33</sup>

So, finally and after too much time, victims of terrorism and their rights begin to be the subject of work in the United Nations. I would be aware that this work prefigured, as in other categories of victims, in the adoption of a declaration of the General Assembly and later in an international treaty on the rights of the victims of terrorism.

In contrast to the general or universal system of the UN just described which is characterized by the non-existence of international norms on victims of terrorism, the progressive emergence of victims within the framework of the *European Union* took a further step on victims of terrorism with the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).<sup>34</sup> In its article 10, it takes into account the protection and assistance given to victims of terrorism. According to this article and related to the concept of “terrorist offences” which is developed in the long list of article 1 of this Council Framework Decision, article 10 states that Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, “at least if the acts were committed on the territory of the Member State.”<sup>35</sup>

As already stated, the most important role in the matter—as in the more general field of human rights and in the more particular area of compensation for victims of crime and of prevention of torture—has been fulfilled by the Council of Europe, which until today is the only international organization to have adopted an international norm on victims of terrorism: the *Guidelines on the Protection of Victims of Terrorist Acts* adopted on 2 March 2005 by the Committee of Ministers.<sup>36</sup> These Guidelines are founded upon the principle that States “should ensure that any person who has suffered direct physical or psychological harm as a result of a terrorist act as well as, in appropriate circumstances, their close family can benefit

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<sup>33</sup> *Ibid.*, para. 25, 7.

<sup>34</sup> OJEC L 164 of 22 June 2002.

<sup>35</sup> Article 10 para. 1, *ibid.*

<sup>36</sup> Council of Europe, Committee of Ministers-CM/Del/Dec(2005) 917.

from the services and measures prescribed by these Guidelines”.<sup>37</sup> These are services and measures that are granted to victims of terrorism independent of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They include emergency and continuing assistance, investigation and prosecution, effective access to the law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the private and family life of victims of terrorist acts, information for victims of terrorist acts, specific training for persons responsible for assisting victims of terrorist acts as well as the possibility for states of adopting more favourable services and measures to victims of terrorist acts.

In that Guidelines, the UN has the model that international norms promoted within its framework should follow.

## The Concept of Victim of Terrorism

Due to the clear link between both concepts, before dealing with the question relating to the concept of victim of terrorism, the definition of terrorism will be dealt with. Concerning this last, and as stated earlier, international law has all the elements to include in this concept all acts actually considered by international law as terrorists. With regard to the concept of “victim of terrorism”, it shall be immediately specified that the non-existence of such a concept does not really constitute an obstacle, although its existence would be very helpful to particularize a concrete legal statute for this category of victims.

Yes, that gap does not constitute an obstacle. On the one hand, because it is possible to affirm the existence of a general concept of victim from the definitions contained in the international norms in force related to the different categories of victims; a concept whose elements are present in those definitions. On the other hand, because, as also stated, all victims—independent of the category to which they belong—have in common the fact of being victims as a consequence of a wrongful act (the victimizer fact) that is a crime. This is why independent of its possible particularization and of its possible inclusion in a certain category of victims depending on the type of criminal act suffered, the different categories of victims are at the same time both victims belonging to a concrete category of victims as well as victims of a crime; also victims of terrorism. Consequently, they all have the same rights inherent to the legal standing of victims in criminal proceedings. Additionally, they have rights not directly linked to the criminal proceedings but to their condition as victims. They are, most of them, rights that are common to the different categories of victims deriving from other international norms. At least victims also have rights inherent to the category of

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<sup>37</sup> These persons are considered victims for the purposes of these Guidelines. The Guidelines make option for a broaden concept of victim.



victim to which they belong. These are rights recognized by international norms related to the category of victim concerned.

As opposed to the situation characterizing general international law, in the European regional system—particularly from the perspective of Member States of the European Union—the non-existence of a general concept of terrorism is in a certain way covered by the qualification as “terrorist offences” of the acts listed in Council Framework Decision (2002/475/JHA) of 13 June 2002<sup>38</sup>; a list which was completed by Council Framework Decision (2008/919/JHA) of 28 November 2008 adding other offences linked to terrorist activities such as public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism.<sup>39</sup>

So far as the Council of Europe is concerned, we can see that the *Guidelines on the Protection of Victims of Terrorist Acts* adopted on 2 March 2005 by the Committee of Ministers do not contain a concept of terrorism. Despite that, such Guidelines give the consideration of victim of terrorism to any person who, as a result of a terrorist act, has suffered direct physical or psychological harm as the result of a terrorist act as well as, in appropriate circumstances, their close family.

