A Politicized and Poorly Conceived Notion Crying Out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism

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At the international level regret is often voiced over the lack of a universally agreed definition of terrorism. This occurs so frequently that it appears to have originated a (somewhat faddish) catchphrase.[1] A tendency exists, moreover, to view the matter less as one to be addressed pragmatically, than as a predominantly abstract question.[2]

The importance attached to it was demonstrated in connection with the "2005 World Summit" held within the United Nations General Assembly (the Assem-

[1] Cf. J. G. Castañeda's recent reference to "the fight against … terrorism, consensually defined". Latin America's Left Turn, Foreign Affairs, May/June 2006, 28, 43 (emphasis added).

[2] Cf. the references, in the preambles of UN General Assembly resolutions 42/159, 44/29 and 46/51 (of 1987, 1989 and 1991, respectively), to "the definition of terrorism" without more.

bly), in September 2005,[3] to enable heads of state and government to address humanity's most pressing problems. The corresponding preparations included strenuous, but unsuccessful, efforts to introduce a definition of terrorism (or, more precisely, what was rather incorrectly regarded as one) into the document adopted at the summit, i.e. the "2005 World Summit Outcome Document", of 16 September 2005.[4]

Consideration of the definition of terrorism has been plagued not only by controversies resulting from politically motivated positions, but also by misconceptions and confused thinking.[5]

Agreement on the matter requires due regard for the purposes of the exercise, a question arising on two separate planes, the political and the legal.[6] The need for this distinction has not been adequately observed. Moreover the definition of terrorism, whether on one plane or the other, has not been separated from the contentious political issues mentioned, which adhere to the question so strongly that often a reference to the need for defining terrorism is, at bottom, no more than an expression of support for a certain position on those issues.

In comparison with what is the case with some other criminal offences, a definition of terrorism intended for exclusively legal purposes should not, however, be particularly difficult to work out. True, certain offences, such as murder, are no doubt easier to define. But one would think that false pretenses and embezzlement, as well as two offences particularly significant at the international level, i.e. torture and the enforced disappearance of persons, are, for legal purposes, more difficult to define than terrorism.[7]

This article seeks to bring the question of the definition of terrorism into focus within the broadest perspective, i.e. that of the international community as a

[3] The summit consisted of seven plenary meetings held, in the Assembly's 60th session, from 14 to 16 September 2005, with most states represented by heads of state or government.

[4] Cf. Assembly resolution 60/1.

[5] Two politically charged staples deserving mention are the notions of state terrorism, meant, nowadays, only as a code word for the use of force by Israel in the context of the Israeli-Palestinian conflict, and that of the root causes of terrorism, generally invoked to justify the reverse use of force. (Until the end of apartheid these notions also covered the use of force against and by African liberation movements.)

[6] Even on this level one can improperly confuse aspects of the definition of terrorism. An example is the idea that a definition of terrorism contained in a draft comprehensive convention on terrorism under consideration at the United Nations could, once it is adopted, be useful to the Council in its action against terrorism. This involves a sort of *confusion des genres* that should be avoided: a definition contained in a treaty normally produces no effect outside the ambit of the treaty. (See E. Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 AJIL 333, 340 [2003].) (Cf. also note 58 *infra*.)

[7] For valuable comments on the definition of terrorism, see R. Kolb, The Exercise of Criminal Jurisdiction Over International Terrorists, in: A. Bianchi (ed.), Enforcing International Law Norms Against Terrorism, 2004, 228-246. (Kolb does not, however, seem to be aware of the definitional "overreach" discussed in the text at note 65 *infra*.)

whole.[8] This will be done with predominant reference to the legal aspects of the matter, which, for that community, are by far the most important ones.

It is precisely in the specifically legal area that a major difficulty relating to the definition of terrorism has arisen. This issue, which is blocking an avenue of progress in the fight against terrorism, will receive considerable attention. It derives from a politically very sensitive addition proposed by the states members of the Organization of the Islamic Conference (OIC) (composed of 56 UN member states and Palestine) to the draft comprehensive convention on terrorism mentioned in note 6 *supra* (hereinafter, respectively, "the OIC proposal" and "the draft convention").

Our approach will be synthetic rather than analytic. Accordingly few of the numerous aspects of the topic will be discussed as extensively as would be called for were it addressed in isolation.

I. General Survey

Some generalities and an account of the overall aspects of the relevant work at the global level will be followed by an overview of the pertinent activities specifically within the United Nations proper and comments on the existing literature.

Past practice in somewhat similar areas shows that no compelling need exists for a p o l i t i c a l definition of terrorism.[9]

With respect to each of three types of reprehensible conduct other than terrorism that, on human rights grounds, have been universally sanctioned, namely, chronologically, racial discrimination, discrimination against women, and torture, the Assembly in each case first adopted a declaration,[10] this initial step being fol-

[8] The distinction between international and purely domestic terrorism deserves comment. An act of terrorism having no international dimension of any kind can usually be handled without international cooperation. Thus counter-terrorism treaties of a universal character limit their range of application on the basis of criteria of an international nature that vary from treaty to treaty. This is exemplified by Article 1 (1) of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, as well as Articles 4 (1) and 13, respectively, of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and the International Convention Against the Taking of Hostages. It should be noted, however, that the International Convention for the Suppression of Terrorist Bombings does not entirely wash its hands of offences having no international dimension. (See Article 3 of this convention, to be compared with Article 4 (1) of the above-mentioned hostages convention.)

[9] In 2001, the United Kingdom representative in the Assembly stated that "[w]hat looks, smells and kills like terrorism is terrorism". (UN Doc. A/56/PV.12, 18.) This colourful *boutade* can be viewed as a denial of the need for a p o l i t i c a l definition of terrorism.

[10] Namely the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963), the Declaration on the Elimination of Discrimination Against Women (1967) and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975). To be sure, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion of Belief defines, quite properly, the phenomena it addresses. (Cf. Article 6 of this declaration.) But, apparently, this is because this declaration, which is not matched by any treaty, was meant, from the outset, to have normative effects.

lowed by a treaty, adopted by the same body, against the particular evil concerned.[11]

Nothing in the three declarations mentioned could be regarded as a definition, however imperfect, of the acts they aim to suppress, or even partially approximates such a definition. The opposite is the case, however, with the three corresponding treaties, each of which contains a well-formulated definition of the acts it sanctions.[12]

Since, unlike a treaty, a declaration is primarily of a solemn, inspirational nature, precision and detail are less appropriate in it than in a treaty. Therefore language which, like that of definitions, is extremely precise and hence dry is substantively less useful and stylistically less suitable in a declaration than in a treaty.[13]

Thus, unlike a treaty aimed against particular acts, a similarly motivated declaration can, and should, do without a definition of those acts, whenever, as is normal, they are sufficiently well understood for the declaration to have a worthwhile impact without defining them.

One might therefore have expected that concerning terrorism, a phenomenon about which everyone has a fairly good idea, the procedure generally applied in the human rights area would have been followed. There would thus have been, first, a declaration censuring terrorism, but containing no provision that is, or even faintly resembles, a definition of the phenomenon, the declaration being followed by a treaty against terrorism containing a definition properly so-called of the latter.

This, however, has not been the case. Although the Assembly has adopted a declaration on terrorism, this was by no means the first step in the process by which terrorism has been globally addressed. Indeed, by the time the Assembly adopted the declaration, i.e. in 1994, such a process was well under way, as by then the Assembly, as well as the United Nations specialized agencies and the IAEA, had adopted ten multilateral treaties against terrorism. (These treaties, now numbering 13, will be collectively referred to as "the UN counter-terrorism treaties".)[14]

(Cf. D. J. Sullivan, Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination, 82 AJIL 487, 488 [1988].)

[11] Namely the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of Discrimination Against Women (1979) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

[12] Cf., respectively, Articles 1 (1), 1 and 1 (1) of the treaties cited in the preceding note.

[13] It is thus not in the 1959 Declaration on the Rights of the Child, but in the 1984 Convention on the Rights of the Child, that the word child is defined. Similarly the draft United Nations Declaration on the Rights of Indigenous Peoples, recently adopted by the UN Human Rights Council, is silent on the meaning of the key term "indigenous people". (See UN Doc. A/61/448, para. 28, draft resolution II.) (In contrast, the 1989 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries [Convention 169] seeks to define the key terms "indigenous people" and "tribal people".) Cf. also note 22 *infra*.

