

Rethinking terrorism in international law

An enquiry into the legal concept of international state terrorism

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I. Introduction

From 27 December 2008 to 18 January 2009, the Israeli army carried out a military intervention in the Gaza Strip, the so-called Operation 'Cast Lead'. During this period of time, Gaza was bombed from the sky and the sea and, in the second phase of the offensive, was invaded by land. Eventually, Palestinian casualties amounted approximately to more than 1400, most of them civilians. On the other hand, 13 Israeli citizens were killed, 10 soldiers and 3 civilians.¹ Operation 'Cast Lead' was judged as "the most violent, the most brutal and the bloodiest offensive against Palestinian civilians and their property since the beginning of Israeli occupation in 1967".² The pattern of widespread destruction was clearly testified by the way the first attacks were carried out: the air bombing took place during rush hour, when the streets of Gaza were crowded with people.³ On top of that, the suffering of the civilian population appears to be a distinctive feature of the Israel's military activities throughout the entire operation.⁴

These events constitute the background to the present thesis. The circumstances that characterised the conflict in Gaza, namely deliberate large-scale violations of human rights and International Humanitarian Law (IHL),⁵ may suggest new interpretations on the use of international armed force.⁶ The concept of aggression, indeed, does not seem to be the most appropriate to address such types of grave violations of human rights.⁷ That is to say, an ulterior legal concept could be more suitable in order to qualify a certain use of armed force whose apparent primary aim is to coerce another state's government by means of directly targeting its population. In fact, this manner of using

¹ See Human Rights Council (hereafter: HRC), Doc. A/HRC/12/48, *Human rights in Palestine and other occupied Arab territories*, Report of the United Nations Fact Finding Mission on the Gaza conflict, 15 September 2009 (hereafter: Goldstone Report), pars. 30-31.

² Palestinian Centre for Human Rights, *Targeted Civilians: A PCHR Report on the Israeli Military Offensive against the Gaza Strip*, 21 October 2009, http://www.pchrgaza.org/files/Reports/English/pdf_spec/gaza%20war%20report.pdf, p. 9. See also Goldstone Report, *op. cit.*, par. 1880: "[b]oth Palestinians and Israelis whom the Mission met repeatedly stressed that the military operations carried out by Israel in Gaza from 27 December 2008 until 18 January 2009 were qualitatively different from any previous military action by Israel in the Occupied Palestinian Territory. Despite the hard conditions that have long been prevailing in the Gaza Strip, victims and long-time observers stated that the operations were unprecedented in their severity and that their consequences would be long-lasting".

³ See Palestinian Centre for Human Rights, *op. cit.*, p. 21.

⁴ See subsection 3.2.3.

⁵ For a thorough analysis of armed attacks directly involving the civilian population and for an overall assessment of the operation, see in general the following reports: Goldstone Report, *op. cit.*; Palestinian Centre for Human Rights, *op. cit.*; B'tselem, *Guidelines for Israel's Investigation into Operation Cast Lead*, February 2009, http://www.btselem.org/press_releases/20090208. For a day-by-day first-hand account on the events occurred in Gaza, see in general V. Arrigoni, *Gaza. Restiamo umani*, Roma, Manifesto Libri, 2011.

⁶ For the purposes of the present work, the phrases 'use of force' or 'international force' must be understood as meaning 'armed force'.

⁷ For the definition of aggression, see subsection 3.2.1.



state force appears to share some characteristics with the crime of international terrorism, namely causing terror among a population to achieve political goals.⁸ The foregoing considerations lead to one question. When a state resorts to armed force not for the purpose of occupying a territory and when related armed attacks aimed directly at targeting the civilian population and its livelihoods, is it possible to consider such use of force as an act of international terrorism?

The present research will propose a reading of the use of international armed force in the light of the category of international terrorism. Thus, it will put forward a definition of international state terrorism.⁹ The overall aim of this work is to point out the twofold relevance of the concept of international state terrorism. From the theoretical viewpoint, it would complement the very concept of terrorism, which usually deals only with acts of non-state groups. From the legal point of view, it would rely on existing norms and most important it would supply the definition of aggression by tackling *specifically* certain uses of international force, which are especially serious.

II. International state terrorism. A theoretical perspective

2.1. Why define terrorism?

Terrorism¹⁰ has become a matter of international concern since the first half of the XX century.¹¹ After the second World War, the United Nations (UN) and its specialised agencies started to adopt a series of conventions with the purpose of criminalising specific acts of terrorism, such as the taking of hostages or crimes against internationally protected persons.¹² Nowadays, a debate surrounds the adoption of the Draft Comprehensive Convention against International Terrorism (DCCIT), which intends to be the final legislative step.¹³ This Convention does not aim at criminalising single physical acts, such as murder, destruction or taking of hostages, but rather terrorism as an autonomous crime.¹⁴ From the onset, some questions must be identified. Firstly, what is the rationale for criminalising terrorism as an independent offence? Why should the terroristic purpose of a crime, i.e. the spread of terror among a targeted social group, change the nature of offences such as murder or destruction instead of being simply deemed as an aggravating circumstance? Further, when is terrorism a matter of international concern? Accordingly, the concept of terrorism will first be addressed in order to explain the overall reasons for its criminalisation. Then, the analysis will move on to the international dimension of terrorism.

It is common knowledge that states used to criminalise terrorism as an autonomous offence. The reason lies in that terrorism is deemed not only as harmful for basic social

⁸ See subsection 3.2.2.

⁹ See subsection 3.2.3.

¹⁰ See below for the definition of terrorism.

¹¹ The earliest attempt of criminalising terrorism on the international level is the League of Nations Convention for the Prevention and Punishment of Terrorism, 1937.

¹² For a historical overview of UN Conventions on international terrorism, see A. Gioia, 'Terrorismo internazionale, crimini di guerra e crimini contro l'umanità', *Rivista di diritto internazionale*, (2004), 1, pp. 11 ff.. A list thereof is available at http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml.

¹³ See Draft Comprehensive Convention against International Terrorism, Doc. A/59/894, 12 August 2005 (hereafter: DCCIT).

¹⁴ See section 2.2 for the analysis of the text.



values, such as people's lives, but also as a threat to the very existence of the state. Indeed, as a form of political violence, terrorism intends to challenge the legitimacy of governments and public institutions.¹⁵ On the side of the state, labelling political violence as 'terrorist' is a key element to delegitimize it:

The term 'terrorism' was originally used to indicate violence inflicted by the dominant forces of a society, as during the *Régime de la Terreur* following the French Revolution [...]. The meaning developed in the nineteenth century in such a way to include violence outside the control of the state, such as the assassination of political leaders perpetrated by anarchists. Since then, the latter has become the most common meaning [...]. This partly reflects a specific political objective. Saying that terrorism is 'unconventional' implies a specific legal and political position, generally expressed by all states. They view the political activity of certain armed groups as *an illegitimate form of obtaining and enforcing power*. This rests on the fact that these groups break certain constitutional constraints. But, most importantly, they are labelled 'terrorists' because of their challenge to the monopoly of (the legitimate use of) political violence held by a state within a territory.¹⁶

Terrorist violence aims at political changes within a society.¹⁷ Any state, therefore, has an interest in combating terrorism, precisely because the latter challenges the legitimacy of the former. The peculiarity of terrorist violence lies on its means, namely the spread of terror among a certain group of people, usually the civilian population.¹⁸ Indeed, terrorism may be defined as follows: "the use (or the threat) of violence against civilians (and personnel not engaged in combat operations) by non-state entities for specific political purposes".¹⁹ The basic reason for considering terrorism as an autonomous offence, thus, is that it threatens fundamental values of organised societies. On the one hand, violent acts outrage fundamental human rights such as right to life and to personal security. On the other hand, terrorism tries to influence governments' behaviour outside constitutional mechanisms of political participation. So, human rights and normal political life are the main values at risk when dealing with terrorist violence.

The criminalisation of terrorism on the international level arguably relies on similar reasons, namely the protection of fundamental values of the international society. However, since distinct legal orders provide different meanings for the word 'terrorism', it is much more difficult to find a precise definition on the international plane.²⁰ As shortly shown, the lack of an internationally agreed upon definition of

¹⁵ "Groups resort to terrorism in order to acquire, maintain or extend political power over a society. Because of its use of violence, terrorism is seen as *an unconventional strategy for political struggle*, when compared with other forms that are generally adopted in a political regime, such as campaigning and voting during elections for various levels of government, and solving disputes through legal procedures [...]", see D. Tosini, 'Sociology of Terrorism and Counterterrorism: A Social Science Understanding of Terrorist Threat', *Sociology Compass*, (2007), 1/2, p. 665.

¹⁶ *Ibid.*

¹⁷ "[A]ll actions defined as 'terrorist' are based on *motivations that are mainly political* [...]", see *ivi*, p. 666.

¹⁸ "The use of violence against civilians (or personnel not engaged in combat operations) depends on a *communicative and strategic component of terrorism*. Apart from hurting or killing the victims who are the immediate targets of violence, a terrorist act also aims to generate a state of terror so as to influence other actors [...]", see *ivi*, p. 667.

¹⁹ *Ibid.*

²⁰ See K. K. Koufa, *Terrorism and Human Rights*, Progress report prepared by the Special Rapporteur, United Nations Commission on Human Rights, Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, par. 24.



terrorism does not actually affect the consensus on the rationale for its criminalisation. In this regard, Ben Saul observed that:

In State practice, view through the lenses of UN organs and regional organizations, the bases of criminalization are that terrorism severely undermines: (1) basic human rights; (2) the State and the political process (but not exclusively democracy); and (3) international peace and security [...]. Treating terrorism as a distinct category of criminal harm symbolically expresses the international community's desire to condemn and stigmatize 'terrorism', as such, beyond its ordinary criminal characteristics. Doing so normatively recognizes and protects vital international community values and interests.²¹

Similar reasons for criminalising terrorism were stated in the UN General Assembly (UNGA) resolution 49/60 of 1994.²² Furthermore, they were reaffirmed in the preamble of the DCCIT²³ which in turn declares that "acts of terrorism in all its forms and manifestations [...] endanger or take innocent lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings; [...] threaten the territorial integrity and security of States".²⁴ The terrorist threat to human rights and to the security of states is not *per se* a matter of international concern, since it could remain within the scope of domestic jurisdiction. Instead, terrorist acts must have an international element: the conduct should have transnational effects²⁵ or threaten international peace and security or other international values.²⁶ However, it can be noticed that serious domestic terrorist acts are becoming more of an international concern, as they are perceived as a danger to international values.²⁷

These concerns have always urged states to search for a legal definition of the crime of international terrorism. The next two sections will analyse how terrorism has been conceived in international law, in the two different contexts of peacetime and wartime respectively.

Whilst the present work deals with the manifold definitions of terrorism, it does not specifically address the issue of the lack of international agreement on such a definition. For a thorough research thereupon, see in general B. Saul, *Defining Terrorism in International Law*, New York, Oxford University Press, 2006.

²¹ B. Saul, *op. cit.*, pp. 10-11.

²² "Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society", see United Nations General Assembly (hereinafter: UNGA), Doc. A/RES/49/60, *Measures to eliminate international terrorism*, 9 December 1994, par. I(2).

²³ Par. 6 of the DCCIT preamble contains the same wording as par. I(2) of UNGA res. 49/60.

²⁴ DCCIT, preamble, pars. 4-5.

²⁵ See art. 4 DCCIT and art. 3 common to the following UN conventions, which already came into force: International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999), International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See also A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice*, (2006), 4, p. 938, which maintains that "the conduct must be *transnational* in nature, that is, not limited to the territory of one state with no foreign elements or links whatsoever [...]".

²⁶ See B. Saul, *op. cit.*, pp. 13-14 and 62.

²⁷ See for example the United Nations Security Council (UNSC) statement on terrorist acts which occurred in Nigeria in November 2011: UNSC, Doc. SC/10437 AFR/2278, 8 November 2011.



2.2. *International terrorism in time of peace*

As mentioned above, a well-known problem related to any legal efforts to criminalise international terrorism is the constant lack of consensus on its definition. In turn, such a lack has always hindered the rise of a customary norm.²⁸ According to Saul, it can only be contended that a customary norm on the *prohibition* of terrorism exists.²⁹ Also, UNGA res. 49/60, the broadest international condemnation of terrorism, only provides for the *reasons* for criminalising terrorism, yet falls short of a legal definition.³⁰ Furthermore, not even UN Security Council (UNSC)'s resolutions provide for a precise definition of terrorism.³¹ Additionally, and significantly, the crime of terrorism has not yet been included in the Rome Statute of the International Criminal Court (ICC), due to the lack of consensus on a definition.³² Moving from these considerations, it is worth understanding, in detail, how terrorism in peacetime is conceived and defined. For this purpose, both the DCCIT's definition and scholarly studies will be examined.