### ***A Previous Question: The Concept of Terrorism***

On the occasion of the international fight against terrorism and, more concretely and as an example, of the qualification of terrorism as a crime against humanity by the statute of the ICC<sup>40</sup> as well as the concept of “victim of terrorism”, this task is always going to be difficult due to the fact that a binding definition of terrorism does not exist. Still practically, all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually in existence as well as by customary international law.<sup>41</sup> Indeed, in international law there is no field or sector in which terrorism is not forbidden. It is a prohibition that exists independent of the context in which the terrorist activity takes place: in time of war or in time of peace. In time of war, the international norms applied to international and non-international armed conflicts expressly prohibit the resort to terrorism against combatants and the

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<sup>38</sup> OJEU L 164 of 2 June 2002.

<sup>39</sup> OJEU L 330 of 9 December 2008.

<sup>40</sup> Regarding this question, see Bou Franch and Fernández de Casadevante Romani (2009).

<sup>41</sup> This aspect is also underlined by the Report of the High Level Panel on Threats, Challenges and Change. Again, it was stated that practically all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually existent as well as by customary international law, the Geneva Conventions or the ICC Statute, see Press Release SG/SM/8891 of 23 September 2003.

civilians. Such a prohibition derives clearly from the Geneva Conventions of 1949<sup>42</sup> as well as from its additional Protocols of 1977.<sup>43</sup>

Furthermore, International Humanitarian Law makes no distinction between crimes of war and crimes against humanity, so that the violation of one of its norms can be qualified as crime of war or as crime against humanity. More recently, in 1986, the ICJ recalled its statement in the *Corfu Channel* case in the line that existent prohibitions in the frame of international humanitarian law (prohibitions also appertaining to customary international law) are applicable both in peacetime and in wartime as “certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war”.<sup>44</sup>

In time of peace, terrorism is an international crime that is prohibited. The thirteen existing international treaties actually relating to terrorism<sup>45</sup> cover most of the various forms of terrorism and oblige states to take necessary measures to ensure that such acts are defined as offences under national law. It has to be remembered that the Geneva Conventions as well as their Protocols and the thirteen international treaties specifically related to terrorism are complementary. This means that these last are also applicable in peacetime and in international or internal armed conflicts.

To complete this description, it is necessary to add that terrorism is also envisaged by international criminal law.<sup>46</sup> Terrorism is one of the most serious international crimes. Even if it is not expressly qualified as a crime under the jurisdiction of the ICC, much of the acts envisaged by the international treaties relating to terrorism are, at the same time, acts appertaining to the “crime against humanity”.<sup>47</sup>

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<sup>42</sup> In this regard, see arts 27, 33 and 34 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. As an example, article 33 states: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.” See also article 51 para. 2 of Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, and arts 4 and 13 of Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts of 8 June 1977.

<sup>43</sup> So, for example, article 51 para. 2 of Protocol I, which states, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Also, article 13 para. 2 of Protocol II.

<sup>44</sup> I.C.J. Reports 1949, 22. This statement was recalled in the *Case concerning Military and Paramilitary Activities in and against Nicaragua, Merits*, ICJ Reports 1986, 114, para. 218.

<sup>45</sup> Security Council Resolution S/RES/1377 (2001) of 12 November 2001 obliges states to rapidly ratify these treaties.

<sup>46</sup> In this respect, see Cassese (2008), 162 et seq.; Bollo Arocena (2004).

<sup>47</sup> International legal doctrine and jurisprudence agree on this matter. In this line also, the president of the ICC, *ut supra* p. 62 et seq. In Spain, the non-prescription of crimes of terrorism has been recently ruled by a bill (*Ley Orgánica*) modifying the Criminal Code. It concerns terrorist offences with result of death or serious injuries.

To prosecute before the ICC, those terrorist acts actually defined as crimes against humanity, according to article 7 of the ICC Statute, it would be necessary that the Prosecutor proves the four elements, which constitute a crime against humanity. First, the commission of certain acts; second, those acts have been committed as part of a widespread or systematic attack. Third, the attack was directed against any civilian population in application or execution of the politics of a state or of an international organization. Finally, the knowledge the author of such acts had of the fact that such acts were part of a widespread or systematic attack.<sup>48</sup> As an international crime, the principle *aut dedere aut iudicare* applies. It can be concluded that acts of terrorism are generally envisaged, defined and incriminated,<sup>49</sup> which will be further examined now.

### The Concept of Terrorism in the Frame of United Nations

In the framework of general or universal international law, the Security Council's Resolution 1566 (2004), even though it does not contain a general definition of "terrorism", lists several acts considered as being acts of terrorism by different international treaties. The listing of such acts is made with reference to the existing international treaties on terrorism. This list of acts in Resolution 1566 (2004) is made "Acting under Chapter VII of the Charter of the United Nations", i.e., in exercise of the Security Council's primary responsibility for the maintenance of international peace and security conferred upon it by Article 24 of United Nations Charter<sup>50</sup> and with the binding effects that resolutions adopted under Chapter VII of the Charter have. The Security Council in operative paragraph 3,

3. Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or

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<sup>48</sup> Kirsch, see note 8 of the present chapter. In practice, only some acts of terrorism are excluded from the jurisdiction of the ICC, e.g. those committed in time of peace which do not fulfil the constitutive elements of the qualification of a crime against humanity. Doucet (2005), 271 et seq.