[14] The 13 treaties are the (1) 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, (2) 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, (3) 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (4) 1973 Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, (5) 1979 International Convention Against the Taking of Hostages,

A few of these treaties, five of which have been adopted by the Assembly, either criminalize no acts at all or criminalize acts that cannot be regarded as terrorist ones.[15] Since the treaties in question that criminalize certain acts define them as occurring in specific circumstances or as being done by certain specific means, they are known as "sectoral" treaties.

Moreover, unlike the first three declarations referred to in note 10, the 1994 declaration contains a provision that, although not formally qualifying as a definition of the acts against which the declaration is aimed (and perhaps not meant to be one), can, for practical purposes, serve, to a considerable extent, as a definition of those acts (and, hence, as one of terrorism).

The Assembly first addressed the subject of terrorism in 1972, when it established an Ad Hoc Committee on Terrorism. This committee, composed of 35 states, met and reported to the Assembly in 1973, 1977 and 1979.[16] The Assembly further considered the question of terrorism, biennially, from 1981 to 1993 inclusive, and, annually, from 1994 to the present.[17]

That the work of the Ad Hoc Committee was to be considerably politicized is shown by the comments made on the definition of terrorism at its first session, as summarized in the corresponding report.[18]

This politicization is further reflected in the title of the agenda item under which, from 1972 to 1985, the Assembly considered terrorism, namely:

> "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance

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(6) 1979 Convention on the Physical Protection of Nuclear Material, (7) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (8) 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (as amended by a protocol of October 2005 (see note 64 *infra*), (9) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (as amended by a protocol of October 2005 (see note 64 *infra*), (10) 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, (11) 1997 International Convention for the Suppression of Terrorist Bombings, (12) 1999 International Convention for the Suppression of the Financing of Terrorism and (13) 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. (The treaty numbered (6) above has been considerably revised by an agreement adopted in July 2005. The conditions of entry into force of the amended treaty, entitled "Convention on the Physical Protection of Nuclear Material and Nuclear Facilities", are given in Article 20 (2) of the original convention; for the text of the agreement see IAEA Doc. GOV/INF/2005/10/GC(49)/INF/6.)

[15] It is, strictly speaking, wrong to say that a treaty criminalizes acts of individuals. What a treaty can do, and is done by most counter-terrorism treaties, is to obligate states parties to criminalize such acts. Nevertheless this article will, for brevity, speak of treaties criminalizing certain acts of individuals, it being understood that what is meant is treaties obligating states parties to criminalize such acts.

[16] UNGAOR, 28th, 32nd and 34th sessions, Supps. No. 28 (for the 28th session) and No. 37 (for the next two).

[17] At each of its regular sessions from 1994 to 2005 the Assembly has, on the report of its Sixth Committee, adopted, without a vote, a general resolution on terrorism, the most recent being resolution 61/40, of December 2006.

[18] First of the reports cited in note 16 *supra*, paras. 32-38.

and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes."[19]

At its 1987, 1989 and 1991 sessions, the Assembly considered terrorism under a dual agenda item, the first sub-item being the single one just cited, the second sub-item the following: "Convening, under the auspices of the United Nations, of an international conference to define terrorism and to differentiate it from the struggle of peoples for national liberation." (Emphasis added.) This coupling of the definition of terrorism with the underlined phrase reflects well the political difficulties plaguing that definition.[20]

In the preambles of its 1987, 1989 and 1991 general resolutions on terrorism, i.e. resolutions 42/159, 44/29 and 46/51, adopted without a vote, the Assembly recognized "that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism."[21]

In 1996, the Assembly established a new committee to deal with terrorism. This body has met annually, its work being pursued each year through a working group of the Assembly's Sixth Committee. The work of this body is bogged down by the OIC proposal.

In 2004 the Security Council (the Council) adopted, for the first time, a resolution directly relating to the definition of terrorism. Like the 1994 declaration, this resolution, namely resolution 1566, contains what can be regarded as an imperfect definition of terrorism.[22] Among the numerous Council resolutions on terrorism preceding resolution 1566, one deserves to be singled out. This is resolution 1373, of September 2001, arising from the terrorist attacks on the United States in that month. It called for a series of abstractly defined state actions against terrorism, but without specifically determining the latter.

[19] This approximates what has been called "persuasive definition", i.e. a definition that, unlike a genuine definition, which is purely objective, aims to influence attitudes or stir emotion and is common in political argument. (Cf. I. M. Copi/C. Cohen, Introduction to Logic, 8th edition 1990, 137-139.)

[20] From 1993 to the present, the Assembly has considered the question of terrorism under a shorter agenda item, i.e. "[m]easures to eliminate international terrorism". But this change has not signalled any lessening of the politicization of the item. It may be noted that no international conference on terrorism, which continues to be advocated by developing countries and is another contentious issue, has been held as yet.

[21] Cf. note 2 *supra*. The abstract nature of this reference to a definition of terrorism should be noted.

[22] Neither of the Council's two declarations on terrorism contains any provision bearing on its definition. (Cf. Council resolutions 1377 and 1456, of 2001 and 2003, respectively, both adopted at ministerial level meetings.) Nor is any such provision to be found in the Assembly's 1975 friendly relations declaration, even though, in connection with one of the rules it lays down (in paragraph 1), it refers to "terrorist acts".

Since the amount of academic writing on terrorism is enormous and definition of the phenomenon is central to this literature, much ink has been spilled over that aspect of terrorism.[23]

As is the case with the general scholarly publications on terrorism, however, the writings on this narrower question are predominantly in the areas of political science, sociology, criminology and other branches of the social sciences distinct from law. And this more specialized literature often tends to be unfocused, which also goes for the purely legal writings on the definition of terrorism. For commentators frequently fail not only to clearly separate the purely legal issues from others, but also to distinguish clearly between the various levels at which the specific issues should be considered.

Since a fairly large number of states sanction terrorism as a specific criminal offence, one of those levels is the purely domestic one.[24] A second level is that of the regional treaties against terrorism. The third level, the one addressed here, is that of the formal action against terrorism by the United Nations and other international organizations of a universal scope.

A further complicating factor is that a definition of terrorism on one of those three levels can serve as inspiration for a definition at any of the other purely legal ones. The same is true of non-legal definitions of terrorism.

It is impossible, within the bounds of this article, to give even a brief account of the literature on the definition of terrorism that can be regarded as being purely or predominantly legal and is relevant for our purposes.[25]

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[23] In 1989 Gilbert Guillaume observed that social scientists had produced over 100 definitions of terrorism. G. Guillaume, Terrorisme et droit international, Académie de Droit International, Recueil des Cours, Vol. 215, 301-302 (1989).

[24] Cf. the United Nations publication containing provisions of national laws against terrorism (ST/LEG/SER.B/22, 23 and 24).

[25] Whoever is interested in this literature, which does not address most of the specific points discussed here, can usefully turn to the articles cited in notes 7 and 49. Although they are outdated in several respects, one can usefully consult paragraphs 32-38 of the first of the reports cited in note 16 *supra* and T. M. Franck/B. B. Lockwood, Jr., Preliminary Thoughts Towards an International Convention on Terrorism, 68 AJIL 69, at 72-82 (1974). More recent writings are, in addition to those cited in notes 7, 23 and 48, J.-M. Sorel, Some Questions About the Definition of Terrorism, 14 EJIL No. 2, 365 (2003); B. Broomhall, State Actors in an International Definition of Terrorism from a Human Rights Perspective, Symposium "Terrorism on Trial", Case Western Reserve Journal of International Law, 427-441 (2004); S. Zeidan, Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism, Cornell International Law Journal, 491 (2004); J. Dugard, The Problem of the Definition of Terrorism, in: P. Eden/T. O'Donnell (eds.), September 11, 2001, A Turning Point in International and Domestic Law 2005, 187; R. Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Law, Boston College International and Comparative Law Review, (Winter 2006); and C. Begorre-Bret, The Definition of Terrorism and the Challenge of Relativism, Cardozo Law Review (2006), Symposium Terrorism, Globalization and the Rule of Law. (A general work on the definition of terrorism published too recently to permit its being taken into account here is Ben Saul's Defining Terrorism in International Law, 2006.)

II. The Definition of Terrorism and UN Declarations, Resolutions and a Recent Report

This section will, from the viewpoint of the definition of terrorism, discuss the 1994 declaration, comparing it with resolution 1566, as well as the legal effects of the relevant provisions of the former and the latter, with particular reference to their bearing on the range of application of Council resolution 1373. It will also comment on a definition of terrorism contained in a 2004 UN report, the above-mentioned efforts to define terrorism in the context of the 2005 World Summit and the relationship between possible use by the Assembly of its power to adopt a definition of terrorism and the relevant work of the Council.