Art. 2(1) of the DCCIT provides:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.³³

The physical conduct envisaged in art. 2 is quite broad. It encompasses not only violations of the right to personal integrity and the right to life. It also includes, on the one hand, damages to public or private property, public facilities and the environment; and, on the other hand, any economic loss deriving from such damages. Furthermore, the subjective element is related to the alternative purpose of intimidating a population or influencing the behaviour of public institutions. The definition of terrorism provided by the DCCIT is generally accepted.³⁴ The negotiations are currently stalemated due to

²⁸ See B. Saul, *op. cit.*, p. 191. Also Georges Abi-Saab underlines the lack of *opinion juris* as to the definition of international terrorism; see G. Abi-Saab, 'The Proper Role of International Law in Combating Terrorism', in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford and Portland Oregon, Hart Publishing, 2004, pp. XIII and XX. *Contra* A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *cit.*, pp. 936 and 957. For a critique of Cassese's position, see B. Saul, *op. cit.*, pp. 211-12.

²⁹ See B. Saul, *op. cit.*, pp. 191 and 213.

³⁰ See *ivi*, pp. 210 ff.; see also D. Zolo, *Terrorismo umanitario. Dalla guerra del Golfo alla strage di Gaza*, Reggio Emilia, Diabasis, 2009, pp. 32-33.

³¹ See B. Saul, *op. cit.*, pp. 249-250.

³² See *ivi*, pp. 182-183; D. Zolo, *Terrorismo umanitario*, *cit.*, p. 201. See also International Criminal Court (hereafter: ICC), Doc. ICC-ASP/10/32, *Report on the Working Group on Amendments*, 12-21 December 2011, pars. 14-17.

³³ DCCIT, art. 2(1).

³⁴ Provisions of a similar broad nature may be found in some regional treaties. See art. 1 of the EU Framework Decision on Combating Terrorism; art. 1(2) of the Arab Convention for the Suppression of Terrorism, Cairo, 1998; art. 1(3) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism adopted at Ouagadougou, 1999; art. 1(3) Organization of African Unity Convention on the Prevention and Combating of Terrorism, Algiers, 1999.



the lack of consensus on art. 20,³⁵ which deals with the scope of application of the Convention.³⁶ It is worth mentioning that this Convention is meant to be the conclusive step of the international legislative process in combating terrorism.

Ben Saul and Antonio Cassese have summarised the constituent elements, which seem to be at the basis of many national, regional and international definitions of terrorism. Saul listed the elements present in most definitions:

- (1) any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
- (2) where committed outside an armed conflict;
- (3) for a political, ideological, religious, or ethnic purpose; and
- (4) where intended to create extreme fear in a person, group, or the general public, and:
 - (a) seriously intimidate a population or part of a population, or
 - (b) unduly compel a government or an international organization to do or to abstain from doing any act.³⁷

In turn, according to Cassese the international crime of terrorism:³⁸

- (i) is an action normally criminalized in national legal systems;
- (ii) is transnational in character, i.e. not limited in its action or implications to one country alone;
- (iii) is carried out for the purpose of coercing a state, or international organization to do or refrain from doing something;
- (iv) uses for this purpose two possible modalities: either spreading terror among civilians or attacking public or eminent private institutions or their representatives;
- and (v) is not motivated by personal gain but by ideological or political aspirations.³⁹

In both scholarly definitions, only serious criminal offences may amount to acts of terrorism. As to the subjective element, Saul's definition considers the spread of terror as an *aim* linked to that of intimidating a population or influencing the behaviour of public institutions. This formulation is similar to art. 2 DCCIT. However, the latter even considers conduct that does not aim at spreading terror, as terrorism. Indeed, in art. 2 intimidating a population or compelling a government to behave in a certain manner are alternative purposes. That is to say, a criminal act could be judge as a terrorist act even though it is not aimed at spreading terror at all. Cassese's definition in turn regards the spread of terror as a *means* for coercing public institutions. Other means may be the commission in general of violent acts against public authorities. Yet, the exclusive purpose is to compel governments or international organisations to behave in a certain manner.⁴⁰

Both Saul and Cassese consider that the *motive*, which may be political, ideological, philosophical, religious or ethnic, is a fundamental element of the definition of

³⁵ A number of the articles refer to the 2005 draft. Originally it was art. 18. In most recent drafts, art. 20 has become art. 3. See UNGA Sixth Committee Working Group (hereafter: WG), Doc. A/C.6/65/L.10, 2010, Annex II.

³⁶ For recent developments on the debate around the scope of application of the DCCIT, see in general UNGA Ad Hoc Committee (hereafter: Committee), Doc. A/62/37, 2007; WG, A/C.6/65/L.10, 2010.

³⁷ B. Saul, *op. cit.*, pp. 65-66.

³⁸ It must be underlined that in Cassese's view these elements are contained in a customary norm and a discrete international crime of peacetime terrorism already exists.

³⁹ A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *cit.*, p. 957.

⁴⁰ "It can be said that for terrorism to materialize two subjective elements (*mens rea*) are required. First, the subjective element (*intent*) proper to any underlying criminal offence: the requisite psychological element of murder, wounding, kidnapping, hijacking and so on (*dolus generalis*). Second, the *specific intent* of compelling a public or a prominent private authority to take, or refrain from taking, an action (*dolus specialis*)", see *ivi*, p. 940.



terrorism. Indeed, the motive must be ‘public-oriented’.⁴¹ Criminal law usually does not take into account the reasons why a crime is committed. It solely considers the intention of the actor to commit the criminal offence, without dealing with any underlying personal motives. Thus, the public-oriented nature of the motive is a specific feature of the definition of peacetime terrorism.⁴²

Finally, it must be highlighted that in all mentioned definitions international terrorism is a crime of non-state actors. Accordingly, the DCCIT is an instrument of law enforcement aimed at rendering national laws more uniform and effective, as well as at enhancing cooperation among states in their counter-terrorism strategies. Also scholarly proposals are based on norms and practices regarding non-state terrorism. Therefore, it can be said that the international concern over terrorism primarily relates to acts committed by non-state actors.

2.3. *Terrorism in time of war*

As shown below, the crime of terrorism in wartime has a different meaning than the crime of terrorism in peacetime. Such a difference is related to the peculiarity of armed conflict, whose inherent violence leads to a change in the nature of the terrorist offence. Several provisions of IHL deal with terrorism. Art. 51(2) of Additional Protocol I⁴³ (AP I) and art. 13(2) of Additional Protocol II⁴⁴ (AP II) to the Geneva Conventions state that “[...] [a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. Art. 33 of the Fourth Geneva Convention⁴⁵ (GC IV) provides that “[n]o 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”. Art. 4(2)(d) AP II states that “acts of terrorism” against persons who do not or have ceased to directly participate in hostilities “are and shall remain prohibited at any time and in any place whatsoever”. The meaning of terrorism in these articles varies and serves different purposes. Accordingly, the analysis will distinguish between, on the one hand, arts. 33 GC IV and 4(2)(d) AP II and, on the other hand, arts. 51(2) AP I and 13(2) AP II. Since the latter provisions are more relevant for the present work, they will be examined more thoroughly.

The meaning of terrorism in art. 33 GC IV “is mainly concerned with the illicit use of terror in the context of the maintenance of public order in an occupied territory”.⁴⁶

⁴¹ See B. Saul, *op. cit.*, p. 45.

⁴² “*Motive* in criminal law is normally immaterial [...]. Motive exceptionally becomes relevant here: [...] criminal conduct must be inspired by non-personal inducements”, see A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *cit.*, p. 940.

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereafter: AP I).

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (hereafter: AP II).

⁴⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (hereinafter: GC IV).

⁴⁶ S. Jodoin, ‘Terrorism as a War Crime’ *International Criminal Law Review*, (2007), 7, p. 91. See also O. Uhler, H. Coursier, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, Geneva, ICRC, 1958, pp. 225-226.



The subjects of the provision are so-called protected persons.⁴⁷ In turn, the definition of “acts of terrorism” provided by art. 4(2)(d) is based on art. 33 GC IV and concerns “acts of violence committed against non-combatants and their property”.⁴⁸ Both provisions aim to protect civilians and persons *hors de combat* from violent acts, which are usually committed in order to terrorise a population and annihilate any resistance, especially in occupied territories.

Arts. 51(2) AP I and 13(2) AP II provide an identical specific prohibition on terrorist acts, respectively in international and in non-international armed conflicts. First and foremost, it is worth noting that the prohibition of “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”⁴⁹ has become a rule of customary IHL.⁵⁰ The commentary of the International Committee of the Red Cross (ICRC) on AP I explains the meaning of this norm as follows:

1940. [T]he prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.⁵¹

4785. [...] Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. 4786. [...] Any attack is likely to intimidate the civilian population. The attacks or threats concerned here [art. 13(2) AP II] are therefore those, the primary purpose of which is to spread terror [...].⁵²

On the basis of the foregoing explanations, it can be maintained that the definition of terrorism in wartime has a narrower scope than the definition of terrorism in peacetime.⁵³

As to the objective element of the definition, “the *prohibited conduct* arguably consists of any *violent action* or *threat* of such action *against* civilians [...]. In contrast, the prohibition on terror does not cover terror caused as a by-product of attacks on military objectives [...]”⁵⁴ Therefore, any *lawful* attacks against combatants cannot result in an act of terrorism, even when they cause terror among civilians as an

⁴⁷ Art. 4 GC IV: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals [...]”.

⁴⁸ S. Jodoin, *op. cit.*, p. 95. See also International Committee of the Red Cross (hereinafter: ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC-Martinus Nijhoff Publishers, 1987, p. 1375.

⁴⁹ This is the wording of the second part of arts. 51(2) AP I and 13(2) AP II.

⁵⁰ J. M. Henckhaerts, L. Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules*, Cambridge, Cambridge University Press, 2005, pp. 8-11.

⁵¹ ICRC, *op. cit.*, p. 618.

⁵² Ivi, p. 1453.

⁵³ See B. Saul, *op. cit.*, p. 297; A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *cit.*, p. 946.

⁵⁴ Ivi, pp. 946-947. See also H. P. Gasser, ‘Acts of terror, “terrorism” and international humanitarian law’, *International Review of the Red Cross*, 84 (2002), 847, p. 556.



incidental effect.⁵⁵ Conversely, when an attack is carried out *unlawfully* against military persons or military objects with the primary purpose of terrorising civilians, such an attack may amount to an act of terrorism. Indeed, “[i]n such a case the terror inflicted on civilians would [...] not be incidental in nature since it would, by implication, constitute the primary purpose of the attack”.⁵⁶ According to the ICRC, “[e]xamples of acts of violence cited in practice as being prohibited under this rule include offensive support or strike operations aimed at spreading terror among the civilian population, indiscriminate and widespread shelling, and the regular bombardment of cities [...]”.⁵⁷ The International Criminal Tribunal for the former Yugoslavia (ICTY) also found that the protracted campaign of sniping and shelling or indiscriminate and disproportionate attacks carried out with the primary purpose of spreading terror among civilians amount to terrorism under IHL.⁵⁸

With respect to the subjective element, IHL requires acts to be committed with *dolus specialis*.⁵⁹ Hans-Peter Gasser pointed out that:

The *intention* to spread terror among civilians is a necessary element for defining acts of terrorism, for the simple reason that in war any use of deadly force may create fear among bystanders, even though the attack may be directed at a lawful target (e.g. aerial bombardment of a military target close to a civilian area).⁶⁰

Therefore, the substance of the subjective element of wartime terrorism is the intention to spread terror among individual civilians or among the civilian population. Conversely, the motive is immaterial:⁶¹ IHL does not require an ulterior public-oriented motive.⁶² This is a fundamental difference in respect to terrorism in time of peace,

⁵⁵ See S. Jodoin, *op. cit.*, p. 92. Conversely, Gasser states that attack against combatants in violation of arts. 35 and 37 AP I, i.e. respectively attacks which cause unnecessary sufferings or that are carried out feigning the status of non-combatants, could result in acts of terrorism; see Gasser, *op. cit.*, p. 557. See *contra* S. Jodoin, *op. cit.*, p. 82. See also International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY), Case No IT-98-29-A, Prosecutor v. *Galic*, Trial Chamber, 5 December 2003 (hereafter: *Galic* Trial Chamber), par. 135, in which it is stated that “[w]ith respect to the ‘acts of violence’ [underlying the crime of terror], these do not include legitimate attacks against combatants but only unlawful attacks against civilians”.