<sup>49</sup> See Doucet (2005).

<sup>50</sup> Article 24 states: "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf". Article 25 adds: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.<sup>51</sup>

As may be seen in this paragraph, there is no definition *stricto sensu* of terrorism. Operative paragraph 3 of Resolution 1566 (2004) present several aspects. On the one hand, it is the first time that this organ of the United Nations refers to terrorism in such detail. An analysis of operative paragraph 3 reveals that it embraces all *criminal acts* including those against civilians and also against the military.<sup>52</sup> These acts are committed *with the intent* to cause death or serious bodily injury or to take hostages. They are committed *with the purpose* of creating a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organization to do or to abstain from doing any act. These acts *constitute offences* within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>53</sup> Finally, they are criminal acts that are *under no circumstances justifiable* by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. Consequently, the Security Council calls upon all states to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

With regard to the reference to international conventions and protocols relating to terrorism, it should be mentioned that some of these treaties, even if they do not directly refer to terrorism, have as their subject a series of acts actually considered as being terrorism. This is the case with wrongful acts against the safety of the civil

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<sup>51</sup> In the opinion of L.M. Hinojosa Martínez, this definition is not technically precise, see his work Hinojosa Martínez (2008), 604.

<sup>52</sup> Even though there is no express reference to military personnel, it can be included since resort to terrorism is prohibited in International Humanitarian Law, see *ut supra* p. 69 et seq. See also article 4 para. 2 lit. d of Additional Protocol II, according to which acts of terrorism against “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted”, are and shall remain prohibited at any time and in any place whatsoever.

<sup>53</sup> Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 24 February 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 14 October 2005; Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1 March 1991; International Convention for the Suppression of Terrorist Bombings of 15 December 1997; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005.

aviation and wrongful acts at airports serving international civil aviation<sup>54</sup>; and the use of unmarked and undetectable plastic explosives.<sup>55</sup>

Together with these international Conventions, there are others that directly envisage terrorist acts. According to them, the following acts are qualified as terrorist acts,

1. The “intentional commission of a murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger this person or his or her liberty”, “a threat to commit any such attack”, “an attempt to commit any such attack” and “an act constituting participation as an accomplice in any such attack;”<sup>56</sup>
2. The seizure, detention and threat of a person “to kill, to injure or to continue to detain another person in order to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage;”<sup>57</sup>
3. The unlawful and intentional deliverance, placement, discharging or detonating of “an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility” with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, facility or system, “where such destruction results in or is likely to result in major economic loss;”<sup>58</sup>
4. The possession of radioactive material or the making or possession of a device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment, as well as the use in any way of radioactive material or a device, or the use or damage of a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment; or with the intent to

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<sup>54</sup> That constitutes the subject of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, UNTS Vol. 974 No. 14118.

<sup>55</sup> That constitutes the subject of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, see note 175. Its object is to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing). With this aim, States Parties are obliged within their respective territories to ensure effective control over “unmarked” plastic explosives.

<sup>56</sup> See article 2 para. 1 lit. a of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973, UNTS Vol. 1035 No. 15410.

<sup>57</sup> Article 1 para. 1 of the International Convention against the Taking of Hostages of 17 December 1979, UNTS Vol. 1316 No. 21931.

<sup>58</sup> Article 2 para. 1 of the International Convention for the Suppression of Terrorist Bombings of 15 December 1997, UNTS Vol. 2149 No. 37517.

compel a natural or legal person, an international organization or a state to do or refrain from doing an act<sup>59</sup>;

5. The intentional commission of “an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property.” Also, the theft or robbery of nuclear material in order to compel a natural or legal person, international organization or state to do or to refrain from doing any act, as well as the attempt to commit any of the offences just described<sup>60</sup>;
6. The provision or collection of funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”<sup>61</sup> or “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act;”<sup>62</sup>
7. The unlawful and intentional seizure or exercise of control over a ship by force, threat or any other form of intimidation to commit an act of terrorism; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.<sup>63</sup> Also, the use of a ship as a device to further an act of terrorism; the transport on board a ship of various

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<sup>59</sup> Article 2 para. 1 of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005. This Convention includes as an offence the threat to commit the offences quoted here (see article 2 para. 2).

<sup>60</sup> Article 7 para. 1 of the Convention on the Physical Protection of Nuclear Material of 3 March 1980, UNTS Vol. 1456 No. 24631.

<sup>61</sup> Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 14 October 2005; International Convention for the Suppression of Terrorist Bombings of 15 December 1997.

<sup>62</sup> Article 2 para. 1 of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, UNTS Vol. 2178 No. 38349.