A. The 1994 General Assembly Declaration

On 9 December 1994, the Assembly adopted, without a vote, resolution 49/60, entitled "Declaration on Measures to Eliminate International Terrorism", which contains the above-mentioned declaration (the declaration).

The declaration, in referring to the acts and activities it sanctions, speaks variously of "acts, methods and practices of terrorism" (paragraphs 1 and 2), "criminal acts" whose characteristics it rather elaborately spells out (paragraph 3, to be quoted in full shortly), "terrorist acts", "acts of terrorism" and "terrorist activities" (paragraphs 4, 5, 6 and 12), and just "terrorism" and "international terrorism" (paragraphs 5, 7 and 10).

One might, at first sight, see a definition of terrorism in paragraph 3 of the declaration, reading as follows:

"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;"[26]

Before the definitional aspects of this paragraph are discussed, it should be observed that neither the paragraph nor any provision of the declaration affords a basis for restricting the scope of the acts it sanctions in a manner that would narrow the coverage of the paragraph to exclude any acts plainly coming within its literal meaning.[27] It should also be noted that it is not absolutely certain, albeit pre-

[26] The Assembly's 1996 supplementary declaration on terrorism (resolution 51/210) is irrelevant for present purposes.

[27] It appears reasonable to apply the rules of the Vienna Convention on the Law of Treaties concerning the interpretation of treaties to the interpretation of United Nations declarations. Accordingly even if (contrary to what is the case) the *travaux préparatoires* of the declaration indicated that paragraph 3 thereof should be construed more narrowly than its literal meaning warrants, this would not justify such a construction: interpreting the language of paragraph 3 "in accordance with the ordinary meaning to be given to its terms" neither leaves the meaning thus derived "ambiguous or obscure" nor

sumable, that those acts are all the acts covered by the declaration and only those acts.

As for the question whether paragraph 3 qualifies as a proper definition of the acts it refers to, it should first be noted that a well-formulated definition is composed of a *definiendum* and a *definiens*, with the latter stating that the former means, or, in a less careful but still acceptable formulation, is this or that.[28] It should, furthermore, be clear from the definition that only the objects to which the *definiens* applies are instances of the *definiendum*. Paragraph 3 of the declaration, whether seen in isolation or in the context of the remainder of the declaration, does not fit this pattern.

If its authors had intended paragraph 3 to do so, they could easily have carried out their intention by drawing inspiration from the well-formulated definitions that are contained in most of the numerous multilateral treaties adopted by the Assembly and show its mastery of the very simple technique of drafting such definitions.[29]

If such had been the intention of the authors of paragraph 3, they could hence have drafted it to read: "[For the purposes of this declaration] Acts of terrorism are criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes", with the paragraph ending at this point (its remainder, which is out of place in a definition, being moved elsewhere and the other paragraphs of the declaration amended so as to designate the reprehensible acts or activities to which they refer only by the term "acts of terrorism").

Paragraph 3 of the declaration can be seen as outlining elements of a definition of terrorism. It appears, besides, that, taken together, those elements, while coming very close to doing so, do not exhaust the characteristics that one would reasonably include in the concept of terrorism, which should not be limited to criminal acts committed "for political purposes" and cover such acts whenever they cause not only terror properly so-called but also mere intimidation.[30] The declaration does not, moreover, contain criteria for determining its international

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leads "to a result which is manifestly absurd or unreasonable". (Cf. Articles 31 (1) and 32 of the Vienna Convention.) The impossibility of reading into paragraph 3 of the declaration any limitation of its *ratione materiae* scope is significant because the problem posed by the OIC proposal is directly involved.

[28] Occasionally, in defining a term, a treaty may, instead of "means" or "is", use "includes". (See, for example, Article 1 (1) of the International Convention for the Suppression of Terrorist Bombings.) This goes against the grain of a definition; it should be understood, however, at least in the majority of such cases, that what the drafters meant to say is "means". (For definitions whose formulation is somewhat *sui generis* but which clearly qualify as such, see Article 76 (1) of the United Nations Convention on the Law of the Sea and Article 1 (1) of the International Convention Against the Taking of Hostages.)

[29] Indeed four of the UN counter-terrorism treaties adopted by the Assembly contain well-formulated definitions of certain of the terms they use.

[30] One would think that the terror or, *a fortiori*, the intimidation aroused need not be permanent, or, even, long-lasting.

scope. (Cf. note 8 *supra*.). Nor does it refer to attempts to commit the acts it sanctions or complicity in their commission. (These omissions reflect the non-legal nature of the declaration.)

It should be observed, finally, that, rather than being seen as a failed attempt to define terrorism, the characterization in paragraph 3 of the "[c]riminal acts" to which the paragraph refers should, despite its being formulated so widely that it appears to be and can serve as a definition, be seen, rather, as an explanation of the reasons why those acts should be deemed unjustifiable. The declaration can thus not be entirely faulted for violating the common sense rule that a definition is out of place in a declaration.

B. Security Council Resolutions 1373 and 1566

By its above-mentioned resolution 1373, adopted unanimously on 28 September 2001, the Council, invoking its powers under Chapter VII of the UN Charter, made itself into a global legislator by prescribing, in that resolution, without setting any time limit, a series of abstractly described state actions for the repression and elimination of terrorism.[31]

An important difference between resolution 1373 and the declaration is that resolution 1373 conspicuously refrains from defining or determining, however imperfectly or incompletely, the terrorist offences it aims to suppress.

On 8 October 2004, the Council unanimously adopted resolution 1566. By this resolution, which makes no reference to the declaration (and, pursuant to the Council's practice, has no title), the Council, again invoking Chapter VII, once more called upon states to take certain actions, described in the abstract, with respect to acts of terrorism. But in resolution 1566 the Council replicated a feature of the declaration by describing certain elements of the acts covered. Thus, in the first of the two sentences of paragraph 3 of resolution 1566, the Council

> "*[r]ecalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from any acts, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are in no circumstance justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or any other similar nature …"[32]

[31] Cf. P. C. Szasz, The Security Council Starts Legislating, 96 AJIL, 901 (2002), and E. Rosand, The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?, 28 Fordham International Law Journal, Feb. 2005, No. 3, 542.

[32] In the second sentence of paragraph 3 the Council "calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their gravity". Henceforth all references to paragraph 3 without more are to be understood as applying only to its first sentence.

This sentence suggests that civilians are n o t the principal victims of terrorism. But everyone knows that quite the contrary is the case.[33]

The sentence also suggests that "criminal acts" against the military are as a rule acts of terrorism. But this is equally wrong: the majority of acts of violence against the military that can be deemed criminal take place in armed conflicts, in which context they are generally not acts of terrorism.

The reference, in paragraph 3, to intimidation applies, literally, only to "a population", not to "the general public", to "a group of persons" or to "particular persons". Since, however, this limitation makes no sense whatsoever, paragraph 3 should be deemed not to contain it.

The reference, in paragraph 3, to acts of compulsion of "a government or an international organization" appears unnecessary, any such act being, *ex hypothesi*, one that intimidates "a group of persons or particular persons".

Although the matter is not entirely free from doubt, paragraph 3 does not appear to encompass common offences covered by the UN counter-terrorism treaties.

A curious feature of paragraph 3 may, finally, be noted: there is no means of ascertaining just what it is that the Council "recalls"!

C. Paragraph 3 of Security Council Resolution 1566 and Paragraph 3 of the 1994 Declaration Compared

Most of the comments made on paragraph 3 of the declaration can, *mutatis mutandis*, be transposed to paragraph 3 of the declaration. In particular, although the paragraph does not, formally, qualify as a definition, it can serve, practically, as one.

The two paragraphs are similar in that, although they can be presumed to do so, it is not absolutely certain that paragraph 3 of the declaration and paragraph 3 of the resolution cover a l l the acts to which the declaration and the resolution, respectively, should be deemed applicable and o n l y those acts, and that there is no basis for limiting the scope of the latter paragraph (or the resolution as a whole) in a manner that would narrow its literal scope.[34]

It may also be noted that, like the declaration, resolution 1566 does not contain criteria for determining its international range of application. (Cf. note 8 *supra*.)

[33] In peacetime, military personnel may figure among the victims of terrorism just as much as civilians. But, for obvious reasons, they are normally less l i k e l y than civilians to be among those victims. Consequently and also because it is within the context of an armed conflict that it fully makes sense to distinguish between military personnel and civilians, it appears that the authors of paragraph 3 were more interested in terrorism carried out in situations of armed conflict than in terrorism occurring in peacetime. This imbalance is most peculiar. Particularly since terrorism, as generally conceived, is more common in peacetime than in the context of armed conflicts.