⁵⁶ See S. Jodoin, *op. cit.*, p. 94. See also R. Bartoli, *Lotta al terrorismo internazionale. Tra diritto penale del nemico, jus in bello del criminale e annientamento del nemico assoluto*, Torino, Giappichelli, 2008, pp. 121 ff.

⁵⁷ J. M. Henckhaerts, L. Doswald-Beck, *op. cit.*, p. 11.

⁵⁸ See ICTY, *Galic* Trial Chamber, *cit.*, par. 597; *Id.*, Case No IT-98-29-A, Prosecutor v. *Galic*, Appeals Chamber, 30 November 2006 (hereafter: *Galic* Appeals Chamber), par. 102, “[t]he acts or threats of violence constitutive of the crime of terror shall not [...] be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof”.

⁵⁹ “‘Primary purpose’ signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. [...] The crime of terror is a specific-intent crime”, see ICTY, *Galic* Trial Chamber, *cit.*, par. 136.

⁶⁰ H. P. Gasser, *op. cit.*, p. 556. “The only conspicuous purpose appears to be that of terrorizing the enemy. In other words, in international humanitarian law, terrorist acts are acts performed within the framework of the general goal of defeating the enemy. Their ultimate purpose is to contribute to the war effort. Instead of simply attacking civilians, a belligerent carries out actions [...] designed to beget profound insecurity and anxiety in the population (and consequently in the enemy belligerent)”, see A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *cit.*, p. 947.

⁶¹ See *ivi*, p. 948.

⁶² See B. Saul, *op. cit.*, p. 297.



which is characterised by the political/ideological motive underlying the violent act. Thus, at the core of the definition of wartime terrorism is “the category of the victim, not the actor or the motives underlying his actions”.⁶³ In the *Galic* case, the ICTY set the elements of the crime of wartime terrorism:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.⁶⁴

On the basis of the elements mentioned above, Sébastien Jodoin has identified two types of terrorism in wartime, i.e. lawful and unlawful terrorism:

The first is composed of acts of terrorism committed against combatants - while this form of terrorism may constitute a violation of other rules of international humanitarian law, such as perfidy, it is not necessarily illicit. The second is composed of acts of terrorism committed against civilians or non-combatants: this form of terrorism is always illicit in the context of an armed conflict and may be termed the offence of terrorism in the law of armed conflict.⁶⁵

Additionally, under IHL terrorist acts may amount to war crimes. The ICTY has indeed stated that the breach of the prohibition of spreading terror among the civilian population is criminalised under customary IHL.⁶⁶

To sum up, it can be maintained that some remarkable differences between terrorism in peacetime and terrorism in wartime do exist. As to the former, a clear definition is not provided by international law. The physical conduct may have quite broad consequences, sometimes encompassing economic losses or environmental damages resulting from violent acts.⁶⁷ The public-oriented nature of the motive is a fundamental characteristic. Spreading terror is considered either as the purpose of the act or as the means by which a political goal is achieved. Alternatively, with respect to terrorism in wartime, a definition may be found in relevant treaties and customary law. Violent acts must be directed against civilians or the civilian population and must cause death or serious bodily injury. Most importantly, spreading terror among civilians must be the *primary* purpose of the act. Hence, indiscriminate attacks on combatants the primary purpose of which is to terrorise civilians amount to terrorism under IHL.

An ulterior difference between the two types of terrorism is that whilst in peacetime solely non-state terrorist acts are criminalised, wartime terrorism is an offence that may be perpetrated by both state and non-state actors. In fact, IHL does not distinguish on the basis of subjective qualifications of the actor, being its provisions applicable to *any* person who directly participates in hostilities. Thus, terrorist acts may be committed: by any combatants in international armed conflicts; by state soldiers and rebels in non-international armed conflicts; or by civilians directly taking part in hostilities in both situations.

⁶³ S. Jodoin, *op. cit.*, p. 97.

⁶⁴ ICTY, *Galic* Trial Chamber, cit., par. 133.

⁶⁵ S. Jodoin, *op. cit.*, p. 96.

⁶⁶ See ICTY, *Galic* Appeals Chamber, cit., par. 98.

⁶⁷ See art. 2 of the DCCIT.



Given the foregoing overview of the international legal framework on terrorism, the research will now move on towards the debate around so-called state terrorism. The aim is to understand whether any theoretical room for such a paradigm exists in international law.⁶⁸

2.4. *The concept of international state terrorism*

State terrorism is a controversial topic in international law. At the outset, it is worth to note that there are at least three meanings for the phrase ‘state terrorism’.⁶⁹ Firstly, it may relate to the use of violence by a state against its own citizens. This meaning is dated back to the French revolution and it is usually labelled ‘state terror’. Secondly, ‘state terrorism’ is used to refer to state sponsorship of or support for terrorist activities.⁷⁰ Such forms of terrorism are better known as ‘state-sponsored’ or ‘state-supported’ terrorism.⁷¹ Eventually, a third meaning relates to the *direct* use of armed force by states in international relations. In this perspective, ‘state terrorism’ describes military interventions carried out by armed forces of a state against another state or territory.⁷² For the purposes of the present research, the phrase ‘state terrorism’ will be referred to the latter meaning.⁷³

A remarkable condemnation of the use of state terrorism in international relations was made in UNGA resolution 39/159(1984). In this document, the General Assembly links state terrorism to the general prohibition on the use of force and to the right to self-determination of peoples.⁷⁴ In particular, the Assembly states:

Expressing its profound concern that State terrorism has lately been practised ever more frequently in relations between States and that military and other actions are being taken against the sovereignty and political independence of States and the self-determination of peoples [...],

⁶⁸ Chapter three will address international state terrorism from a legal viewpoint.

⁶⁹ See G. Guillaume, ‘Terrorisme et Droit International’, *Recueil des Cours de l’Académie de Droit International*, 215 (1989), p. 297.

⁷⁰ In regard to this topic, Kimberly Trapp has pointed out that “[t]errorism [...] is not merely a tool of the dispossessed. It is equally a tool used by states to achieve, in a deniable fashion, their foreign policy objectives. As a result, international law addresses the state as a potential terrorist actor, and states are subject to an obligation to refrain from participating in, supporting, or acquiescing in acts of international terrorism”, see K. N. Trapp, *State Responsibility for International Terrorism*, New York, Oxford University Press, 2011, p. 9.

⁷¹ As to the distinction between state sponsorship of and support for terrorism, this work will follow the distinction put forward by Trapp: “[s]tate sponsorship of terrorism is the term used in this book to denote terrorist conduct that is carried out by or on behalf of a state, i.e. terrorist conduct which is attributable to the state. State support for terrorism refers to a state’s assistance in the commission of terrorist acts in cases where the act is not attributable to the state. State support can take many forms, including training, financial support, provision of arms and/or technology, assistance with diplomatic assets (provision of passports and other forms of cover), provision of transportation or intelligence and permitting use of territory as a base of operations”, see *ivi*, p. 24.

⁷² See G. Guillaume, *op. cit.*, pp. 297-299. See also K. K. Koufa, *op. cit.*, paras. 42 ff., 51 ff. and 62 ff., which lists similar types of state terrorism: regime or government terror, state-sponsored terrorism and international state terrorism.

⁷³ See section 3.1 for further explanations.

⁷⁴ See UNGA, Doc. A/RES/39/159, *Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States*, 17 December 1984, preamble, par. 1.



1. *Resolutely condemns* policies and practices of terrorism in relations between States as a method of dealing with other States and peoples [...].⁷⁵

State terrorism is perceived as a threat to the independent existence of states and to the maintenance of peaceful relations among states, as well as a factor likely to lead to war.⁷⁶ However, no definition is provided. In the context of the resolution, the concept of state terrorism seems to cover both state-sponsored/state-supported terrorism and terrorism as direct use of armed force. In fact, in the preamble, the term is coupled with the words “military” (use of armed force) and “other actions” (sponsorship by means of state agents or support for clandestine groups in foreign territory).

The issue of state terrorism was also raised by some delegations at the UN Ad Hoc Committee on International Terrorism. In the 1973 report, state terrorism was defined as follows:

Terror inflicted on a large scale and with the most modern means on whole populations for purposes of domination or interference in their internal affairs, armed attacks perpetrated under the pretext of reprisals or of preventive action by States against the sovereignty and integrity of third States, and the infiltration of terrorist groups or agents into the territory of other States.⁷⁷

As to academic analyses, some scholars have examined state terrorism within the broader context of aggressive measures, which states may use in international relations. In this regard, Michael Stohl maintained that:

[T]he concept of terrorism [...] describe[s] many of the uses and threats of the use of force within the international system [...]. [T]he use of terror tactics is common in international relations and [...] the state has been and remains a more likely employer of terrorism within the international system than insurgents and with much grater effect. I [...] [present] a definition of *terrorism* that is consistent with that employed to examine both insurgent and state terrorism in domestic situations. By *terrorism* I mean ‘the purposeful act or threat of violence to create fear and/or compliant behavior in a victim and/or audience of the act or threat’.⁷⁸

Stohl conceives state terrorism as a form of ‘coercive diplomacy’, a type of overt behaviour of states.⁷⁹ The author cites some examples concerning both war and non-war situations. As to war situation, Stohl recalls the 1972 bombing of Hanoi in Vietnam, which was carried out by the United States in order to bring both North and South Vietnamese to negotiations. The campaign of air bombing was intended as a shock treatment, aimed at achieving the US’s political goal of finding an agreement between the parties to the conflict.⁸⁰ With respect to non-war situation, the author cites the general behaviour of Israel towards its Arab neighbours:

⁷⁵ Ivi, preamble, par. 2, and art. 1.

⁷⁶ See ivi, preamble, par. 3.

⁷⁷ Official Records of the General Assembly, Twenty-Eighth Session, Supplement No. 28 (A/9028), 1973, par. 24, cited in K. K. Koufa, *op. cit.*, par. 64. This definition will be further analysed in subsection 3.2.1.

⁷⁸ M. Stohl, ‘International Dimensions of State Terrorism’, in M. Stohl, G. A. Lopez (eds.), *The State as Terrorist. The Dynamics of Governmental Violence and Repression*, Westport, Greenwood Press, 1984, p. 43.

⁷⁹ See ivi, p. 44.

⁸⁰ See ivi, pp. 44-45.



Israelis reprisals and bombing raids are designed as much to instil fear as they are to produce damage. The Israelis perceive that they must constantly remind their adversaries how costly another war or assistance to the Palestinians is and will continue to be. The key elements of such a tactic are available to any Third World nation that is in a position of clear superiority vis-à-vis a nearby adversary.⁸¹

More recently, Beau Grosscup expressly linked the use of aerial bombardment by states to terrorism:

Over the past quarter-century the rise in the popularity of strategic bombing has occurred within a Western political context in which concern with terrorism has risen to prominence. As a strategy that purposely target civilians and their livelihoods, the question of whether or not strategic bombing constitutes terrorism could have been from its very conception, and in the contemporary political climate should now be, a most poignant and pressing concern.⁸²

[W]hy is the plan that proposes to attack a whole society with a massive bombardment and warns that ‘the political imperative to keep civilian casualties to a minimum will have to be put to one side’ greeted with humour, indifference or applause? Why is the plan not openly and universally castigated at least as ‘wrong-headed’ or, more important, as a morally and politically repugnant strategy of terrorism?⁸³

States usually argue that strategic bombing, which is said to minimise civilian casualties in the targeting of military objects, is inherently different to terrorism: unlike the latter it aims not at directly or wilfully targeting civilians.⁸⁴ Yet, a historical examination shows that since World War II strategic bombing has constantly been used to hit civilian populations as well as those infrastructures, facilities and livelihoods, which are essential for the life of the civilian population.⁸⁵

The doctrine of ‘Shock and Awe’ or ‘Rapid dominance theory’, which underlay the last war in Iraq, expressly supported the strategy of gaining military advantages by means of terrorising the enemy. The authors of this theory state that it “is aimed at influencing the will, perception, and understanding of an adversary rather than simply destroying military capability”.⁸⁶ Grosscup contended that this doctrine is to be considered as a form of state terrorism:

⁸¹ Ivi, p. 45.