<sup>63</sup> See article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, UNTS Vol. 1678 No. 29004.

materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism; as well as the transporting on board a ship of persons who have committed an act of terrorism<sup>64</sup>;

8. The unlawful and intentional seizure or exercise of control over a fixed platform by force or threat thereof or any other form of intimidation; the performance of an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; the destruction of a fixed platform or the causing of damages to it which is likely to endanger its safety; the placement or causing to be placed on a fixed platform, by any means whatsoever, of a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; the injuring or killing of any person in connection with the commission or the attempted commission of any of the offences just described.<sup>65</sup>

Consequently, although there is no generally accepted definition of terrorism, it is possible to build an objective definition of terrorism based upon the commission of concrete acts that comprehend the great majority of terrorist acts. Such concrete acts are those envisaged by the international conventions quoted above.<sup>66</sup> Despite the value of this catalogue of acts considered as criminal offences made by reference to the international treaties on terrorism, it should be added that such a catalogue does not cover all forms of terrorism. In other words, there are forms of terrorism other than those envisaged in the treaties quoted here. Such is the case of urban violence, extortion or political prosecution which was denounced, e.g. by the Human Rights Commissioner of the Council of Europe in its report regarding the visit to the Autonomous Basque Community (Spain) in February 2001.<sup>67</sup>

### The Concept of Terrorism in the Frame of the European Union

As stated above, in the frame of the European Union the nonexistence of a generally accepted concept of terrorism is to some extent covered by the qualification as “terrorist offences” of the acts listed in Council Framework Decision (2002/475/

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<sup>64</sup> See the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 14 October 2005.

<sup>65</sup> See article 2 para. 1 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 14 October 2005, UNTS Vol. 1678 No. 29004.

<sup>66</sup> Cf. Hinojosa Martínez (2008), 60.

<sup>67</sup> Cf. Council of Europe, The Commissioner for Human Rights, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain and the Basque Country 5–8 February 2001 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg, 9 March 2001, CommDH (2001) 2. In this respect, see Fernández de Casadevante Romani (2006). Also, Lozano Contreras (2001–2002), 17 et seq.

JHA) of 13 June 2002. Article 1 lists a series of intentional acts which are considered “terrorist offences” and oblige Member States to take necessary measures to ensure that such acts are defined as offences under national law.<sup>68</sup> Such acts are<sup>69</sup>:

- Seriously intimidating a population,
- Unduly compelling a Government or international organization to perform or abstain from performing any act,
- Seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

According to article 1, the following intentional acts 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).

As can be seen, terrorism is not exhaustively described.<sup>70</sup> This is why Council Framework Decision (2008/919/JAH) of 28 November 2008 provides “for the criminalization of offences linked to terrorist activities in order to contribute to the more general policy objective of preventing terrorism through reducing the

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<sup>68</sup> According to article 1 of the Council Framework Decision 2002/475/JHA, “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, . . .”.

<sup>69</sup> Article 4 also envisages the fact of inciting or aiding or abetting an offence referred to in article 1 para. 1 and in articles 2 or 3.

<sup>70</sup> From the perspective of Spain, some criminal acts present in the terrorist acts of the Basque terrorist nationalist organization ETA remain outside this catalogue. This is the case with political prosecution (which can lead to exile). Extortion is covered by the revision by the Council Framework Decision 2008/919/JHA of 28 November 2008.



dissemination of those materials which might incite persons to commit terrorist attacks.”<sup>71</sup> By this, states are obliged to take the necessary measures to ensure that offences linked to terrorist activities include the following acts:

- (a) Public provocation to commit a terrorist offence;
- (b) Recruitment of terrorists;
- (c) Training of terrorists;
- (d) Aggravated theft with a view to committing one of the offences listed in Article 1(1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, quoted here;
- (e) Extortion with a view to the perpetration of one of the offences listed in Article 1(1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, quoted here;
- (f) Drawing up false administrative documents with a view to committing one of the offences listed in Article 1(1)(a) to (h) and Article 2(2)(b) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, quoted here.

### The Concept of Terrorism in the Frame of Other Regional Systems

The European regional system is not the only with international regulation on terrorism. On the contrary, there are actually seven international treaties adopted in the frame of other regional systems. Most of them have a definition of terrorism as well as a description of acts considered terrorist acts. As we will see, these treaties have in common with the Security Council Resolution 1566 (2004) and with both Council Framework Decisions (2002/475/JHA) of 13 June 2002 and (2008/919/JAH) of 28 November 2008 the fact of underlying in terrorist acts the presence of the following elements:

- They are all criminal acts that are fulfilled with a concrete intention and purpose,
- These criminal acts are under no circumstances justifiable.

The treaties in question are the following: the Arab Convention on Suppression of Terrorism, of 22 April 1998, adopted in the frame of the *Arab League*<sup>72</sup>; in the frame of the *Cooperation Council For Arab States Of The Gulf*, the Convention against Terrorism of 4 May 2004<sup>73</sup>; the Convention of the Organization of the Islamic Conference on combating international terrorism of the 1st July 1999, adopted in the frame of the *Islamic Conference Organization*<sup>74</sup>; in the *African regional system*, the Convention on the Prevention and Combating

<sup>71</sup> Paragraph 7 of its preamble, *OJEU* L 330 of 9 December 2008.