[34] The *travaux préparatoires* provide no clue in these respects. (Clearly, the observations made in note 27 *supra* also apply to resolution 1566.)

Nor does it refer to attempts to commit the acts it sanctions or complicity in their perpetration (which omissions reflect the non-legal nature of the resolution).

The fundamental differences in the design, contents and structure of the two paragraphs, as well as the confused language of paragraph 3 of resolution 1566, make it extremely difficult to determine precisely and with certainty all the differences in coverage between the two (a task that would exceed the confines of this article). Moreover, since some differences make one paragraph appear wider than the other, while other differences do the opposite, it is almost impossible to ascertain which of the two is, as a whole, the wider one. There follows, nevertheless, an attempt to bring out at least the most salient of these diverse points of differences.

Paragraph 3 of the declaration appears to be wider than its counterpart in resolution 1566 in one very important respect. The UN counter-terrorism treaties do not cover all the criminal acts that one would normally consider to be of a terrorist nature (this being in fact the *raison d'être* of the efforts made to conclude the draft convention); since paragraph 3 of resolution 1566 describes the acts to which it refers as constituting "offences within the scope of and as defined in the international conventions and protocols relating to terrorism" (i.e. the UN counter-terrorism treaties), it would appear that any acts that one would normally consider to be terrorist ones but are outside the scope of the UN counter-terrorism treaties are also outside the scope of paragraph 3 of resolution 1566. The contrary seems to be the case, however, with paragraph 3 of the declaration, which makes no reference to those treaties.

But paragraph 3 of resolution 1566 appears wider than paragraph 3 of the declaration in two ways. Unlike that paragraph, it does not provide that the acts it specifies are to be done "for political purposes". Moreover, unlike paragraph 3 of the declaration, it refers not only to the arousing of terror but also to intimidation.[35]

D. Legal Effects of the Imperfect Definitions of Terrorism Contained in the 1994 Declaration and Resolution 1566

The legal effects of the imperfect definitions of terrorism contained in paragraph 3 of the declaration and paragraph 3 of resolution 1566 depend on whether or not the provisions of the declaration or the resolution calling for action or the taking of positions by states, among which provisions those two paragraphs are included, are binding or only recommendatory in nature. It is therefore necessary to examine this question.

[35] The first sentence of paragraph 3 of resolution 1566 ends with "or [considerations of] other similar nature" (emphasis added), corresponding, in paragraph 3 of the declaration, to "or [considerations of] any other nature". This minor discrepancy appears, however, immaterial: the specific "considerations" set forth are, as a whole, so wide-ranging that the presence or absence of the word "similar" can hardly affect the coverage.

The resolution containing the declaration was adopted by the Assembly without a vote; thereafter everyone of its annual resolutions on terrorism, also adopted without a vote, recalls (in the preamble) and "reaffirms" (in the operative part) the declaration, paragraph 3 of which it "reiterates" in full. Moreover, starting with the one adopted in 1997, i.e. resolution 52/165, every one of these resolutions, in its operative part, also "calls upon all States to implement" the declaration. It may therefore be the case that the declaration has entered the realm of customary international law.[36]

If this is the case, then, insofar as the acts specified in paragraph 3 of the declaration are concerned, the principle, formulated in that paragraph, of the absolutely "unjustifiable" character of those acts has become legally binding on states. This is important, since the acts specified in paragraph 3 clearly cover at least the principal forms of terrorism. Moreover, if the declaration has metamorphosed into customary law, it not only obligates states to criminalize those acts, but deprives them of any basis for limiting the range of application of paragraph 3.[37] Also, despite the rather weak language of the chapeau of paragraph 5 of the declaration, states might well be under an obligation to comply with almost all the provisions of that paragraph,[38] including, in particular, its subparagraph (b), which calls for the application of the *aut dedere aut judicare* rule.[39] Besides, if the declaration has become customary law, it compels states, with regard to the acts it sanctions, to abstain from certain actions and cooperate against those acts, as provided in paragraphs 4 and 6 of the declaration.

The invocation, in a Council resolution, of Chapter VII of the Charter as a whole, is, from the strictly legal viewpoint, aberrant.[40] It is not, however, without legal effects; for it cannot but imply that the Council is, as far as the circumstances and the text of the resolution allow, making the fullest possible use of its powers conceivable in those circumstances.[41] A resolution invoking that chapter should

[36] Cf. note 17. In October 2004 the representative of Guatemala on the Sixth Committee made a statement implying that the declaration had become customary law, a view on which no one commented. (UN Doc. A/C.6/59/SR.9, para. 20.)

[37] See the paragraph accompanying note 27 *supra* and that note.

[38] Since subparagraph (e) merely urges states to observe preexisting obligations, it cannot itself impose any obligations on them.

[39] The rule figures in all the UN counter-terrorism treaties criminalizing acts of coercion or violence. It would nevertheless be useful for it to apply by virtue of the declaration being part of customary international law; for those treaties do not cover all the offences covered by the declaration and not all states are parties to all of them. It is regrettable that in laying down the rule, paragraph 3 of the declaration weakens it by subordinating it to "national law".

[40] See R. Lavalle, A Novel, if Awkward, Exercise in International Law-Making: Security Council resolution 1540, LI Netherlands International Law Review, 411, at 419-420 (2004).

[41] To be sure, the Council may, under Article 39 of the Charter, which is contained in Chapter VII, make mere recommendations. As is clear from statements by members of the Council and is logical, it is generally considered, however, that whenever it invokes that chapter as a whole, the Council, aware that one does not use a sledge-hammer to kill a gnat, really "means business". Thus, although it hardly makes sense for a Council resolution to be based so broadly, it is sensible to consider that any Council resolution that is so based cannot be limited to making recommendations: it should,

thus be interpreted, if at all possible, as laying some obligation on states (normally by virtue of Charter Article 41). If, however, such a resolution contains provisions by which the Council decides that states are to take certain actions, along with provisions by which it merely calls upon states to take certain others, it seems reasonable to consider only the former as binding on states.[42] The four provisions of resolution 1566 that concern actions by states, i.e. paragraphs 2, 3 (in its entirety), 4 and 5, are of the latter type. Since, however, the resolution invokes, in its preamble, Chapter VII, it should be interpreted, if at all possible, as imposing some obligation on states. Obviously, since neither of the last two of those four paragraphs can have that effect, one or the other, or both of the first two, must do so. It is reasonable to consider that paragraph 2 lays obligations on states. This paragraph sets forth, without qualifying it, as the declaration does, by referring to national law, the rule *aut dedere aut judicare.* In the light of note 39, this is clearly a commendable feature of resolution 1566, which covers acts that include the vast majority of those that one would normally deem to be of a terrorist nature. It is also reasonable to view both sentences of paragraph 3, which lay down rules, as also being binding on states. This means that paragraph 3 renders mandatory for states the principle of the absolutely unjustifiable nature of those acts. It also means that states are not only obligated (by implication) to criminalize the acts the paragraph describes, but to do so without any limitation as to scope.[43]

Assuming that the declaration has become part of customary law, and that resolution 1566, including its paragraph 3, is based on Charter Article 41, some comments are in order regarding possible conflicts between the declaration and resolution 1566. Not so much because the latter is *lex posterior* but, rather, because the Council has primary responsibility for maintaining international peace and security (Charter Article 24 [1]), any such conflict should be resolved in favour of the resolution. Thus, with respect to any act covered by paragraph 3 of the declaration, or paragraph 3 of the resolution, or both, neither the declaration nor the resolution would apply if the act, although a common offence, is within the range of applica-

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if allowable by the circumstances and the text of the resolution, involve at least, the application of Charter Article 41. (Conversely, a Council resolution that, like resolution 1624, of 2005, by which the Council "calls for" action by states [in connection with terrorism] but without invoking Chapter VII, or any provision thereof, should be considered purely recommendatory.) Council members have, in fact, been fearful that, even if it nowhere makes any mention whatsoever of Charter Article 42, such a Council resolution could be interpreted as authorizing UN Members to take action under that article in order to ensure the implementation of the resolution. (Cf. Lavalle, note 40 *supra*, *eo. loc.*, and, in The New York Times of 14 October 2006, U.S. Hits an Obstacle in Action by UN Against North Korea, pages A-1 and A-7, extreme right-hand column of the latter page.) It is most probably to meet this concern (which is legally but perhaps not politically unfounded) that the Council resolution ending the recent massive hostilities in the Middle East, i.e. resolution 1701, of August 2006, does not, even though its operative paragraph 15 could not be a more obvious application of Charter Article 41, indicate its constitutional basis.