⁸² B. Grosscup, *Strategic Terror. The Politics and Ethics of Aerial Bombardment*, London, Zed books, 2006, p. x.

⁸³ Ivi, p. 4.

⁸⁴ See ivi, p. 165.

⁸⁵ See ivi, pp. 179 ff..

⁸⁶ H. K. Ullman, J. P. Wade (eds.), *Shock and Awe: Achieving Rapid Dominance*, National Defense University, 1996, http://www.dodccrp.org/files/Ullman_Shock.pdf, p. 2. “[T]he objective is to apply brutal levels of power and force to achieve Shock and Awe. In the attempt to keep war ‘immaculate’, at least in limiting collateral damage, one point should not be forgotten. Above all, war is a nasty business or, as Sherman put it, ‘war is hell’. While there are surely humanitarian considerations that cannot or should not be ignored, the ability to Shock and Awe ultimately rests in the ability to frighten, scare, intimidate, and disarm”, see ivi, p. 34. For an overall analysis of this theory, see B. Grosscup, *Strategic Terror*, cit., pp. 1 ff..



Rapid dominance theory is the latest revision of classical post-First World War strategic bombing theory. Though modified in some respects, the central goal of shock and awe remains consistent with strategic bombing policy: to rain terror from the skies on civilians and their infrastructure, thereby forcing capitulation of their political/military leadership. Thus, like its predecessor, it is a strategy of state terrorism.⁸⁷

Moreover, Danilo Zolo noted that the acts of the state are never labelled ‘terrorist’, even if they cause higher levels of destruction and larger losses of lives than acts of non-state actors.⁸⁸ He maintains that, since in contemporary wars ordinary weapons cause high-level and indiscriminate destruction, the use of armed force has become inherently terroristic.⁸⁹ For this reason, Zolo proposes that *any* illegal use of international armed force, which relies on military supremacy and mass-destruction weaponry, should fall under the definition of terrorism.⁹⁰

There exists strong disagreement with regards to this stance. Indeed, critics argue that the use of international armed force is already regulated under the UN Charter.⁹¹ However, it is worth noting that the UN Special Rapporteur on terrorism and human rights took into account the concept of international state terrorism:

(a) While war is not necessarily, or even normally, a species of terrorism, belligerent practices and threats may be. (b) Terrorist acts can be committed by States against States, in both war and non-war situations. [...] (d) From the legal point of view, the distinction between (international) State terrorism and State-sponsored terrorism is immaterial, since the invocation of either one of them would have exactly the same results (i.e. identification of the violated international law norms, articulation of charges reflected in the relevant international law norms, renunciation of alleged behaviour, etc., and the attendant question of responsibility).⁹²

The legal concept of state terrorism was also addressed during the work on the DCCIT. Reports of both the Ad Hoc Committee on Terrorism and the Sixth Committee Working Group show that it is a matter of major concern. The possible inclusion of

⁸⁷ B. Grosscup, ‘Cluster Munitions and State terrorism’, *Monthly Review*, 62 (2011), 11 <http://monthlyreview.org/2011/04/01/cluster-munitions-and-state-terrorism>.

⁸⁸ See D. Zolo, *La giustizia dei vincitori. Da Norimberga a Baghdad*, Roma-Bari, Laterza, 2006, p. 130. On this point, see also M. Stohl, *op. cit.*, pp. 43 and 55; B. Grosscup, *Strategic Terror*, *cit.*, pp. 156 ff.. “In addition to their ‘mistakes’ ‘tragic errors’ and ‘stray bombs’, [North America and its allies] may at times ‘use inappropriate force’ ‘violate human rights’ or ‘circumvent, undermine or break the law’. But they never commits acts of terrorism”, see B. Grosscup, *Strategic Terror*, *cit.*, p. 174.

⁸⁹ With reference to cluster munitions, a similar reasoning has been adopted by Grosscup: “The bombing nations will continue the production, sale, and use of cluster munitions because they are an essential component of their strategy to conduct modern war. When they work as designed, within their footprint they kill or maim both soldiers and ‘the ocean they swim in’, or assumed sympathetic enemy civilians. As unexploded devices, they help control the combat zone and terrorize its inhabitants. Once the war has ended, with the enemy gone, unexploded ordnance remains to remind former enemies of the killing power of the past war’s adversary”, see B. Grosscup, ‘Cluster Munitions and State terrorism’, *cit.*

⁹⁰ See D. Zolo, *Terrorismo umanitario*, *cit.*, pp. 34-35. Of course, the author argues that violent acts, whose level of gravity is comparable to that of states, such as 11/9 attacks, must be criminalised as terrorist as well.

⁹¹ See G. Guillaume, *op. cit.*, p. 299; K. K. Koufa, *op. cit.*, par. 66; K. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the United Nations Secretary-General, Doc. A/59/2005, 21 March 2005, par. 91 ; WG, Doc. A/C.6/65/L.10, 2010, par. 22.

⁹² Ivi, par. 67.



state terrorism in the Convention's definition has constantly been discussed.⁹³ On the other hand, the Working Group Coordinator and other delegations have always rejected such proposals. These objectors maintain that since the Convention is an instrument concerning law enforcement, state terrorism should be dealt with in a different context.⁹⁴ However, it is noteworthy that these concerns regarding state terrorism have been taken into account in most recent drafts of the Convention.⁹⁵

To sum up, it can be said that the notion of international state terrorism is not new in international debates, as this issue has been raised, since the seventies, in the UN. Furthermore, official discussions during the works on the DCCIT show constant concern for the matter, which was eventually taken into account during the drafting process. The main problem, still, is that the concept of state terrorism seems to be used in a political rather than legal meaning. The definition put forward in 1973 could be a starting point, even though it seems too broad and tends to encompass both state-sponsored/state-supported terrorism and terrorism as the direct use of armed force. Additionally, the issue of state terrorism has never been addressed by relevant UN resolutions or declarations. The only official condemnation of state terrorism is contained in UNGA res. 39/159, however it is quite isolated, dated and vague.

Nevertheless, claims regarding state terrorism are not only of a political nature. From the legal viewpoint, it does not seem unreasonable to maintain that certain manners of using armed force may amount to terrorism. Scholarly research has clearly shown that terror tactics are an effective tool in international relations.⁹⁶ Moreover, IHL envisages that members of both state and non-state armed forces may commit terrorist acts during armed conflicts. That is to say, international law already envisages that members of the state apparatus may be involved in the commission of terrorist acts. Hence, it follows that it may be reasonable to define state terrorism as a wrongful act of states or as a crime of state officials. Moreover, what must be pointed out is that the rationale for defining international state terrorism is to protect those values, which underlie both the criminalisation of non-state terrorism and the prohibition on aggression, that is, human rights and international peace and security.⁹⁷ That being said, the next chapter will investigate how international state terrorism could be defined as a legal paradigm.

III. International state terrorism. A legal perspective

3.1. Reasons for a paradigm

At the outset of the analysis, it seems useful to restate the rationale for defining international state terrorism. It is worth to recall that the latter is part of the broader concept of the use of armed force by states.⁹⁸ Accordingly, an explicit prohibition on

⁹³ As to the Ad Hoc Committee, see Docs. A/56/37, 2001, par. 15; A/58/37, 2003, par. 9; A/59/37, 2004, par. 15; A/60/37, 2005, par. 13; A/62/37, 2007, par. 5; A/64/37, 2009, paras. 1 and 6; A/65/37, 2010, paras. 3 and 11; A/66/37, 2011, paras. 2 and 11. As to the WG, see Docs. A/C.6/55/L.2, 2000, par. 6; A/C.6/62/SR.16, 2007, par. 115; A/C.6/63/SR.14, 2008, par. 46; A/C.6/64/SR.14, 2009, par. 36; A/C.6/65/L.10, 2010, par. 11; A/C.6/66/SR.28, 2011, par. 79.

⁹⁴ See WG, Doc. A/C.6/64/SR.14, 2009, paras. 39-41. See also WG, Doc. A/C.6/65/L.10, 2010, par. 22.

⁹⁵ See WG, A/C.6/65/L.10, 2010, par. 18.

⁹⁶ See above in this section.

⁹⁷ See section 3.1.

⁹⁸ See G. Guillaume, *op. cit.*, p. 299; K. K. Koufa, *op. cit.*, paras. 62 ff.. See also UNGA, Doc. A/RES/39/159, *cit.*, preamble, paras. 1-2.



state terrorism would serve as protection for those values, which underpin the general prohibition on the use of force, namely international peace and security. These are paramount principles of contemporary international society with which arbitrary use of armed force is at odds.⁹⁹ Acts of international state terrorism constitute a breach of the peace as well as aggression,¹⁰⁰ which in turn have been considered “the most serious and dangerous form of the illegal use of force”.¹⁰¹

Moreover, reasons for theorising and shaping the paradigm of international state terrorism may be inferred from those that underlie the criminalisation of international (non-state) terrorism. Relevant legal texts proclaim that the latter seriously imperils certain values, namely international peace and security, friendly relations among States, international cooperation, human rights, fundamental freedoms and security of states.¹⁰² That is to say, international (non-state) terrorism threatens human rights and the security of states, which are deemed to be fundamental values of the international society. Furthermore, terrorism works in the most horrendous manner, namely killing civilian people. This is the reason why states have criminalised it as an autonomous offence: terrorism is considered to deserve ulterior criminal consideration than those violent acts constituting the physical conduct.¹⁰³ International state terrorism seems to work in a similar fashion, that is, spreading large-scale terror among the population of a state.¹⁰⁴ Additionally, it makes use of higher degrees of violence as it resorts to means of warfare (e.g. aerial bombardment).¹⁰⁵ Thus, state terrorism appears to breach the international values mentioned above and, therefore, it would deserve particular attention and condemnation.

The special heinousness of acts, which aims to expressly kill civilians, leads to conclude that not only non-state terrorism needs to be tackled but state terrorism should as well. As shown below, states may use armed force for purposes other than conquering a territory or overpowering an enemy state. When military operations are carried out with the intent of influencing political choices of a foreign state by means of terrorising its civilian population, such activities should be qualified as acts of state terrorism. Of course, that is not to say that non-state terrorism and state terrorism are two aspects of the same phenomenon. The former is a form of political violence, that is, a struggle that a political group starts in order to challenge the legitimacy of a certain state. On the contrary, state terrorism is a particular use of armed force, which states resort to as a tool in international relations.¹⁰⁶ From this point of view, the two types of terrorism are completely different. From another point of view, they converge on the means, namely the spread of terror among civilians. In this regard, it is worth noting that this is also the feature which peacetime and wartime terrorism share. Hence, it may

⁹⁹ See UNGA, Doc. A/RES/25/2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970.

¹⁰⁰ See UNGA, Doc. A/RES/39/159, *cit.*, pars. 3, 5 and 6. For the analysis of the concept of international state terrorism in relation to the definition of aggression, see section 3.2.

¹⁰¹ UNGA, Doc. A/RES/3314(XXIX), *Definition of Aggression*, 14 December 1974, preamble, par. 5.

¹⁰² See UNGA, Doc. A/RES/49/60, *cit.*, par. I(2); DCCIT, preamble, pars. 4-6. See also B. Saul, *op. cit.*, pp. 10-11. See in general section 2.1.

¹⁰³ See B. Saul, *op. cit.*, pp. 66-68.

¹⁰⁴ See subsection 3.2.1.

¹⁰⁵ See section 2.4.

¹⁰⁶ See M. Stohl, *op. cit.*, p. 43; B. Grosscup, *Strategic Terror*, *cit.*, pp. 179 ff.. With regard to state-sponsored and state-supported terrorism, see K. Trapp, *op. cit.*, p. 9.



be maintained that as long as terrorist acts are generally prohibited in international law, such a prohibition should encompass *any* acts of terrorism, whether state or non-state.