<sup>72</sup> See Article 1.2 in <https://www.unodc.org>.

<sup>73</sup> Article 1 defines both “terrorist act” and “terrorist offence” *ibid*.

<sup>74</sup> See Article 1.2, *ibid*.

of terrorism, of 14 July 1999 and its Protocol of 2004<sup>75</sup>; in the *Asiatic regional system* and adopted in the frame of the *South Asian Association for Regional Cooperation (SAARC)*, the Regional Convention on Suppression of Terrorism of 4 November 1987 and the Additional Protocol to it of 6 January 2004<sup>76</sup>; in the frame of the *Association of South East Asian Nations (ASEAN)*, the ASEAN Convention on Counter-Terrorism of 13 January 2007. At least, in the *American regional system*, the Inter-American Convention Against Terrorism, of 2002.<sup>77</sup>

From these treaties, only three do not have a definition of terrorism: the SAARC Regional Convention on Suppression of Terrorism of 4 November 1987, the ASEAN Convention on Counter-Terrorism of 13 January 2007 and the Inter-American Convention Against Terrorism of 2002. Nevertheless, the SAARC Regional Convention on Suppression of Terrorism of 4 November 1987 contains a list of acts that shall be considered as terrorist acts.<sup>78</sup> Except for these differences all the treaties have concurrent and common points.

## **Consequently, There Are Sufficient Elements to Build a Concept of Terrorism**

In the frame of the United Nations as well as in the regional frame of the European Union, there are sufficient elements to conclude which acts may be actually qualified as terrorism. In the case of the United Nations, Resolution 1566 (2004) of the Security Council states that terrorist acts are criminal acts committed against civilians and the military with a concrete intentional element: that of causing death or serious bodily injury, or taking of hostages. These are acts with a concrete purpose: that of provoking a state of terror in the general public or in a group of persons; intimidating a population or compelling a government or an international organization to do or to abstain from doing any act. Such criminal acts committed against civilians and the military are under no circumstances justifiable. Such criminal acts committed against civilians and the military with the intention and purpose quoted above actually constitute criminal offences which are defined as such in international treaties on terrorism; treaties which comprehend the great majority of terrorist acts.<sup>79</sup>

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<sup>75</sup> See Article 1.3 of the Convention. *ibid.*

<sup>76</sup> See Article 1 of both treaties. *ibid.*

<sup>77</sup> It does not contain a definition of terrorism and makes a remission to the international treaties on terrorism.

<sup>78</sup> In Article 1.e). In Article 1.f), it also envisages the attempt and the conspiracy to commit such acts. *ibid.*

<sup>79</sup> They are annexed to Security Council Resolution S/RES/1566 (2004) of 8 October 2004.

In the case of the European Union, the benefits deriving from Council Framework Decisions (2002/475/JHA) of 13 June 2002, and (2008/919/JAI) of 28 November 2008 are more obvious because they oblige Member States to take the necessary measures to ensure that the intentional acts referred to become punishable as criminal offences. This is why it is possible to conclude that the legal frame built in the European Union constitutes a big advance both from the point of view of the definition of terrorism and of its consequences in the legal field.

The international treaties existing in the different regional systems follow the same line. As can be seen most of them contain definitions both of “terrorism” and of “terrorist acts” and the others make a remission to the acts envisaged by the existent international treaties on terrorism. That is the treaties to which point 3 of the Security Council resolution 1566 (2004) adopted in the frame of Chapter VII of the Charter refers to.

The analysis of the legal body constituted by Security Council resolution 1566 (2004), by Council Framework Decisions (2002/475/JHA) of 13 June 2002, and (2008/919/JAI) of 28 November 2008, as well as by the treaties existing in the different regional systems allow one to conclude the existence in all these international norms of *common elements*. These are the ways in which it defines terrorism or the acts considered as terrorist, the intention and purpose of such acts as also the statements that are under no circumstances justifiable.

With regard to the first element, its *definition* or *description*, those international norms quoted above underline the fact that they are always acts of violence or the threat of use of violence against civilians and the military. Second, all of it underline the existence of an *intentional element*: such acts of violence are realized for the advancement of an individual or collective criminal agenda, with the aim of causing death or serious bodily injury or aiming to cause damage to the environment or to public or private installations or property, or to natural resources or to the cultural heritage. Third, all international norms quoted above emphasize that such criminal acts are realized with a *concrete purpose* consisting either in seriously terrorizing or intimidating a population, or an attempt on the life, freedom and security of the population, or disrupting any public service, the delivery of any essential service to the public or to create a public emergency; or in unduly compelling a Government or international organization to perform or abstain from performing any act.

At least all international norms quoted above underline that terrorist acts are *under no circumstances justifiable*.