[42] Compare, on the one hand, operative paragraphs 1 and 2 of Council resolution 1373 with, on the other, operative paragraph 3 thereof, as well as, on the one hand, operative paragraphs 1, 2, 3 and 5 of Council resolution 1540 with operative paragraphs 8 and 9 thereof.

[43] Cf. the paragraph accompanying note 27 *supra* and that note.

tion of any of the UN counter-terrorism treaties; the declaration and the resolution would apply, however, to any act within the terms of paragraph 3 of either one, whether or not the act has been committed for political purposes.

It is clear, however, that in practice these disparities between their respective ranges of application are relatively minor. Accordingly a state may, with respect to almost any act that one would normally regard as an instance of terrorism, be able to invoke, as appropriate, the declaration, resolution 1566, or both.

E. The Possible Connection of Resolution 1373, for Definitional Purposes, with Resolution 1566

As has been noted, resolution 1373 fails entirely to specify, let alone define, the terrorist acts it aims to suppress.[44] It is therefore reasonable to ask oneself whether this could not be remedied by showing that those acts are the ones paragraph 3 of resolution 1566 covers.

The connection would be a most useful one.[45] For if one could establish that the acts covered by paragraph 3 of resolution 1566, which acts clearly encompass the main forms of terrorism, a r e within the purview of resolution 1373, one would at least have gone quite some way towards determining the range of application of resolution 1373. This would be particularly important since, as has been observed, the range of application of paragraph 3 of resolution 1566 cannot be narrowed to mean less than what the paragraph literally means. This would make it impossible to consider resolution 1373 as being inapplicable to acts that would qualify as acts of terrorism were it not for their possessing certain attributes (such as, in particular, aiming to further a struggle against foreign occupation).

Such a connection between paragraph 3 of resolution 1566 and resolution 1373 would also be useful for the purposes of the work of a committee established by resolution 1373 to combat terrorism (and known as the Counter-terrorism Committee [the CTC]).

True, at the beginning of its preamble, resolution 1566 reaffirms resolution 1373. But this is no argument in favour of any such connection between the two resolutions, a connection for which no valid basis can be found.

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[44] The *travaux préparatoires* consist only of the draft resolution that became resolution 1373 and the procès-verbal of the meeting at which it was adopted and which shows that there was no discussion of the draft.

[45] Unless one were to concur with the view that resolution 1373 "allows each member state to define terrorism under its domestic system". (R o s a n d [note 6] *supra*, at 339.) But (if correctly understood by the present writer) this curious interpretation does not seem reasonable: barring a provision of the constitutive instrument of an intergovernmental institution clearly so providing, it appears absurd for the interpretation of a decision of an organ of the institution to be left entirely and exclusively to the discretion of each of its members.

F. A Proposed Definition of Terrorism that Did Not Get Off the Ground: The Relevant Proposal in a 2004 UN Report

Terrorism is defined in the December 2004 report entitled "A more Secure World: Our Shared Responsibility", prepared by a "High-Level Panel" of persons convened by the Secretary-General to assess threats to international peace and security and make recommendations for strengthening the United Nations.[46]

For the Panel terrorism is:[47] "[a]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."

This sentence, while, as will be shown, quite defective in other respects, has at least the merit of constituting a well-formulated definition.[48] (Although, incongruously enough, the subparagraph containing it, i.e. the one cited in note 47 *supra*, characterizes its content as a "[d]escription".)

The definition is substantively flawed in that, if (as certainly seems to be the case) its initial reference to "existing conventions" is to the UN counter-terrorism treaties, that reference does not tie in with a feature of those treaties to be discussed in Section III B below, namely that in most cases the criminal acts which they specify may, but do not necessarily have to, be terrorist acts. It is, moreover, wrong to characterize those treaties as being on "aspects" of terrorism: they are on certain types of terrorism.

Furthermore, in implying that all (or several) of the Geneva Conventions refer to terrorism, the definition is misleading, such a reference being contained in only one of them, i.e. the fourth. And what the corresponding provision of the fourth Convention (i.e. Article 33) does is create a particular type of war crime.[49]

The reference, in the panel's definition of terrorism, to "civilians or non-combatants" is peculiar. Since civilians may be (and indeed almost always are) non-combatants, the categories "civilians" and "non-combatants" are not mutually exclusive, for which reason logic required inserting "other" just before "non-combatants". More important, since it is only in situations of armed conflict that the distinction between combatants and non-combatants is entirely meaningful, the reference to "civilians or non-combatants" seems to imply that terrorism is

[46] Cf. Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565.

[47] See subparagraph (d) of paragraph 164 of the High-Level Panel's Report (note 46).

[48] Clearly the panel drew inspiration for this definition from Article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism (a provision to be discussed in Section III B) and paragraph 3 of resolution 1566.

[49] Cf. also Article 4 (2) (d) of the 1977 Protocol II Additional to the Geneva Conventions (a provision creating an offence different from what the declaration and resolution 1566 regard as terrorism). Cf. also A. Cassese, Terrorism as an International Crime, in: A. Bianchi (note 7) *supra*, 220-221.

particularly worthy of attention when it occurs in such situations. This appears to reflect an unbalanced view, since terrorism occurring in peacetime is at least as serious a cause for concern as terrorism arising in situations of armed conflict.[50] Moreover the reference in question seems to disregard the fact that military personnel can be targeted by terrorists just as much as civilians (cf. note 33).

G. The Unsuccessful Efforts Made to Include a "Definition" of Terrorism in the 2005 Summit Outcome Document

Early in September 2005, very informal (but open-ended) negotiations were held, under the chairmanship of the president-elect of the Assembly at its 60th session (begun on 13 September),[51] in order to reach a consensus on the section on terrorism of the "2005 World Summit Outcome Document".[52] It was sought to bring within that section what was considered as "a definition of terrorism". Although the negotiations did produce a consensus on the section, the text adopted (on 16 September 2005) does not, despite strenuous efforts made to that end at those negotiations, contain anything that is, can be regarded as, or even remotely approximates such a definition.[53]

Curiously enough, the imperfect definition of terrorism that was the basis of the work of the informal negotiations, while not entirely different from, was not patterned on the, imperfect, definitions of terrorism contained in paragraph 3 of the declaration or paragraph 3 of resolution 1566. That imperfect definition read:[54]

> "We [the heads of state or government participating in the summit] affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance, and we declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government

[50] The likelihood that non-combatants other than civilians, i.e. prisoners of war and combatants who have laid down their arms or are *hors de combat*, may be victims of terrorism is so small that this eventuality hardly deserves to be mentioned. (The panel's definition should have referred simply to "non-combatants", rather than to "civilians or non-combatants".)

[51] The negotiations were not announced in the United Nations Journal.

[52] Cf. notes 3 and 4 *supra*, and the accompanying text.

[53] The outcome document's section on terrorism (which hardly goes beyond rehashing stale banalities) is in paragraphs 81 to 91, inclusive. (Cf. note 4 *supra*.)

[54] The draft 2005 outcome document containing this imperfect definition of terrorism (and whose relevant provision is Article 63) is not fully in the public domain (although it has a United Nations document symbol, namely A/59/HLPM/CRP.1/Rev. 2). This document (dated 5 August 2005) can, however, be consulted at the UN's Dag Hammarskjold Library. None of the participants in the summit meetings expressly referred to the failure to agree on a definition of terrorism. However the summary record of a meeting of the Assembly's Sixth Committee of 6 October 2005 quotes the representative of Australia as saying that the summit had not "grasped the opportunity to produce a political declaration defining acts of terrorism." (UN doc. A/C.6/60/SR.3, para. 19.)

or an international organization to carry out or to abstain from any act cannot be justified on any grounds and constitutes an act of terrorism."

As has been observed, there was no consensus on this text, which, quite apart from not being a well-formulated definition, has fairly serious flaws.[55] These flaws were not, however, the reason (or at least not the main reason) for this failure.

What blocked consensus was a grave disagreement of a political nature already mentioned and arising in connection with the draft convention, which is designed to fill the gaps due to the fact that certain acts that clearly qualify as terrorism ones are not covered by any of the UN counter-terrorism treaties. This impasse, which has thus far stalled the work on the draft convention, results from the OIC proposal, which seeks to bring into the draft convention a clause removing situations of foreign occupation from its range of application, a provision that, while not expressly mentioning it, is clearly meant to apply to the Israeli-Palestinian conflict. (The matter will be discussed in Section III.C.2. *infra*.)