A final premise appears to be necessary for the sake of the present discourse. As already mentioned, the phrase ‘state terrorism’ even refers to state sponsorship or support for terrorist activities. State sponsorship of terrorism relates to “terrorist conduct that is carried out by or on behalf of a state, i.e. terrorist conduct which is attributable to the state”,¹⁰⁷ whilst “[s]tate support for terrorism refers to a state’s assistance in the commission of terrorist acts in cases where the act is not attributable to the state”¹⁰⁸ but rather to clandestine groups. This twofold meaning of state terrorism will not be addressed by the present work. As shortly shown, both state-sponsored and state-supported terrorism have long been recognised within international law.¹⁰⁹ As a matter of fact, since 1970 the General Assembly solemnly proclaimed that states have the duty not to engage in terrorist and clandestine activities which, amounting to an illegal use of force, actually endanger the security of other states.¹¹⁰ Moreover, the 1974 definition of aggression envisaged the possibility that state-sponsored terrorism may amount to aggression,¹¹¹ and, the International Court of Justice stated that the latter “may be taken to reflect customary international law”.¹¹² As to substantive rules applicable to this type of state terrorism, Kimberly Trapp maintained that:

The prohibition of state sponsorship or support for acts of international terrorism is an instantiation of rules under general international law, in particular the prohibition of aggression, the prohibition of the use of force, and the principle of non-intervention. [...] In order that a state’s involvement in terrorism amount to an act of aggression [as defined in the UNGA Definition of Aggression], the terrorist attack must be attributable to the state and be of such gravity as to amount to an act of aggression had it been carried out by the state’s military forces. If the terrorist attack is not grave enough to be characterized as an act of aggression, but is nevertheless attributable to the state, the state’s conduct amounts to a prohibited use of force [as set out in Article 2(4) of the UN Charter and the UN Declaration on Friendly Relations]. [...] Where conduct is not attributable to a state, and the state is only supporting (rather than sponsoring) international terrorism, [...] [s]upport that itself amounts to a use of force breaches the prohibition of the use of force, while other forms of support, to the extent that the aim of the terrorist force is interventionist (very broadly defined), breach the principle of non-intervention.¹¹³

¹⁰⁷ Ivi, p. 24.

¹⁰⁸ *Ibid.*

¹⁰⁹ Admittedly, they do not pose problems as to their definition, but rather they do with respect to questions of attribution for the sake of international responsibility. For an in depth study on questions of attribution related to state-sponsored and state-supported terrorism, see *ivi*, pp. 34 ff.

¹¹⁰ See UNGA, Doc. A/RES/25/2625, *cit.*, principle one.

¹¹¹ “[T]he following [act] [...] shall [...] qualify as an act of aggression: g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [acts of aggression], or its substantial involvement therein”, see UNGA, Doc. A/RES/3314(XXIX), *cit.*, art. 3(g).

¹¹² International Court of Justice (hereafter: ICJ), *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports, 1986, 14 (hereafter : Nicaragua Case), par. 195.

¹¹³ K. Trapp, *op. cit.*, pp. 33-34.



Considering the foregoing, terrorist acts committed by a state's agent seem to already be addressed by international law and recognised as state-sponsored terrorism.¹¹⁴ Instead, the present research intends to deal with that comprehensive use of armed force, which, although usually qualified as aggression, appears to have some characteristics for which it may amount to state terrorism, as defined below.¹¹⁵ The next sections will exactly analyse such characteristics.

3.2. *Elements for a definition*

In order to define international state terrorism, the present work will rely on legal and scholarly materials concerning both non-state terrorism and the use of armed force. In particular, the analysis will draw on the following sources: the 1974 UNGA definition of aggression; the already mentioned 1973 proposal on state terrorism; scholarly analyses on the use of armed force; the legal definition of terrorism in peacetime and in wartime. From each source, elements that may contribute to defining international state terrorism will be singled out. Finally, a comprehensive definition will be put forward.

3.2.1. *Objective element*

Since international state terrorism fits into the broader concept of the use of armed force by states, the objective elements of the paradigm will be firstly derived from the definition of aggression provided by international law. The UN General Assembly defined aggression as follows:

Art. 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. *Explanatory note:* In this Definition the term 'State': a) Is used without prejudice to questions of recognition to whether a State is a member of the United Nations [...].

Art. 3. Any of the following acts, regardless of a declaration of war, shall [...] qualify as an act of aggression: a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State [...].¹¹⁶

The definition of aggression encompasses several elements. For the sake of defining international state terrorism, the present work will consider the following: that "[a]ggression is the use of armed force by a State against the sovereignty [...] or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations";¹¹⁷ that the word 'State' has a broad meaning that may refer to

¹¹⁴ "The direct participation of state organs in a terrorist attack would result in that attack being attributable to the state. France's use of a state organ (secret service agents) to destroy the 'Rainbow Warrior' Greenpeace ship in Auckland Harbour amounted to state sponsorship of terrorism", see *ivi*, p. 29.

¹¹⁵ See subsection 3.2.3.

¹¹⁶ UNGA, Doc. A/RES/3314(XXIX), *cit.*. It is worth noting that it was incorporated in art. 8*bis* of the ICC Statute concerning the crime of aggression, see International Criminal Court, Doc. RC/Res.6, *The crime of aggression*, 11 June 2010.

¹¹⁷ UNGA, Doc. A/RES/3314(XXIX), *cit.*, art. 1.



political entities the legal status of which is not clearly defined;¹¹⁸ that violent acts which amount to aggression are “a) the invasion or attack by the armed forces of a State of the territory of another State [...]; b) [b]ombardment by the armed forces of a State against the territory of another State [...]”.¹¹⁹

A second source for the present analysis is the aforementioned definition of state terrorism provided by the 1973 report of the UN Ad Hoc Committee on International Terrorism. In this context, ‘state terrorism’ is defined as:

Terror inflicted on a large scale and with the most modern means on whole populations for purposes of domination or interference in their internal affairs, armed attacks perpetrated under the pretext of reprisals or of preventive action by States against the sovereignty and integrity of third States, and the infiltration of terrorist groups or agents into the territory of other States.¹²⁰

It is useful to restate that this definition contains elements of both state terrorism as direct use of armed force and state-sponsored/state-supported terrorism. What is relevant for the paradigm of international state terrorism is that the use of armed force may result in “terror inflicted on a large scale [...] on whole populations for purposes of domination or interference in their internal affairs [and] armed attacks perpetrated [...] by States against the sovereignty and integrity of third States”.¹²¹ This part of the definition partially corresponds to that of aggression, even though some other elements are present, and it therefore seems helpful to the current analysis.

As to scholarly sources, useful elements may be drawn on Yoram Dinstein’s analysis of the concept of war.¹²² This author distinguishes between military actions which amount to war and those, which consist in closed incidents ‘short of war’. Such a distinction hinges on what he defines as ‘comprehensive’ use of armed force:

[N]ot every episodic case of use of force by States amounts to war. Only a comprehensive use of force does.¹²³ Force is comprehensive if it is employed (i) spatially, across sizeable tracts of land [...]; (ii) temporally, over a prolonged period of time; (iii) quantitatively, entailing massive military operations or a high level of firepower; (iv) qualitatively, inflicting extensive destruction. [...] [G]enerally only a combination of all four [criteria] will paint a clear picture of the nature of hostilities.¹²⁴

Thus, in Dinstein’s view ‘comprehensiveness’ is the element that characterises those military activities that amount to war.

To sum up, the objective element of the definition of international state terrorism is basically related to the illegal use of armed force. In particular, relating to acts of aggression by states against the sovereignty or political independence of other states.

¹¹⁸ Ivi, art. 1, Explanatory note. It has been pointed out that art. 1 “was intended to cover clearly defined territories whose statehood was disputed, such as existed in Germany, Vietnam, Korea, and Israel”; see M. C. Bassiouni, B. B. Ferencz, ‘The Crime Against Peace and Aggression: From its Origins to the ICC’, in M. C. Bassiouni (ed.), *International Criminal Law. Vol. 1. Sources, Subjects, and Contents*, Leiden, Martinus Nijhoff Publisher, 2008, p. 223.

¹¹⁹ UNGA, Doc. A/RES/3314(XXIX), cit., art. 3(a-b).

¹²⁰ UNGA, Official Records of the General Assembly, Twenty-Eighth Session, Supplement No. 28 (A/9028), 1973, par. 24, cited in K. K. Koufa, *op. cit.*, par. 64.

¹²¹ *Ibid.*

¹²² See Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge, Cambridge University Press, 2005.

¹²³ Ivi, p. 13.

¹²⁴ Ivi, p. 12.



Examples of violent acts are invasion, attack and bombardment. The 1973 definition of state terrorism adds that such armed force should inflict large-scale terror on the population of the targeted state. Finally, in order to distinguish such armed attacks from mere incidents ‘short of war’ the use of force must be comprehensive.

3.2.2. *Subjective element*

Dinstein further proposed to distinguish total war from limited war. The former is characterised by the pursuit of total victory on the enemy¹²⁵ or by total use of military resources against the adversary.¹²⁶ Conversely, limited war has narrow purposes:

In a limited war, the goal may be confined to the defeat of only some segments of the opposing military apparatus; the conquest of certain portions of the opponent’s territory (and no others); or the coercion of the enemy Government to alter a given policy (e.g., the Kosovo air campaign of 1999), without striving for total victory. Now and then, it is not easy to tell a limited war (in the material sense)¹²⁷ apart from a grave incident ‘short of war’. The difference between the two is relative: more force, employed over a longer period of time, within a larger theatre of operations, is required in a war setting as compared to a situation ‘short of war’.¹²⁸

Dinstein points out that not every type of war has the purpose of overcoming the enemy or conquering its territory. This element is present also in the 1973 definition of state terrorism, which identifies the purposes of “domination or *interference in [third States’] internal affairs*”.¹²⁹ Moreover, the definition of aggression provides that acts of aggression may be committed “against the sovereignty [...] or *political independence* of another State”.¹³⁰ Of course, phrases such as ‘interference in internal affairs’ or ‘political independence’ have quite broad meanings and may be construed in several ways. However, what is remarkable is that states may use armed force for different purposes than conquering a foreign territory or defeating an enemy state. As shortly shown, these findings are of special interest for the topic of international state terrorism.

In the context of the present research, it is particularly relevant to recall one of the various military goals of limited wars listed by Dinstein: “the coercion of the enemy Government to alter a given policy”.¹³¹ This kind of objective is quite similar to the typical non-state terrorist purpose. Indeed, art. 2 of the Draft Comprehensive Convention against International Terrorism (DCCIT) provides that a person commits an act of terrorism “when the purpose of the conduct, by its nature or context, is [...] to

¹²⁵ “Many a war is unquestionably ‘total’ in that it is conducted with total victory in mind. Total victory consists of the capitulation of the enemy, following the overall defeat of its armed forces and/or the conquest of its territory, and if this is accomplished the victor is capable of dictating peace terms to the vanquished”, see *ibid.*.

¹²⁶ “A war is total also when the means, used to attain a limited objective, are total. That is to say, war may be catalogued as total when the totality of the resources (human and material) of a belligerent state is mobilized [...]”, see *ivi*, p. 13.

¹²⁷ War in a technical sense relates to formal elements such as the declaration of war and the signature of a peace treaty. War in a material sense concerns the existence of armed hostilities between two states; see *ivi*, pp. 9-10.

¹²⁸ *Ivi*, p. 13.

¹²⁹ UNGA, Official Records of the General Assembly, Twenty-Eighth Session, Supplement No. 28 (A/9028), 1973, par. 24, cited in K. K. Koufa, *op. cit.*, par. 64 (emphasis added).

¹³⁰ UNGA, Doc. A/RES/3314(XXIX), *cit.*, art. 1 (emphasis added).

¹³¹ Y. Dinstein, *op. cit.*, p. 13.



compel a Government or an international organization to do or abstain from doing any act”.¹³² On account of this, Dinstein’s findings that the use of armed force may aim at coercing the enemy to alter a given policy does seem to correspond to the non-state terrorist purpose of coercing a state to do or to abstain from doing something. That is to say, armed force by states could be used in order to achieve goals that are usually attributed to non-state terrorist actors.