Consequently, with the existing elements to achieve the goal, it should not be so difficult to arrive at a consensus on the international general definition of terrorism. In particular because the *political* element of the discrepancy—that is resorting to armed force in the defence of the right to self-determination or against the occupant of a territory—is already covered in international law. In other words, even in such cases international law does not authorize the resort to terrorism. It allows resorting to armed force, but it is an armed force within the framework of international law: an armed force that should be managed respecting the international obligations existing on the matter. Clearly, international law never authorizes the resort to terrorism.

## The Lack of a Concept of “Victim of Terrorism”: Proposals

As stated earlier, in contrast to other categories of victims which have a definition of victim that is based in the international norms related to them, in the case of victims of terrorism the non-existence of concrete international norms related to them has as a consequence given rise to the non-existence of a concept of what such victims are. This is why I have criticized the passivity of the UN on the matter and why I ask for legal action from the UN promoting an international norm on victims of terrorism on the lines of those others adopted by this international organization with regard to other categories of victims such as victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law and victims of enforced disappearance.

In the interim, the lack of an international concept of “victim of terrorism” can be filled by different ways. On the one hand, by reference to the international norms containing a definition of terrorism or containing a list of acts considered “terrorist acts”. In such cases, it is clear that persons becoming victims of such acts—acts that are qualified by the concerned international norms as terrorist—fulfil the requirement of victims of terrorism.<sup>80</sup> On the other hand, and on the same lines, persons who are targets of the criminal acts prohibited by the international treaties on terrorism that are annexed to Security Council Resolution 1566 (2004) as well as by four of the regional treaties quoted earlier also fulfil the requirement of victims of terrorism.<sup>81</sup> At least, the obligation on the charge of states to take necessary measures to ensure that the international acts referred to become punishable as criminal offences lead to the conclusion that, once such legal action is taken, victims of such criminal offences become victims of terrorism. On the contrary, the lack of such legal action by states would prevent victims of the concerned criminal offences from being qualified as victims of terrorism. In other words, to make it possible the legal action of states in domestic law is indispensable.

At the same time, that the states take legal action in domestic law by necessary measures to ensure that the international acts referred to in the different treaties on terrorism (and on other international crimes) become punishable as criminal offences would also enlarge the concept of the victim. Through this, a larger number of victims would benefit from the statute inherent to the different categories of victims actually existent.<sup>82</sup> And this from the double perspective adopted by

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<sup>80</sup> The same is the case of the Security Council Resolution 1566 (2004) (S/RES/1566), of Council Framework Decisions (2002/475/JHA) of 13 June 2002 and (2008/919/JHA) of 28 November 2008, and of the international treaties existing in the different international regional systems.

<sup>81</sup> The Convention of the Organization of the Islamic Conference on combating international terrorism of the 1st July 1999, adopted in the frame of the *Islamic Conference Organization*; the Regional Convention on Suppression of Terrorism of 4 November 1987, adopted in the frame of the *South Asian Association for Regional Cooperation (SAARC)*; the ASEAN Convention on Counter Terrorism of 13 January 2007, in the frame of the *Association of South East Asian Nations (ASEAN)* and the Inter-American Convention Against Terrorism, of 2002, adopted in the frame of the *American regional system*.

<sup>82</sup> Because all these norms require that states take the necessary measures to ensure that the international acts referred into become punishable as criminal offences in domestic law.

international norms on victims—on the one hand, *direct victims*: that is victims having suffered harms and on the other hand, *indirect victims*: that is the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

But what is important is that in all these cases we are confronted by victims of crime. In some of them moreover, we are confronted by victims of very serious crimes.

As a consequence of all this, we can conclude that the non-existence in international law of a concrete definition of “victim of terrorism” does not constitute a real obstacle because this lack can be filled by reference to the universal and regional international norms on terrorism.

Complementarily, the determination of the type of victim (if direct or indirect) can also be done by reference to the General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted on 29 November 1985, because terrorism is an infringement of criminal domestic law.

Although the propositions I have put forward could be useful to fill the gaps actually existing in the matter, it is obvious that the best solution would be a specific international norm on victims of terrorism. In the meanwhile, as stated, it is possible to determine which persons fulfil at a given moment the requirement of victims of terrorism. Complementarily, such persons would also be victims of crime as well as victims of gross violations of international human rights law and consequently benefit from the rights that international norms recognize as due to these categories of victims.

## **The Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime: an inadequate response for victims of terrorism**

As we have seen, to date the work developed by the European Union in the field of victims has failed to pay adequate care to the victims of terrorism, having devoted its attention almost exclusively to victims of crime. With regard to them, *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*,<sup>83</sup> actually in discussion by the EU, will substitute Council Framework Decision 2001/220/JHA of 15 March 2001 *on the standing of victims in criminal proceedings*.<sup>84</sup> It is a Proposal for a Directive containing a catalogue of rights to which victims of crime are entitled. Obviously victims of terrorism, in their status as victims of

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<sup>83</sup> European Commission, Brussels 18.5.2011, SEC(2011) 580 final. About this Proposal for a Directive cf. [Pemberton and Groenhuijsen](#).