It would not appear, though, that the absence in the outcome document of such a definition, however imperfect, is, in itself, regrettable. Since that document does not specifically call for any action or omission by states with respect to terrorism,[56] inclusion in it of such a "definition" of terrorism would not have produced any legal effect by reason of the document becoming customary international law. Moreover, since the imperfect definition that would have resulted from the fully successful conclusion of the September 2005 negotiations would no doubt have gone into the outcome document without change, the imperfect definition of terrorism that the summit would thus have adopted would have deviated fairly substantially from the relevant paragraphs of the declaration and resolution 1566. This, while probably without consequences on the strictly legal plane, could have made the United Nations look as if it lacked a clear idea of what terrorism is.[57]

Actually what, in their efforts to concoct a definition, however imperfect, of terrorism, the participants in the September 2005 negotiations were seeking probably transcended the direct purpose of those negotiations, i.e. the adoption of a text for inclusion in the outcome document. What was likely at the back of the minds of the negotiators was that, if they agreed on a definition of terrorism, however imperfect, which somehow met the concern motivating the OIC proposal, this would remove the obstacle blocking progress on the draft convention, the corresponding provisions of which would reflect the agreement thus reached.

Regard being had to this, so to speak, latent aim, the failure of the negotiators to agree on some kind of definition of terrorism is to be regretted.

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[55] To a certain extent, the text suffers from the same defects as those marring the above-quoted definition of the High-Level Panel.

[56] See the paragraphs of the outcome document cited in note 53 *supra*.

[57] Any discrepancy between the definition, in the draft convention, of the criminal acts to which it applies, on the one hand, and paragraph 3 of the declaration and paragraph 3 of resolution 1566, on the other, cannot create any difficulties. This is because the effects of a definition contained in the draft convention are, like those of any other of its provisions, confined within the purview of the draft convention.

H. A Point of Basic Constitutional Significance: The Relationship Between a Possible Use by the General Assembly of Its Power to Adopt a Definition of Terrorism and the Relevant Work of the Security Council

Could a definition of terrorism adopted by the Assembly be considered binding on the Council, which would lack the power to adopt, for its own purposes, such a definition itself?[58] The answer should clearly be no: the Assembly obviously lacks the power to impose on the Council any rule or definition that would limit the Council's discretion in the constitutionally lawful exercise of its functions. It also appears clear that no organ other than the Council itself can (provided, of course, it stays within its powers under the Charter) impose any such limitations on that discretion. (Which is not to say, of course, that the Council could not, for its own purposes, endorse a definition of terrorism adopted by the Assembly [or any other body].)

III. The Definition of Terrorism and Multilateral Treaties of a Universal Scope Against Terrorism

This section will address a treaty on terrorism adopted in 1937, the 13 UN counter-terrorism treaties and the draft convention, with particular reference to the difficulty stalling its adoption, namely the OIC proposal.

A. A Forerunner: The 1937 League of Nations Treaty Against Terrorism

Resort to multilateral treaties as a means of combating terrorism started in 1937, when, under League of Nations auspices, a multilateral treaty of universal scope was adopted for that purpose.[59]

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[58] In accordance with what appears to be the view of Rosand, a definition of terrorism adopted by the Assembly could *ipso facto* be applicable within the framework of the actions taken by the Council to eliminate terrorism (Rosand [note 6] *supra*, *eo. loc*); this seems to imply that the latter would not have the power to adopt, for its own purposes, such a definition itself. This appears to tie in, to a certain extent, with an opinion expressed, in April 2003, before the Council, by the then Chairman of the CTC, namely that it would be useful for the Council to "have a definition of terrorism from the Assembly". (UN Doc. S/PV.4734 [Resumption 1], page 18, emphasis added.) (In expressing this opinion the CTC Chairman apparently overlooked that paragraph 3 of the declaration could serve as a working definition of terrorism.)

[59] For the text of this treaty, see UN Doc. A/C.6/418, Annex I, or 7 Manley O. Hudson, International Legislation, No. 499 (1941).

That treaty, entitled "Convention for the Prevention and Punishment of Terrorism", has not come into force and, having become obsolete, cannot be expected to ever do so.[60]

The Convention is nevertheless interesting in that it contains what was destined to become a kind of holy grail, namely a definition of terrorism. It is contained in paragraph 2 of Article 1 of the Convention. This paragraph reads as follows:

> "In the present Convention, the expression 'acts of terrorism' means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public."

Article 2 of the Convention complemented this well-formulated definition by specifying the cases in which the acts falling within its terms were to be criminalized.

B. The UN Counter-Terrorism Treaties

With three exceptions, namely the very *sui generis* one, to be discussed later, of the International Convention for the Suppression of the Financing of Terrorism (the financing convention), and the amended texts of the treaties numbered 8 and 9 in note 14 *supra* (see note 63 *infra*), none of the UN counter-terrorism treaties contains any provision that can even remotely qualify as a definition, however imperfect, of terrorism.

One of the UN counter-terrorism treaties, namely the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, limits itself to allocating jurisdiction in respect of offences, of any nature, committed on board aircraft (also prescribing the return of hijacked aircraft and their cargo and the release of passengers and crew). The Convention on the Marking of Plastic Explosives for the Purpose of Detection could not contain a definition of terrorism, the acts it sanctions not being acts of coercion or violence. The Convention on the Physical Protection of Nuclear Material criminalizes acts that involve (or, rather, could involve) coercion or violence only in one case, i.e. the "theft or robbery" of nuclear material,[61] which could hardly constitute acts of terrorism. The acts criminalized by the International Convention for the Suppression of Acts of Nuclear Terrorism are also mixed, since only some of them involve coercion or violence.[62] But when they do so they may be of a terrorist nature.[63]

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[60] The convention was ratified by only one state, India, in 1941, and signed by 24 other states (also before the creation of the United Nations). It is interesting to compare the provisions of this convention that have been cited with the definition of terrorism contained in Article 1 of a draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism submitted by the United States, in 1973, to a Sub-Committee of the above-mentioned Ad Hoc Committee on Terrorism. (Cf. page 29 of the first of the reports referred to in note 16 *supra* [which report also contains, on pages 21-28, definitions of terrorism proposed by several states].)

[61] Cf. Article 7 (1) (b) of the physical protection convention.

[62] The International Convention for the Suppression of Acts of Nuclear Terrorism, in addition to criminalizing certain modalities of use or possession of nuclear materials or devices, criminalizes acts

With two exceptions,[64] the remaining eight UN counter-terrorism treaties that criminalize acts of coercion or violence do so without in any way specifying the motivation behind or the purposes of the acts.[65] Given this lack of *dolus specialis*, the latter do not necessarily have to be of a terrorist nature in order to be "caught" by any of those treaties. Thus the acts in question, while by no means excluding (since they are intended to apply mainly to) acts that one would generally regard as instances of terrorism, also include acts of coercion or violence that are in the nature of common offences.[66]

This definitional "overreach" suggests a comparison with the well-known fishery concepts of "target catch" and "bycatch". But this comparison is only partly accurate: bycatch fish are, generally, not only unwanted, but often fish that should ideally n o t be caught, whereas, as will now be explained, it seems reasonable that the common offences "caught" by the UN counter-terrorism treaties should be within their reach.

Offences of a coercive or violent nature covered by any counter-terrorism treaty are of an inherently grave nature and accordingly their coverage by any such treaty in cases where they constitute common offences is all to the good. Moreover, in respect of any instance of an offence covered by one of the counter-terrorism treaties not only may there be, initially, doubts about whether or not it is of a terrorist na-

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doing "damage" to a nuclear facility in a manner which releases or risks releasing radioactive material. (Article 2 (1) b) of the convention.)

[63] The same will be true of the acts covered by the physical protection convention once the agreement amending it comes into force. (Cf. note 14 *supra*, *in fine*, and subparagraphs (a), (c) and (d) to (g) of paragraph 1 of Article 7 of the convention as amended.)

[64] The exceptions are the treaties numbered 8 and 9 in note 14 *supra*, as amended by the protocols of October 2005. These protocols add new offences to those originally covered by these treaties. As defined, the new offences involve a *dolus specialis* pertaining to terrorism, namely that "the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from" any act. (See IMO Docs. LEG/CONF.15/21 and 22.)

[65] These eight treaties are those numbered, in note 14 *supra*, 2 to 5 inclusive, 7, 8, 9 and 11.