Finally, attention must be paid to the most relevant feature of terrorism, namely the spread of terror among the civilian population. The civilian status of the victims and the method of spreading terror characterises not only peacetime terrorism but especially wartime terrorism.¹³³ As mentioned above,¹³⁴ IHL criminalises “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.¹³⁵ The scope of the norm solely encompasses acts that are intended to target civilians, both directly and by means of indiscriminate attacks on combatants, which primarily intend to terrorise the civilian population. The ‘primary purpose’ of the act must therefore be to target civilians. The core of the customary rule on wartime terrorism is the prohibition on the deliberate creation of a state of terror among civilians. This rule does not require any ulterior public-oriented motive as the definition of peacetime terrorism conversely does. The definition of terrorism in wartime may serve as a comparison for the definition of international state terrorism, in particular for the purpose of distinguishing it from aggression. It must indeed be pointed out that any use of international armed force is likely to create a state of fear in the population of the targeted state, since for example widespread bombardments inherently cause fear and dread. Yet, following the definition of terrorism in wartime it could be maintained that the use of armed force by a state may amount to an act of international state terrorism solely when invasion, bombardments or attacks by its armed forces have the ‘primary purpose’ to spread terror among the enemy population.¹³⁶ That is to say, the evaluation of the purposes of the military activities may lead to draw a distinction between armed force that amounts to aggression, and armed force that amounts to international state terrorism.¹³⁷

To summarise, the subjective element of acts of international state terrorism may be shaped drawing on both definitions of terrorism in peacetime and in wartime. With regard to the former, the purpose of the act would be “the coercion of the enemy

¹³² DCCIT, art. 2. As to scholarly definitions, Saul maintains that an internationally recognised purpose of terrorist acts is to “unduly compel a government or an international organization to do or to abstain from doing any act”, see B. Saul, *op. cit.*, p. 66. Similarly, Cassese states that acts of international terrorism are “carried out for the purpose of coercing a state, or international organization to do or refrain from doing something”, see A. Cassese, *op. cit.*, p. 957.

¹³³ It must be borne in mind that in the definition of terrorism provided by art. 2 DCCIT spreading terror is only one type of purpose. Indeed, according to art. 2 an act of terrorism could be committed even though a state of terror is not created at all, when the violent act aims at coercing public institutions by other means. See in general section 2.2.

¹³⁴ See section 2.3.

¹³⁵ Art. 51(2) AP I; art. 13(2) AP II.

¹³⁶ It seems quite useful to recall the words of Gasser already quoted above: “The *intention* to spread terror among civilians is a necessary element for defining acts of terrorism, for the simple reason that in war any use of deadly force may create fear among bystanders, even though the attack may be directed at a lawful target (e.g. aerial bombardment of a military target close to a civilian area)”, see H. P. Gasser, *op. cit.*, p. 556.

¹³⁷ See subsection 3.2.3 for further elaboration on this point.



Government to alter a given policy”,¹³⁸ which is the goal of terrorism in general; in respect to the latter, the *primary* intention of armed attacks should be “to spread terror among the civilian population”.¹³⁹ The final step of the current analysis is then to propose a definition of the paradigm at stake.

3.2.3. A definition of international state terrorism

On the basis of the preceding analysis, the paradigm may be defined as follows:

International state terrorism is the comprehensive use of armed force by a State against the sovereignty of another State or territory in order to coerce the Government of the latter to alter a given policy, in a manner inconsistent with the Charter of the United Nations.

The use of armed force shall qualify as an act of international state terrorism when invasion, bombardment or any other type of attack is systematically carried out by the armed forces of a state with the primary purpose of spreading large-scale terror among the population of the targeted State or territory.

For the sake of clarity, some explanatory notes are required. Firstly, the use of armed force must be *illegal*, i.e. in breach of the prohibition on the use of armed force set forth in the UN Charter and provided by customary international law.¹⁴⁰ Secondly, the use of armed force must be *comprehensive*, that is, to be employed “(i) spatially, across sizeable tracts of land; (ii) temporally, over a prolonged period of time; (iii) quantitatively, entailing massive military operations or a high level of firepower; (iv) qualitatively, inflicting extensive destruction”.¹⁴¹ Thirdly, the words ‘state’ and ‘territory’ must be understood in broad terms, in the sense that *any* political sovereign entity may be the victim of an act of international state terrorism, regardless of its status under international law.¹⁴²

Fourthly, the intent underlying the use of armed force should be that of *coercing* the government of the enemy state to do or to abstain from doing something. That is to say, the terrorist act must aim at *illegitimately influencing* the behaviour of the public institutions of the targeted state.¹⁴³ This subjective element differs from so-called

¹³⁸ These are the words used by Dinstein to describe one of the purposes of what he calls ‘limited wars’. He never relates such a purpose to terrorism. The link between Dinstein’s analysis of limited wars and the paradigm of international state terrorism is put forward by the present research.

¹³⁹ This is part of the wording of arts. 51(2) AP I and 13(2) AP II, and of the related customary norm.

¹⁴⁰ Art. 2(4) of the UN Charter prohibits any resort to force by states. Only two exceptions are envisaged. According to art. 51, on the one hand, states can use armed force for individual or collective self-defence. According to Chapter VII, on the other hand, the Security Council may authorise states to use armed force when it “determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression”.

¹⁴¹ Y. Dinstein, *op. cit.*, p. 12. It is worth noting that, within the present work, comprehensiveness renders distinguishable state terrorism as direct use of force from state terrorism as indirect use of force, namely state-sponsored terrorism through agents of the state. Whilst the former consists in military activities carried out by the armed forces of a state, the latter relies on covert operations undertaken by a state’s intelligence. That is to say, states may commit acts of terrorism in several and different manners.

¹⁴² See UNGA, Doc. A/RES/3314(XXIX), *cit.*, art. 1, Explanatory note: “In this Definition the term ‘State’[...] [i]s used without prejudice to questions of recognition to whether a State is a member of the United Nations [...]”. See also M. C. Bassiouni, B. B. Ferencz, *op. cit.*, p. 223.

¹⁴³ As shown above, such use of force could be qualified as ‘limited war’.



animus aggresionis, namely the aim “to invade and conquer foreign territory, or destroy the foreign State apparatus, and so on”.¹⁴⁴ The latter constitutes the typical intent of acts of aggression.¹⁴⁵

Fifthly, violent acts that underpin the use of armed force must have the *primary* purpose of *terrorising* the population at a large-scale degree. In other words, invasion, bombardment or other types of military activities should be carried out in order not to defeat the enemy forces but rather to spread terror among the enemy population. In this regard, weaponry should be used not to achieve military advantages in the conflict but to target *directly* and *systematically* the whole population in order to terrorise it. That is to say, the spread of terror should be a *means* whose final aim is to influence the enemy government.

It goes without saying that the two paragraphs of the definition must be read in conjunction. On the one hand, the intent of coercion (first part) could *per se* fall within the category of aggression without amounting to terrorism. On the other hand, armed attacks, the primary purpose of which is to spread terror among civilians (second part), may amount to ‘simple’ war crimes committed in the context of an act of aggression. In order to qualify the use of armed force as international state terrorism both elements must be present. Hence, the spread of terror among the civilian population must be *systematically* carried out through a comprehensive use of state force, in order to coerce the enemy government to alter its policies. In this sense, the two parts are closely linked and interdependent.

It must be underlined that such a definition does not have any claim of being exhaustive. Its elements are exclusively drawn on existing norms, proposals or scholarly analyses. Gaps or shortcomings may be present. Rather, the overall aim is to show that it is possible to define international state terrorism as a legal concept. The latter appears to be quite useful since the definition of aggression is not appropriate to interpret the particular heinousness of state terrorism. Admittedly, aggression does not specifically address that use of armed force, which is carried out by means of terrorising a population, as particularly repulsive. Hence, it cannot be contended that the current regulation of the use of international armed force already encompasses the concept of state terrorism.¹⁴⁶ Moreover, the possibility of conceiving international state terrorism as an autonomous manner of using armed force is provided by existing sources. The lack of interest in addressing such a phenomenon seems to lie more on political reasons than on legal ones. As a matter of fact, states are reluctant to bind themselves by means of international norms. Whether this is so with regard to aggression, it is even truer when state terrorism comes to the forefront. Indeed, considering international state terrorism as a legal concept means not only to deal with constraints on the possibility for states to use armed force, but also to judge that use of force as especially negative and heinous.

To show how the paradigm of international state terrorism could work in practical terms, this work intends to investigate a strategic concept, the ‘Dahiya doctrine’, and a military operation, ‘Cast Lead’, both linked to the Israeli-Arab conflict. It must be noted, however, that providing a legal classification of either the doctrine or the operation in the light of the proposed definition is not within the scope of this paper. In

¹⁴⁴ A. Cassese, *International Law*, New York, Oxford University Press, 2005, p. 273.

¹⁴⁵ “[I]n the case of aggression, it would seem that a claimant State should prove that the state’s officials that planned and unleashed aggression had the *animus aggresionis*”, see *ibid.*.

¹⁴⁶ See K. Annan, *op. cit.*, par. 91.



particular, Operation ‘Cast Lead’ is governed by IHL or *jus in bello*, while the definition of international state terrorism, which derives from the definition of aggression, is regulated by the *jus ad bellum*. Whereas *jus ad bellum* governs the resort to international force, *jus in bello* regulates the conduct of hostilities. These two systems are linked but separate. The former deals with the legality of the use of force and applies to the phase preceding the conflict. The latter automatically applies from the outbreak of hostilities onwards, regardless of any consideration of the legality of the resort to force.¹⁴⁷

The legality of Operation ‘Cast Lead’ under IHL must be explained in the light of the classification of the Israeli-Palestinian conflict and of the legal status of the Gaza Strip. As held by the International Court of Justice in its 2004 advisory opinion, IHL applies to the Occupied Palestinian Territory, i.e. the West Bank, Gaza and East Jerusalem.¹⁴⁸ However, the status of Gaza became debatable following the 2005 Israeli ‘Disengagement Plan’, which consisted of the withdrawal of the army and the evacuation of the settlers from the Strip. Since then, Israel maintains that Gaza cannot be considered occupied anymore, because military occupation requires the presence of troops on the ground.¹⁴⁹ At the same time, the Israeli government acknowledges the applicability of IHL to the conflict against Palestinian armed groups, including to Operation ‘Cast Lead’.¹⁵⁰ Conversely, the majority of scholars and UN bodies and mechanisms classify Gaza as still occupied.¹⁵¹ Notwithstanding the physical withdrawal of its army from the Strip, indeed, Israel continues to exercise effective control on land

¹⁴⁷ See Al-Haq, *Operation Cast Lead and the Distortion of International Law: A Legal Analysis of Israel’s Claim to Self-Defence under Article 51 of the UN Charter*, Position Paper, April 2009, <http://www.alhaq.org/attachments/article/225/OperationCastLeadandtheDistortionofInternationalLaw.pdf>, pp. 3-4.

¹⁴⁸ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 (hereafter: Wall Opinion), par. 101.

¹⁴⁹ See Israel Ministry of Foreign Affairs, *The Disengagement Plan: General Outline*, 18 April 2004, <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm>, par. 2(i)(3). The Israeli government maintains that Gaza is a *sui generis* territory, which can be described neither as occupied nor as a state, see Israel Ministry of Foreign Affairs, *The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, July 2009, <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation+in+Gaza-Factual+and+Legal+Aspects.htm>, par. 30.

¹⁵⁰ See Israel Ministry of Foreign Affairs, *The Operation in Gaza*, cit., pars. 28 ss.

¹⁵¹ See UNGA, Doc. A/RES/63/96, *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, 18 December 2008, par. 1; HRC, Doc. A/HRC/S-9/L.1, *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip*, 12 January 2009, preamble par. 6 e operative par. 1; Goldstone Report, *op. cit.*, pars. 276 ff.; UNGA, Doc. A/67/379, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 19 September 2012, par. 18; S. Darcy, J. Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’, *Journal of Conflict & Security Law*, 15 (2010), 2, p. 243; V. Kattan, ‘Operation Cast Lead: Use of Force Discourse and *Jus ad Bellum* Controversies’, *The Palestine Yearbook of International Law*, 15 (2009), pp. 107-8, and see relevant bibliography cited at notes 52 and 53. *Contra*: Y. Shany, ‘The Law Applicable to Non-occupied Gaza: A Comment on *Bassiouni v. Prime Minister Of Israel*’, *International Law Forum of the Hebrew University of Jerusalem Law Faculty*, Research paper no. 13-09, (2009); E. Samson, ‘Is Gaza Occupied?: Redefining the Status of Gaza under International Law’, *American University International Law Review*, 25 (2010), 915.



crosses and aerial and maritime spaces, maintaining the capability to militarily intervene in the whole territory at any moment.¹⁵² This situation is in compliance with the ‘Disengagement Plan’,¹⁵³ and the condition of effective control in which it results qualifies Gaza as an occupied territory.¹⁵⁴

This circumstance affects the legality of the use of force with regard to ‘Cast Lead’. Since the operation is part of an ongoing conflict, IHL applies thereto.¹⁵⁵ In turn, the application of *jus in bello* excludes the possibility of invoking the right of self-defence in accordance with art. 51 of the UN Charter. In fact, the latter pertains to *jus ad bellum*.¹⁵⁶ It follows that Israel’s claims of acting in self-defence under art. 51¹⁵⁷ are incorrect from an international law viewpoint.¹⁵⁸ Rather, Israel has the right to conduct military operations against Palestinian fighters, respecting the basic IHL principles of distinction, necessity and proportionality. ‘Cast Lead’ must be consequently interpreted as one of the many military operations Israel has carried out since the beginning of the occupation.¹⁵⁹

As a final remark, it can be observed that the General assembly’s resolution granting Palestine the status of non-member observer state may have legal consequences as to individual responsibilities deriving from the conduct of hostilities.¹⁶⁰ The new status indeed allows Palestine to accede to the Rome Statute of the ICC.¹⁶¹ If the Court retroactively exercised its jurisdiction, which is a matter of debate,¹⁶² it could judge the crimes committed by all parties during ‘Cast Lead’.