<sup>84</sup> *OJ*, L 82, of 22 March 2001.

crime—the crime of terrorism—can also invoke such rights but it is important to underline that terrorism is not an ordinary crime but a crime that seriously violates human rights as well as an international crime.

With regard to the past as well as to the actual regulation on the matter, the Proposal for a Directive constitutes an advance from the perspective of victims' international legal statute because it is now through a clearly binding norm—a directive—that Member States will be obliged to safeguard the exercise of a catalogue of rights broader and more specific with regard to the victims of crime than that currently existing in the aforementioned Framework Decision.<sup>85</sup>

In addition, the Proposal for a Directive is not confined to proclaim a series of rights but its aim is broader in that it also includes “support and protection” of the category of victims it envisages: victims of crime.

This is why I consider that the *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime* is *inadequate* from the perspective of the victims of terrorism: on the one hand because it is not intended for them, but in general, for victims of crime.<sup>86</sup> As a result, it does not give visibility to the victims of terrorism and visibility is important. Particularly because, in contrast to other categories of victims, victims of terrorism become victims as instruments used by terrorists groups or associations to combat democracy and to attack the structure of the State seeking to defeat it imposing by force a totalitarian project. Terrorizing society is the means to achieve this. This is why victims of terrorism are not like other categories of victims. It is true, as already said, that terrorism is a crime and as a result, that victims of terrorism are also and at the same time victims of crime. However terrorism is not a simple crime (like murder, for example) nor are the victims of terrorism simple victims of crime. No. Terrorism is a serious violation of human rights and an international crime. This is why victims of terrorism are defined as *macrovictims*.<sup>87</sup>

Consequently, recognition of victims of terrorism is, overall, recognition of the fundamental values of democracy and the rule of law; values that are only possible in democratic societies and that need to be protected.

On the other hand this Proposal for a Directive is not only limited to victims of crime but, with respect to these, its intention is not to establish or pick up a catalogue of rights which they are holding, but simply “minimum standards on the rights, support and protection of victims of crime”; minimum standards that Member States can improve.

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<sup>85</sup> Cf. Pemberton and Rasquete.

<sup>86</sup> Its title is clear: *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*.

<sup>87</sup> As noted by Beristain, all crimes of terrorism are of a greater tragic gravity than similar crimes in the same genus (a terrorist murder is more serious than murder). For this reason, their victims deserve the name of macrovictims. (See Beristain 2004, 35.) See also Beristain (2000, 2008).

*Third*, the victims of terrorism are not a simple category of “vulnerable” victims. In this regard, the Proposal for a Directive falls short. Despite the fact that in Recital No. 18 of the Proposal for a Directive it is stated that “victims of terrorism require particular attention in any assessment—in order to determinate their vulnerability—given the varying nature of such acts ranging from mass acts of terrorism to targeted terrorism against individuals”<sup>88</sup> later, in the corresponding article—article 18, entitled “Identification of vulnerable victims”—the victims of terrorism are not identified as a vulnerable category.<sup>89</sup>

In any case, even if we include victims of terrorism in the category of vulnerable victims, limiting the treatment of victims of terrorism to their inclusion in that category is insufficient and unsatisfactory because, as I have already said, the victims of terrorism are not a simple category of vulnerable victims or simple victims of an ordinary crime but victims of a crime seriously violating human rights as well as an international crime—a crime committed to terrorize society as the means of attacking the State and destroying democracy in order to impose by force a totalitarian project.

*Fourth*, the Proposal for a Directive does not list the rights claimed by the victims of terrorism. It is merely a case, within the right to information, of providing information to victims of any change in the implementation of the judgment: prison privileges, benefits, changes in level, etc. In this regard, article 4 (titled, “*Right to receive information about his case*”) only provides notification to the victim, when it has so requested, of the following issues:

- Of any decision ending the criminal proceedings instituted as a result of the complaint of a criminal offence made by the victim,
- The decision not to proceed with or to end an investigation or a prosecution, or a final judgement in a trial, including any sentence;
- Information enabling the victim to obtain information of the state of affairs of the criminal proceedings instituted as a result of the complaint of a criminal offence made by the victim, unless, in exceptional cases the proper handling of the case may be adversely affected;
- The time and place of the trial;
- The time when the person prosecuted or sentenced for offences concerning them is released from detention.

These gaps and more are explained precisely by the general character<sup>90</sup> possessed by this Proposal for a Directive because it is only intended for victims of crime;

<sup>88</sup> European Commission, Brussels 18.5.2011, SEC(2011) 275 final, 17.