[66] Two of the UN counter-terrorism treaties criminalizing acts of coercion or violence, namely the bombing convention and the nuclear convention, contain, in both their titles and preambles, the words "terrorism" or "terrorist" (in reference to acts). Another one of those treaties, namely the hostages convention, contains a reference to "terrorism" in its preamble. Do these features of the three treaties mean that the acts of coercion or violence they criminalize m u s t be terrorist in nature? It appears that the answer to this question is most definitely no. It is, in each case, plain that nothing in the title and the preamble of the treaty concerned, which are necessarily vague, can by itself have an effect on the scope of the acts that the corresponding treaty criminalizes and are, as they should be, defined, in a p r e c i s e manner, by provisions in the operative part of the treaty that d o n o t c o n t a i n t h e w o r d terrorism or any cognate word. Moreover the requirement, laid down by each of the three treaties, that the offences it covers should have certain international dimensions (see note 8 *supra*) does not mean that the offences must be terrorist in nature. When the agreement amending the physical protection convention comes into force (note 14 *supra*, *in fine*), the preamble, but not the operative part of that convention, will contain references to terrorism; accordingly what has been said about the nuclear convention will apply to the amended text of the physical protection convention. (It may be noted, incidentally, that the implication carried by the last preambular paragraph of the hostages convention that all acts of hostage taking are of a terrorist nature is mistaken, such acts being, in many if not most cases, in the nature of common offences.)

ture, but it may be necessary, if such doubts are to be dispelled (a task that the prosecutor will not have to accomplish), to await the results of the prosecution of the suspect(s). Furthermore the definitional "overreach" in question has largely made it possible to avoid not only the thorny problem of devising, for the UN counter-terrorism treaties criminalizing acts of coercion or violence, a specific definition of terrorism, but also the eventuality that this definition would vary from treaty to treaty.

Although it does not criminalize any acts of coercion or violence, the financing convention nevertheless contains a provision that can be regarded as a definition of terrorism.

The introductory part of paragraph 1 of Article 2 of this convention, which paragraph determines the criminal acts covered by the convention, provides that

"[a]ny person commits an offence within the meaning of this Convention if that person", in any of the ways indicated in the introductory part of the paragraph, provides or collects funds "with the intention that they should be used or in the knowledge that they are to be used … in order to carry out" the offences to which subparagraphs (a) and (b) of paragraph 1 refer. The offences to which subparagraph (a) refers are those covered by the eight treaties referred to in note 65 and the physical protection convention. The offences to which subparagraph (b) refers are those coming within the following phrase, contained in that subparagraph:

"[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

Clearly this oblique, quasi definition of terrorism, which seems to have inspired, partially, the definition of terrorism addressed in Section II.E. above, is, to that extent, open to similar criticism as that definition.[67]

C. The Definition and Scope of the Acts to Which the Draft Convention Applies

A general discussion of the matter will be followed by comments on the difficulty caused by the OIC proposal.

1. General

In 1996 the Assembly, by resolution 51/210, established a new committee to deal with terrorism. This body, named "Ad Hoc Committee established by As-

[67] It is also flawed in that, in referring to "any other person … in a situation of armed conflict", it incorrectly implies that it is impossible or in all cases unlawful for civilians to take any active part in hostilities.

sembly resolution 51/210 of 17 December 1996", has met every year prior to the Assembly's regular session. At each such session, the work of the Ad Hoc Committee has been pursued by an Ad Hoc Working Group established by and reporting to the Sixth Committee of the Assembly (which Committee also receives the reports of the Ad Hoc Committee). Since this Working Group, which, like the Ad Hoc Committee, is open-ended is, for all practical purposes, the same body as the Ad Hoc Committee, the latter can conveniently be referred to as the "Ad Hoc Committee/Working Group".

One of the issues with which the Ad Hoc Committee/Working Group has been grappling is the elaboration of the draft convention. Although the Ad Hoc Committee/Working Group is very close to consensus on a complete text thereof, a complete consensus has been blocked by the impossibility that appears to exist of removing a political stumbling block, namely the OIC proposal, a difficulty referred to several times and to be discussed under (2) below.

The article of the draft convention that defines terrorism for the purposes thereof is Article 2, which reads as follows:[68]

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

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

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

(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

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

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

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

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

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

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

[68] UN Doc. A/59/894 (Appendix II), which represents the highest point reached in the negotiations. (For criticisms of this text by the OIC members, see UN Doc. A/C.6/60/3; the main reasons for those criticisms relate, however, to the OIC proposal.)

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

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

Article 2 is sufficiently comprehensive for the attainment of its purposes and should not be a particularly fertile source of problems of interpretation.

2. The Difficulties Raised by the OIC Proposal

The OIC proposal calls for the addition to the draft convention of a clause[69] excluding from the range of application of the latter the activities of parties to an armed conflict "in situations of foreign occupation".[70]

At first sight the OIC proposal might appear to render lawful any act of coercion or violence done by a party to an armed conflict in a situation of foreign occupation if the act is aimed against the latter.[71] That this is wrong is clear from the fact that, plainly, it does not go beyond excluding any such act from the range of application of the draft convention. It has hence no effect on the legal conse-

[69] The clause would be inserted in paragraph 2, which, as thus amended, would read: "The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, are not governed by this Convention." (Emphasis added, the words spaced out being the clause proposed by the OIC members.) To induce the OIC members to withdraw their proposal, it has been sought to give greater emphasis, in the preamble of the draft convention, to the principle of self-determination (referred to in the tenth preambular paragraph of the latest version thereof [cf. note 68 *supra*]). But these efforts have so far been unavailing. (As to the situation prevailing in July 2005, cf. Appendix I to the document cited in note 68 *supra*, with particular reference to the proposed preambular paragraph on page 5 of that document.) The same is true of a proposal made in October 2005 to add to Article 20 of the draft convention a provision to the effect that "[n]othing" in it "makes acts unlawful which are governed by international humanitarian law and which are not unlawful under that law".) (UN Doc. A/C.6/60/INF/1; for the text of Article 20, see note 73 *infra*.)

[70] The clause in question represents a concession by the OIC members. They had initially proposed including, in Article 1, a definition of terrorism taken from the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism, as well as the addition to Article 2 of a paragraph (also taken from that Convention) to the effect that "[p]eoples' struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime". (UN Doc. A/C.6/55/L.3, Annex III, No. 30 [pages 37-38].)

[71] Literally, the addition the OIC members propose applies equally to the population of the occupied territory and the occupying power. But, given paragraphs 2 and 3 of Article 20 of the draft convention (see note 73 *infra*) and the fact that the occupying power will normally exert its authority in the occupied territory through its military, the draft convention will, at any rate, hardly apply to the occupying power.

quences of the act outside the draft convention.[72] This is, moreover, confirmed by paragraph 4 of Article 20 of the latter.[73]

There appears to be very little doubt that, were it not for the stumbling block arising from the OIC proposal,[74] the draft convention, on which steady progress has been made since 1997, when it was first considered,[75] would be speedily finalized.

Some comments are in order concerning the relationship existing at the purely conceptual level between the OIC proposal and the definition of terrorism contained in the above-quoted Article 2 of the draft convention. The addition the OIC proposal calls for is not, in terms, an element of that definition, but a limitation of the range of application of the draft convention (determined by Article 20 thereof; for which see note 73 *supra*). While that addition nevertheless does affect the definition, it does so only as a kind of appendage that leaves its core intact. Accordingly, however great the controversy the addition might stir, that controversy would not affect the core definition.[76] Consequently, whoever is interested in

[72] The OIC proposal calls to mind the famous tag "one man's terrorist is another man's freedom fighter". (The heyday of the saying was in the 1970s, when national liberation movements were struggling for independence in Africa and against apartheid.)

[73] In the latest version of the draft convention (see note 68 *supra*), Article 20 reads as follows:

"1. Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention.

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the present Convention.

4. Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws."

Paragraphs 1, 2 and 3 of article 20 (of which the first seems useful only insofar as, at the end, it refers to "international humanitarian law") are, except for a minor change in format, identical with Article 19 of the bombing convention. Paragraph 4 is taken from the end of the last preambular paragraph of the bombing convention.

[74] A question that might still delay a final consensus on the draft convention concerns the need for a provision on possible overlapping between the draft convention and any of those of the UN counter-terrorism treaties criminalizing acts of coercion or violence. But, most likely, this could be speedily resolved. (Cf. note 82 *infra*.)

[75] The work has been considerably facilitated by the fact that most of the provisions of the draft convention are patterned on corresponding ones in the bombing convention.