That being said on the legal classification of the Israeli-Palestinian conflict, Operation ‘Cat Lead’ and the status of Gaza, the analysis will turn again to the factual examples possibly relating to the paradigm of international State terrorism. As to the ‘Dahiya doctrine’, this is a strategic concept elaborated on by some Israeli military officials after the 2006 war between Israel and Hizbullah.¹⁶³ The doctrine has been summarised as follows:

¹⁵² See HRC, Doc. A/HRC/7/17, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 21 January 2008, par. 11; S. Darcy, J. Reynolds, *op. cit.*, pp. 235 ff.

¹⁵³ See Israel Ministry of Foreign Affairs, *The Disengagement Plan*, *cit.*, par. 3(i)(1).

¹⁵⁴ See HRC, Doc. A/HRC/7/17, *cit.*, par. 11; Goldstone Report, *op. cit.*, par. 276.

¹⁵⁵ The Israeli government also took this stance, see Israel Ministry of Foreign Affairs, *The Operation in Gaza*, *cit.*, par. 28.

¹⁵⁶ See ICJ, *Wall Opinion*, *cit.*, par. 139; Al-Haq, *op. cit.*, p. 3; V. Kattan, *op. cit.*, pp. 108-9.

¹⁵⁷ See UNSC, Doc. S/2008/816, *Identical letters dated 27 December 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and to the President of the Security Council*, 27 December 2008, p. 1; Israel Ministry of Foreign Affairs, *The Operation in Gaza*, *cit.*, pars. 68 ff.

¹⁵⁸ Israel’s inconsistency is apparent as it maintains to act in self-defence in the context of an armed conflict, see Israel Ministry of Foreign Affairs, *The Operation in Gaza*, *cit.*, par. 72.

¹⁵⁹ See Al-Haq, *op. cit.*, p. 3. Under an opposite perspective, the Israeli government draws the same conclusion, see Israel Ministry of Foreign Affairs, *The Operation in Gaza*, *cit.*, par. 68.

¹⁶⁰ See UNGA, Doc. A/RES/67/19, *Status of Palestine in the United Nations*, 29 November 2012, par. 2.

¹⁶¹ L. Maccarone, ‘Palestine’s Status as a Non-Member Observer State In The United Nations and its Implications for the International Criminal Court’, *American Non-Governmental Organizations Coalition for the International Criminal Court*, Columbia University, 5 December 2012, http://www.amicc.org/docs/Palestine_and_the_ICC.pdf, p. 3.

¹⁶² *Ibid.*

¹⁶³ The name relates to the southern neighbourhood of Beirut, which being a Hizbullah’s stronghold, was one of the main targets of Israel’s military campaign.



The military approach expressed in the Dahiye Doctrine deals with asymmetrical combat against an enemy that is not a regular army and is embedded within civilian population; its objective is to avoid a protracted guerilla war. According to this approach Israel has to employ tremendous force disproportionate to the magnitude of the enemy's actions. *The intent of this [...] is to harm the civilian population to such an extent that it will bring pressure to bear on the enemy combatants.* Furthermore, this policy is intended to create deterrence regarding future attacks against Israel, through the damage and destruction of civilian and military infrastructures which necessitate long and expensive reconstruction actions which would crush the will of those who wish to act against Israel.¹⁶⁴

The above description of the Dahiya doctrine relies on several statements and analyses carried out by officials of the Israeli Defense Army (IDF). Major-General Eisenkot made one of the earliest public statements in March 2008 on that topic: "What happened in [...] Dahiya [...] will happen in every village from which Israel is fired on. [...] We will apply disproportionate force on it (village) and cause great damage and destruction there. From our standpoint, these are [...] military bases [...]. This is not a recommendation. This is a plan. And it has been approved [...]"¹⁶⁵

The new pattern of the Israeli military strategy is constituted by a disproportionate use of armed force aimed at influencing actual and future behaviour of the enemy government. What is explicitly said is that not only military but also civilian objects and infrastructures are considered legitimate targets for attacks. The most effective way to cope with non-state actors is deemed to make the civilian population suffer. This, in turn, would put political pressure on the belligerent counterpart. Such goals have been clearly stated by Major-General (Ret.) Giora Eiland in an essay dealing with a possible third war between Israel and Lebanon:

Such a war will lead to the elimination of the Lebanese military, the destruction of the national infrastructure, and intense suffering among the population. There will be no recurrence of the situation where Beirut residents (not including the Dahiya quarter) go to the beach and cafes while Haifa residents sit in bomb shelters. Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hizbollah's behavior more than anything else.¹⁶⁶

A similar view has been expressed by another military analyst and member of the army, Gabi Siboni, who stressed the importance of damaging the assets of the enemy as a punishment for having resorted to force against Israel:

With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. The strike must be carried out as quickly as possible, and must prioritize damaging assets over seeking out each and every launcher. Punishment must be aimed at decision makers and the power elite. [...] The IDF will make

¹⁶⁴ Public Committee Against Torture in Israel, *No Second Thoughts. The Changes in the Israeli Defense Forces' Combat Doctrine in Light of 'Operation Cast Lead'*, November 2009, http://www.stoptorture.org.il/files/no%20second%20thoughts_ENG_WEB.pdf, p. 21 (emphasis added).

¹⁶⁵ Yedioth Ahronoth, 'Israel warns Hizbullah war would invite destruction', 10 March 2008, <http://www.ynetnews.com/articles/0,7340,L-3604893,00.html>.

¹⁶⁶ G. Eiland, 'The Third Lebanon War: Target Lebanon', in *Strategic Assessment*, 11 (2008), 2, <http://www.inss.org.il/upload/%28FILE%291226472866.pdf>, p. 16.



an effort to decrease rocket and missile attacks as much as possible, but the main effort will be geared to shorten the period of fighting by striking a serious blow at the assets of the enemy.¹⁶⁷

The report of the UN Human Rights Council fact-finding mission on the conflict in Gaza considered the ‘Dahiya doctrine’ as “a qualitative shift from relatively focused operations to massive and deliberate destruction”.¹⁶⁸ What is noteworthy is that such a strategy was deemed not only applicable to the Gaza Strip,¹⁶⁹ but also appears to have been applied in Operation ‘Cast Lead’.¹⁷⁰ Indeed, the latter was carried out through the systematic and deliberate targeting of civilian objects, infrastructures and the civilian population.¹⁷¹ The main goal of the military operation was to re-establish Israel’s deterrence towards Hamas’ policy of rocket launch,¹⁷² and, the most effective means to achieve it was deemed to directly target civilian population’s livelihoods.¹⁷³

Besides, a further element seems to characterise the objective of re-establishing deterrence: the spread of terror and fear among the population.¹⁷⁴ In this regard, it seems particularly useful to recall some paragraphs of the report issued by the Human Rights Council fact-finding mission:

1883. The Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: *the people of Gaza as a whole*. 1884. In this respect, the operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and *possibly with the intent of forcing a change in such support* [...].

¹⁶⁷ G. Siboni, ‘Disproportionate Force: Israel’s Concept of Response in Light of the Second Lebanon War’, in *INSS Insight*, (2008), 74, <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

¹⁶⁸ Goldstone Report, *op. cit.*, par. 1193.

¹⁶⁹ See G. Siboni, *op. cit.*.

¹⁷⁰ “The Mission [...] is able to conclude from a review of the facts on the ground that it witnessed for itself that what is prescribed as the best strategy appears to have been precisely what was put into practice”, see Goldstone Report, *op. cit.*, par. 1199; “[T]he picture which emerges points [...] to the full implementation of the Dahiye Doctrine during Operation Cast Lead”, see Public Committee Against Torture in Israel, *op. cit.*, p. 28.

¹⁷¹ For a thorough analysis of armed attacks involving civilians and civilian objects, see in general Goldstone Report, *op. cit.*, 2009; Palestinian Centre for Human Rights, *op. cit.*; B’tselem, *op. cit.*; V. Arrigoni, *op. cit.*.

¹⁷² See G. Eiland, *op. cit.*; Y. Evron, ‘Deterrence: The Campaign against Hamas’, in *Strategic Assessment*, 11 (2009), 4, <http://www.inss.org.il/publications.php?cat=21&incat=&read=2656>.

¹⁷³ “[C]ivilian suffering appears to have been more intended than not, more permitted than prevented, and more integrated into Israeli strategic plans than unexpected or undesired. Cast Lead seems to have delivered precisely what its planners and implementers wanted in operational terms”, see A. Flibbert, ‘The Gaza War: Instrumental Civilian Suffering?’, in *Middle East Policy*, 18 (2011), 1, <http://mepc.org/journal/middle-east-policy-archives/gaza-war-instrumental-civilian-suffering>.

¹⁷⁴ “Punishing the Gazan population while striking at Hamas was a way of advancing this strategic objective [the reestablishment of deterrence], because attacks on the organization alone would not have had the desired political effect. Killing rocket squads and militants would not have created sufficient fear on the part of the Hamas leadership, and *fear is the essential ingredient in deterrence*”, see *ibid.* (emphasis added).



1891. It is clear from evidence gathered by the Mission that the destruction of food supply installations, water sanitation systems, concrete factories and residential houses was the result of a *deliberate and systematic policy* by the Israeli armed forces. It was not carried out because those objects presented a military threat or opportunity, but to make the daily process of living, and dignified living, more difficult for the civilian population.

1893. The operations were carefully planned in all their phases. Legal opinions and advice were given throughout the planning stages and at certain operational levels during the campaign. There were almost no mistakes made according to the Government of Israel. It is in these circumstances that the Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a *deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population*, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.¹⁷⁵

As mentioned, the present research does not intend to assess whether Operation ‘Cast Lead’ could fall within the scope of the definition of international state terrorism. In particular, because the operation was part of a broader on-going armed conflict and, subsequently, the use of armed force must be assessed against IHL.¹⁷⁶ However, both the ‘Dahiya doctrine’ and Operation ‘Cast Lead’, respectively as a strategic concept and as a military operation, share elements with the definition of international state terrorism. This is especially true in regard to the intent (coercing the enemy, which differs from militarily defeating it or conquering its territory); the object of the attacks (civilian infrastructures and the civilian population); and, the means by which ultimately influencing the policies of the enemy government (terrorising the population).¹⁷⁷ Therefore, the use of armed force presented in this work qualifying as state terrorism appears to be not only conceived on a strategic-military level but also possibly carried out in practice. That is to say, although the ‘Dahiya doctrine’ and Operation ‘Cast Lead’ may not actually fall within the proposed definition of international state terrorism, they both show that this paradigm may work in practice.

What must be pointed out is that certain military operations are *expressly* carried out with complete disregard for human rights, which are particularly endangered during armed conflicts. Better said, the supposed efficacy of certain military strategies relies on a systematic violation of IHL, and of human rights protected thereby, by means of directly attacking civilian objects as well as spreading terror among the civilian population. As already stated, the particular gravity of these violations of human rights

¹⁷⁵ Goldstone Report, *op. cit.*, pars. 1880-1895 (emphasis added).

¹⁷⁶ See *ivi*, pars. 270-285. As noted, the above definition of international state terrorism is linked to the definition of aggression. Hence, this manner of using force should be assessed against *jus ad bellum* norms.