<sup>89</sup> Article 18 only considers as vulnerable victims “due to their personal characteristics” the following: Children and Persons with disabilities. On point 2 it states: “For the purposes of this Directive, the following categories of victims are considered to be vulnerable due to the nature or type of crime to which they have fallen victim: (a) Victims of sexual violence; (b) Victims of human trafficking.”

<sup>90</sup> General character because it only envisages victims of crime. That is, *all* kinds of crime.

generality that is *incompatible* with the special treatment in a specific international norm which—like other categories of victims—are also required by the victims of terrorism.

The Proposal for a Directive itself is aware of that and says so explicitly in the concluding paragraphs of its explanatory memorandum: on the one hand, when it states—without concretising them—that “victims of terrorism will benefit from improved mechanisms for identifying their needs, keeping them informed of proceedings and providing adequate protection during proceedings”; on the other hand, when it states that “looking to the future, action in relation to specific categories of victims such as victims of terrorism and organised crime is also envisaged. In particular analysis of the existing gaps in the protection of victims of terrorism is due to take place with a view to improving the situation of victims of terrorism in Europe”.<sup>91</sup>

At least, if we compare the rights listed in the Proposal for a Directive and those listed in the *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe on 2 March 2005, we see that neither the right of emergency assistance nor the right to continuing assistance are envisaged by the proposal. This last, on article 7, only takes into account the right to access free of charge confidential victim support services. The same concerns the right to investigation and to prosecution that is not envisaged by the proposal.

On the other hand, both texts have in common the lack of references to two rights closely linked to victims of terrorism and victims of serious violations of human rights: the right to the truth and the right to memory.

## **The Need for a Specific International Norm on the Victims of Terrorism**

The analysis I have done confirms, in my opinion, the need for both the UN and the European Union to develop an international norm on the international legal statute of victims of terrorism. That is, a catalogue of rights to which this category of victims is entitled.

As I have also stated, it is not a difficult task since both international organizations do not have to do anything else but follow the path outlined by the Council of Europe with its *Guidelines on the Protection of Victims of Terrorist Acts*, adopted by the Committee of Ministers on 2 March 2005. That is, Guidelines containing both a general concept of victim of terrorism and a catalogue of services, measures and rights which the victims of terrorism are entitled to.

As I have already said and will address more broadly later, in my opinion the above-mentioned catalogue of rights must be completed with the other two directly

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<sup>91</sup> European Commission, Brussels 18.5.2011, SEC(2011) 275 final, 4.



linked to the victims of serious violations of human rights: the right to the truth and the right to memory.

The need for this specific international norm on victims of terrorism is justified, we must insist, by the very nature of the terrorist act: an act that constitutes a serious violation of human rights—an international crime—which aims at terrorizing the population in general and compelling a Government to act or fail to act in a certain sense to achieve the imposition by force of a totalitarian political project that the terrorist group pursues.

On the other hand, and from the *victimological perspective*, the victims of terrorism are not simple victims of crime but macrovictims. Including victims of terrorism within the more general category of victims of crime is therefore negative because it aids to ignore them, preventing their visibility. In other words, they help to make them—once more—invisible. In this case, in the legal field.

Finally, the development of a particular international norm for the victims of terrorism also has pedagogical virtues for the democratic system and their societies because it highlights the fragility of democracy and the need for recognition of those who, being innocent, have been unjustly slaughtered by those availing of democracy, seeking to annihilate her and, with it, its system of freedoms to impose a totalitarian political project on society as a whole. For terrorists, the victims are only the means to achieve it and the maximum possible terror is the instrument for which society crease at will.

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# The Existence of Common Elements in the Different Definitions of Victim

The recognition of the condition of victim is important because it has legal consequences. The most important of it is the attribution to the victim of a catalogue of rights that, at the same time, are obligations on the charge of states. Additionally, such recognition is also important because states, international organizations, NGOs and private companies are called upon by international norms to treat victims with respect and compassion as well as in a manner which respects their personal security, their private as well their family life.<sup>1</sup>

From this perspective, the determination of which persons are entitled to the condition of victim is a relevant question. Nevertheless, in international law there does not exist a unique definition of victim but almost as many definitions as categories of victims. In any case, this lack does not constitute a problem. On the one hand, because almost all categories of victims envisaged by international norms become victims as a consequence of a crime, is the hypothesis envisaged by the UN General Assembly resolution 40/34 adopted on 29 November 1985 which contains the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>2</sup> On the other hand, because the existence of a common definition of victim is not necessary to determine the rights that make part of the international legal statute of victims. In reality, like in other fields, the definition of who fulfils the condition of victim in a concrete case is a question of common sense. It is the group of persons directly targeted by the concerned criminal act.

Consequently, the lack of such a common definition can be filled by the definition of victim from the UN General Assembly Resolution 40/34 quoted earlier; a resolution reflecting the consensus of the international community on the matter.

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<sup>1</sup> See Bassiouni (2002), 134–185.

<sup>2</sup> The only victims who do not become victims as a consequence of a crime are victims of abuse of power. That is, “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights”.