[76] Similar is the view of Antonio Cassese that a definition of terrorism does exist, there being however a lack of agreement on an "exception" to that definition, namely the case of the so-called "freedom fighters". (Cf. Cassese [note 49] *supra*, 214.) (In the opinion of the present writer, there is, however, a minor conceptual flaw here: there can, strictly speaking, be no such thing as an exception to a definition. If, for instance, to define the word ship one were to adopt the corresponding definition in a certain dictionary but with the addition that it does not apply to ferries not travelling beyond the English Channel, this exclusion [which would make the definition into a special one] would not be an exception to the definition but an element determining its range of application.) (Compare the defini-

evaluating, from a purely formal viewpoint, the definition of terrorism contained in Article 2 of the draft convention need not be overly disturbed by the OIC proposal.

It is, however, absolutely the opposite that is the case from the practical viewpoint. For, as has been repeatedly observed, the OIC proposal is blocking the adoption of the draft convention, which would be a useful capstone to the efforts made to combat terrorism through treaties of a universal scope.

IV. An Apparently Overlooked Aspect of the Impasse Blocking the Adoption of a Draft Comprehensive Convention on Terrorism: The Relationship Between that Impasse and Certain Matters Pertaining to the Existing UN Counter-Terrorism Treaties

If valid reasons exist for excluding activities which are part of the struggle against "foreign occupation" (whatever the exact meaning and scope of this term may be) from the range of application of the draft convention, then the same reasons militate against the coverage of those activities by the prior UN counter-terrorism treaties that criminalize acts of coercion or violence. However, with one, very remarkable, exception, namely the International Convention against the Taking of Hostages,[77] none of those treaties excludes from its coverage acts aimed against "foreign occupation".

The International Convention for the Suppression of Terrorist Bombings (the bombing convention) typically applies to acts done by individuals struggling against foreign occupation. Although less manifestly in some cases, the acts covered by the other counter-terrorism treaties sanctioning acts of coercion or violence can also serve to promote that struggle.[78]

It would thus have been reasonable for the OIC members to have sought to introduce into those treaties and particularly into the bombing convention provi-

tion of "dumping" contained in section (a) of paragraph (5) of Article 1 of the United Nations Convention on the Law of the Sea and section (b) of that paragraph.)

[77] Article 12 of this convention provides that it "shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of Additional Protocol I, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the" 1975 Friendly Relations Declaration. (Emphasis added.) It is most remarkable that despite the presence therein of the phrases emphasized, both the Sixth Committee of the Assembly and the latter adopted the hostages convention without a vote and that the United States as well as, except for Israel (and San Marino!), all the other states of the UN Western European and Others Group are parties to it.

[78] Article 12 of the International Convention Against the Taking of Hostages confirms this (if in a negative way).

sions along the lines of the highly contentious one they are endeavouring to introduce into the draft convention. Such a provision would, in fact, have been easy to fit into the bombing convention, Article 19 of which could have accommodated it perfectly.[79] The OIC members refrained, however, from making any such proposals.

It seems, further, that the absence from the counter-terrorism treaties criminalizing acts of coercion or violence, and particularly from the bombing convention, of a provision like the one the OIC member states are seeking to add to the draft convention would have induced those states either not to participate in those treaties, and particularly the bombing convention, or to do so subject to reservations to the effect that they would not apply the treaty concerned to acts aimed against foreign occupations.

But this is not at all what has happened. Many OIC member states have become parties, without any such reservation, to those treaties; in particular 33 of them are parties to the bombing convention, with only one, namely, Pakistan, having made such a reservation.[80]

This might, to be sure, make sense if the draft convention were intended to take the place of the prior UN counter-terrorism treaties.[81] But such is by no means the case.[82]

Given this attitude of the OIC member states to the prior UN counter-terrorism treaties, and in particular the bombing convention, it seems reasonable that they should withdraw the addition they have proposed to the draft convention and, once the latter is adopted, either refrain from becoming parties to it or, preferably, do so but with reservations along the lines of Pakistan's reservation to the bombing convention.[83]

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[79] This article is in fact the pendant, in the bombing convention, to Article 20 of the draft convention. (Cf. note 73 *supra*.)

[80] The reservation reads: "The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded in conflict with an existing *jus cogens* or peremptory norm of international law is void and the right of self-determination is universally recognized as a *jus cogens*."

[81] Much as the United Nations Convention on the Law of the Sea has superseded the 1958 conventions on the law of the sea. (Article 311 of that convention.)

[82] See, in the document cited in note 68 *supra*, Article 3 of the draft convention, reading: "Where the present Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both the present convention and the said treaty, the provisions of the latter shall prevail." This provision appears acceptable to the OIC members.

[83] If the addition the OIC proposal calls for was accepted, serious problems could arise as to the scope of that addition. As a point of treaty interpretation, it would be obviously wrong to interpret it exclusively in the manner that presumably corresponds to the intention of its sponsors, i.e. as a reference to the Israeli-Palestinian conflict solely. So one wonders whether the addition could not also be considered applicable to separatist groups in Chechnya, Sri Lanka and the Indonesian province of

It may be observed, moreover, and in all fairness, that given the comments in note 77 and the accompanying text, the states opposing the OIC proposal (conspicuous among which are the members of the Western European and others Group) can also be charged with some inconsistency.

It may also be mentioned that the inconsistency noted between the present position of the OIC members and the antecedents mentioned may reflect the fact that inclusion in the title of the draft convention of the word "comprehensive" gives it a symbolic connotation politically justifying that position.[84]

V. What Lies Ahead

After the failure of the efforts made to include a definition of terrorism in the 2005 World Summit Outcome Document, it seems most unlikely that the Assembly will ever adopt such a definition, which would be exclusively of a political nature. This, to reiterate the present writer's opinion, should be welcomed.

However, since resolution 1566 emanates from an eminently political organ, anyone not sharing this view may look to its paragraph 3 for what, if one is not too demanding about formal perfection, may be regarded as a serviceable political definition of terrorism.

Three developments are, however, desirable. One would be breaking the deadlock blocking progress on the draft convention, which would no doubt permit its adoption.[85] The second would be agreement on a definition of terrorism for the purposes of resolution 1373. The third would be eliminating the discrepancies in language between paragraph 3 of the declaration and paragraph 3 of resolution 1566.

As for the first matter, it should be noted that the existing deadlock is not as regrettable as would appear at first sight. This is because the overall coverage of the UN counter-terrorism treaties, which, as has been noted, largely operate without

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Aceh, as well as ETA rebels in Spain, etc. And what about similar movements that may arise in the future? The addition in question might thus become a loose cannon.

[84] If, however, the draft convention, as adopted, contains Article 3, as quoted in note 82 *supra*, it will likely be applied less frequently than the bombing convention. (In view of this and the fact that participation in the UN counter-terrorism treaties is wide, one would, if the draft convention as adopted were to include that article, wonder whether it should not be called "residual" rather than "comprehensive".)

[85] That the Assembly's work on the draft convention in 2006 was unsuccessful is clear from the last page of UN press release GA/L/3311, pertaining to a Sixth Committee meeting of November of that year. At the Ad Hoc Committee's annual session of 2007, no progress was made in overcoming the deadlock. (Cf. UN doc. A/62/37.) It may also be noted that the OIC members had apparently been gaining support for their proposal. The Final Document of the 2003 summit of the Non-Aligned Movement (NOAL) merely rejected the equation of terrorism with "the legitimate struggle of peoples under colonial or alien domination and foreign occupation". (UN Doc. A/57/759, Annex I, para. 106.) But the Final Document of the 2006 NOAL summit, in addition to reiterating that rejection, states, twice, that that struggle "does not constitute terrorism". (UN Doc. A/61/472, Annex I, paras. 118.4 and 118.5.)

defining terrorism, is wide enough to "catch" the majority of instances of international terrorism, to the repression of which resolution 1373, which also does not define terrorism, no doubt makes a useful contribution.

As for the second matter, the best and simplest remedy would be for the Council to decide that the formally flawed but serviceable definition of terrorism contained in resolution 1566 is to apply for the purposes of resolution 1373. But it seems most unlikely that the Council would take such a step, which would be inconsistent with its practice and probably politically problematic.

As for the third development that would be desirable, it seems most improbable that the Assembly and the Council would take the necessary corrective action, which would be inconsistent with their practice and probably raise political problems.

To conclude, one may observe that no fundamental change in the overall situation prevailing at the global level concerning the definition of terrorism appears likely for the foreseeable future, but that this is not extremely detrimental to the fight against terrorism.