¹⁷⁷ “[A]n important, if publicly unstated, objective of Cast Lead was to change the political environment in which Hamas operated by making it less welcoming and supportive. From this perspective, Israeli leaders expected at least some Palestinians to blame Hamas for their woes, with the operation further delegitimizing the Islamists”, see A. Flibbert, *op. cit.*; “Though it appears that Israel did not have a policy of intentionally killing civilians, it is possible to summarise and assert that the many casualties and widespread destruction were the result of a coherent strategy that incorporated two major elements into the planning of Operation Cast Lead: 1. The implementation of the ‘Dahiye Doctrine’, the principal tenet of which was to cause intentional suffering to civilians *so that they would bring pressure to bear on those who were fighting against the IDF* [...]”, see Public Committee Against Torture in Israel, *op. cit.*, p. 29 (emphasis added).



seems to be better interpreted by the definition of international state terrorism than by that of aggression. Above all, because using force in this way is not only morally worse but also more serious on a legal level, for it entails a deliberate and systematic violation of basic international rules protecting civilians in time of war.

Even though it is quite unlikely that states will try to cope with such an issue, it is of scholarly interest to do it as well. Assuredly, it can be contended that on the practical level it is not advisable to complicate the framework on the prohibition of the use of force with ulterior definitions. This may be true. However, it can also be maintained that it is a matter of equality and justice to openly recognise that under certain circumstances even states may commit acts of international terrorism. The use of armed force by states inherently causes gross violations of human rights, since the very nature of war is killing people. Such violations become all the more grave when armed attacks directly target the civilian population as part of a strategic plan. Exterminating civilians is the essence of terrorism and when it is the state who acts, it should be acknowledged that it is committing a terrorist act.

If the foregoing analysis is deemed sensible, the next step would be to investigate the legal consequences deriving from the commission of acts of international state terrorism in terms of both international responsibility and individual criminal responsibility. As to the former, the principal benchmark is the regime of responsibility for acts of aggression. In general, the prohibition on the use of force is a paramount principle of contemporary international law, to the extent that from art. 2(4)¹⁷⁸ of the UN Charter a customary norm has developed.¹⁷⁹ Additionally, the specific prohibition on aggression has become a peremptory norm of general international law or *jus cogens*.¹⁸⁰ The latter is a type of customary law that has specific substantial features and which gives rise to a particular class of state responsibility. In this respect, Cassese distinguishes between ‘aggravated’ and ‘ordinary’ state responsibility, which respectively originates from breaches of peremptory norms of international law and from breaches of any other type of international norm.¹⁸¹ In general, state responsibility arises from the commission of an act which is in breach of an international norm and which is attributable to the wrongdoer. What marks ordinary responsibility is a bilateral relation between two states. That is to say, the legal relationship and related consequences solely concern the wrongdoer and the injured state.¹⁸² Legal consequences arising from ordinary responsibility are the obligation to cease and to not repeat the wrongful act and the

¹⁷⁸ See art. 2(4) UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

¹⁷⁹ See ICJ, *Nicaragua Case*, cit., par. 190; N. Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, Giappichelli, 2006, pp. 32-3.

¹⁸⁰ See J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, p. 246; N. Ronzitti, *op. cit.*, p. 33; G. Kemp, *Individual Criminal Liability for the International Crime of Aggression*, Antwerpen, Intersentia, 2010, p. 48. Art. 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as follows: “[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

¹⁸¹ See A. Cassese, *International Law*, cit., p. 244.

¹⁸² See *ivi*, p. 262.



obligation to make full reparation for the injury caused.¹⁸³ Aggravated responsibility arises from an act which breaches a norm of *jus cogens*. The wrongful act must be serious, namely it must consist of “a gross or systematic failure by the responsible state to fulfil the obligation”.¹⁸⁴ What ensues from the commission of such an act is that all states are involved in the legal relationship and this, in turn, affects the type of consequences that arise.¹⁸⁵ The wrongdoer is under the same obligations that derive from ordinary responsibility, i.e. cessation, non-repetition and reparation.¹⁸⁶ Yet, aggravated responsibility poses further obligations on all states. Indeed, art. 41 provides that they must “cooperate to bring to an end” the breach and they must not “recognize as lawful” the situation created by the wrongful act or “render aid or assistance in maintaining” such a situation.¹⁸⁷ Acts of aggression, because they breach a *jus cogens* norm, give rise to aggravated international responsibility of the state.¹⁸⁸

Since international state terrorism derives from the category of aggression and could therefore be considered as a subcategory thereof, the foregoing framework may apply thereto. To be precise, elements of the characterisation are: 1) the intention of coercing the enemy government to alter its policies; and, 2) the planning and execution of armed attacks with the primary purpose of spreading large-scale terror among the enemy population. What follows from this definition, in terms of international responsibility, is that, at least, acts of international terrorism give rise to ordinary responsibility for breach of the general prohibition on the use of force. However, the question is whether aggravated responsibility can arise from acts of international state terrorism. The proposed definition of international state terrorism requires the use of force to be comprehensive, that is, armed attacks must be carried out on a large-scale. This fashion of using armed force already amounts to aggression.¹⁸⁹ Hence, it follows that whether one fails to prove either an intent to coerce the enemy government or that armed attacks are systematically carried out with the primary purpose of spreading terror among the civilian population, the use of force falls back within the definition of aggression. Admittedly, violent acts underlying both aggression and international state terrorism lead to identical material effects, namely large-scale destruction and mass murders. Therefore, it would not make sense to judge the prohibition on international state terrorism as different from the prohibition on aggression. Whether the latter concerns the gravest breaches of the values of the international society, i.e. peace and security, the former constitutes exactly the same type of act, yet with different and more specific intent. In this perspective, it seems possible to maintain that the commission of acts of international state terrorism gives rise to aggravated international responsibility.

The issue of individual criminal responsibility is far more complicated. In 2010, the crime of aggression was included in the Rome Statute of the ICC.¹⁹⁰ However, the Court will be able to exercise its jurisdiction exclusively from 2017 on, and only if the Assembly of States Parties activates it after at least 30 states ratify the amendments to

¹⁸³ See arts. 30 e 31 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter: ILC’s Draft Articles), 2001.

¹⁸⁴ See art. 40 ILC’s Draft Articles.

¹⁸⁵ See A. Cassese, *International Law*, cit., p. 273.

¹⁸⁶ See J. Crawford, *op. cit.*, pp. 252-3.

¹⁸⁷ See art. 41 ILC’s Draft Articles. See also A. Cassese, *International Law*, cit., p. 274.

¹⁸⁸ See UNGA, Doc. A/RES/3314(XXIX), cit., art. 5.

¹⁸⁹ See *ivi*, art. 3.

¹⁹⁰ See ICC, Doc. RC/Res.6, cit.. On the crime of aggression, see the special issue of the *Journal of International Criminal Justice*, 10 (2012), 1.



the Statute.¹⁹¹ While framing individual responsibility for aggression is quite difficult, it is even more difficult for international state terrorism. To be prosecuted as such, an amendment to the Rome Statute would be needed and this is quite unlikely to happen. At present, the prosecution of the planning or commission of acts of international state terrorism could be carried out by classifying such acts in a different way, namely as crimes against humanity. Another possibility is to prosecute the war crimes constituting the physical conduct, that is, directly targeting and spreading terror among the civilian population. Yet, this would mean a focus on the violations of *jus in bello* and not of *jus ad bellum*. As in cases where war crimes committed during an armed conflict are punished without prosecuting the act of aggression that gave rise to that conflict, the criminalisation would not concern the act of international state terrorism as such. All in all, the legal consequences arising from acts of international state terrorism appear to be better framed through the law of state responsibility rather than international criminal law.

IV. Conclusion

As shown in chapter two, the international debate has mainly focused on international (non-state) terrorism. This sounds reasonable for two reasons. On the one hand, from a historical perspective terrorism has mainly consisted of political violence carried out by non-state actors against states and governments. On the other hand, it must be highlighted that states are the key actors in the making of international law. It follows that the latter mirrors the interest of states in combating political groups, which challenge their legitimacy outside an armed conflict. Subsequently, *non-state* terrorism has been the principal object of criminalisation in international law.¹⁹² Conversely, IHL provides for the criminalisation of any terrorist act, whether perpetrated by state or non-state actors.¹⁹³ Yet, it must be pointed out that wartime terrorism diverges from peacetime terrorism, since it is not a form of political violence but rather a prohibited method of warfare. In this regard, the two types of terrorism are absolutely different. The common feature, instead, is the criminal conduct of spreading terror among the civilian population. Besides, the analysis has also shown that an interest in contrasting state terrorism has somehow emerged. However, the meaning of this concept has always been influenced by the broader context of international relations, thus acquiring more a political sense than a legal one. Non-powerful states, indeed, have a strong interest in condemning the use of armed force by great powers as terrorism: it means to blame it as particularly grave.

Chapter two also provided some examples of terror tactics adopted by states.¹⁹⁴ Aerial bombing on the one hand, and sponsorship of covert operations or support for clandestine groups in foreign countries, on the other hand, are used as tools in international relations and may be qualified as terrorist acts. State terrorism is nothing but one way of using force to achieve geopolitical goals. The common feature of state terrorist tactics is that their primary aim is to cause fear among the population of the targeted state. Additionally, some strategic military doctrines, such as ‘Shock and

¹⁹¹ See arts. 15*bis* and 15*ter* of the Rome Statute.

¹⁹² See sections 2.1 and 2.2.

¹⁹³ See section 2.3.

¹⁹⁴ See section 2.4.



Awe¹⁹⁵ and the ‘Dahiya doctrine’,¹⁹⁶ expressly state that the means for pursuing certain military and political goals is to target civilian objects and infrastructures in order to spread fear against the enemy. On the one hand, this means that state terrorism is a reality in international relations and therefore an aspect of the use of armed force. On the other hand, a major issue at stake is the respect for and protection of human rights. Terrorism by definition consists of serious violations of human rights. If this is true for terrorist acts carried out by non-state actors (non-state terrorism) and for operations conducted by states’ agents (state-sponsored terrorism), it is also true for war-like terrorist acts (international state terrorism). Non-state actors will never achieve the capacity of inflicting the level of widespread destruction, which states are conversely capable of wreaking through their armed forces and weaponry. For example, although Hamas could improve its capacity for launching rockets against Israel, it will never be capable of inflicting large-scale destruction in a similar manner as Operation ‘Cast Lead’ did.¹⁹⁷ That is to say, whether the threat posed by international (non-state) terrorism is of major concern, the danger posed by international state terrorism is of equal or even higher level.

Whereas chapter two dealt with the theoretical possibility of conceiving the paradigm of state terrorism under international law, chapter three attempted to define it as an international norm. The main aim of the investigation was to illustrate that international state terrorism could be defined as a legal concept. As a matter of fact, it has always been, and continues to be, a politically loaded notion as well as that of non-state terrorism. The word ‘terrorism’ itself is used to politically delegitimize the adversary as a criminal. However, what must be pointed out is that the concept of international state terrorism was built on *existing* legal materials with the purpose of showing that it is possible to *legally* define it.¹⁹⁸

Arguably, it must be acknowledged that from a practical standpoint overloading the definition of aggression might not be effective. Binding states to the prohibition of using armed force still proves extremely difficult. Yet, qualifying certain forms of aggression as terrorist acts would have a strong symbolic meaning, particularly in regard to acts of powerful states. Additionally, legally defining international state terrorism would achieve the goal of detaching such a concept from its actual political meaning. Not every use of armed force would fall under this category, only conduct which presents the characteristics defined above would fulfil the definition. In this way, the phrase ‘state terrorism’ could finally cease to be a politically loaded concept, at least under international law.¹⁹⁹

¹⁹⁵ See section 2.4.

¹⁹⁶ See subsection 3.2.3.

¹⁹⁷ This statement should not be understood as an implicit and general qualification of Hamas’ or Israel’s actions as terrorist. Such a qualification can exclusively be made on a case-by-case basis and falls out of the scope of the present work.

¹⁹⁸ See subsections 3.3.1 and 3.3.2.

¹⁹⁹ This article constitutes a reworked version of my master’s and university’s theses. I am grateful to Fabian Raimondo, supervisor at the University of Maastricht, and Orsetta Giolo, supervisor at the University of Ferrara, for their precious comments during the drafting of the texts. I would also like to acknowledge Danilo Zolo, whose reflections on international law underlie the whole work; Damiano De Facci, for the reading suggestions and intellectual inputs he has given me throughout these years; and Sarah Wheaton, for helping me to edit the text.