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State Actors in an International Definition of Terrorism from a Human Rights Perspective

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STATE ACTORS IN AN INTERNATIONAL DEFINITION OF TERRORISM FROM A HUMAN RIGHTS PERSPECTIVE*

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I. Introduction

The question of whether and how to define the crime of terrorism is one that raises a series of intriguing and difficult questions: intriguing, because the international community has been devoting unprecedented attention to the categorical condemnation of this (undefined) crime; and difficult, because efforts to define terrorism seem destined perpetually to evoke the most volatile, partial, and situation-driven of State sensitivities. The following brief discussion argues that recent endeavors at the international level to establish a comprehensive definition of terrorism raise serious concerns from a human rights perspective. It argues, moreover, that greater efforts must be made to ensure that any results emerging from these negotiations take into consideration their impact on existing principles of international humanitarian law (hereinafter "IHL") as well as on the progressive advancement of international human rights standards and principles. Without such an approach, an internationally sanctioned definition of terrorism may run contrary to tendencies that have recently defined the development of international law, increasing rather than reducing incoherence in the international system. Such a definition would raise more problems than it resolves.

While there is good reason to undertake a human-rights based analysis of existing or proposed definitions of the crime of "terrorism" under the national law of various jurisdictions, this paper examine efforts at the international level. At the time of writing, the United Nations remains in the midst of an uncertain process to negotiate what is referred to as a Comprehensive Convention on International Terrorism.[1] In the context of

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[1] *See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* G.A. Res. 51/210, U.N. GOAR, 57th Sess., Supp. No. 37, U.N. Doc. A/57/37 (2002) [hereinafter 2002 Ad Hoc Committee Report] (offering the various texts that as of 2004 continue to form the basis of the negotiations).

these negotiations, 'comprehensive' implies both the fact that the proposed convention would supply a definition that encompasses effectively all acts that might be characterized as terrorism, adopting a unified approach in place of the fragmentary or sectoral one that has characterized previous international action, and the fact that the proposed convention would provide a broad and inclusive framework for the regulation of terrorism, including mechanisms for prevention, for policy-coordination, and for repression through criminal, financial, immigration, and other administrative means.

Both the scope of the definition itself and the various means provided for its suppression through a Comprehensive Convention call for analysis from the perspective of ensuring consistency with and wherever possible enhancing the protection of international human rights standards. A wide range of internationally-recognized human rights have come under increasing pressure in the face of national and international "counter-terrorism" measures, with a consequent increase in efforts to ensure that States do not take their counter-terrorist campaigns as an opportunity to weaken or ignore these rights.[2] This tendency to weaken human rights protection in the name of combating terrorism is so pronounced that the author of the present piece has grave doubts that present circumstances would permit the international community to adopt a balanced convention that strengthened rather than undermined basic rights, but the present piece proceeds on the assumption that adoption of a Comprehensive Convention may well be inevitable. At a minimum, efforts to ensure rights protection in the context of counter-terrorist measures should rigorously be taken into consideration during the negotiation of Comprehensive Convention both with respect to its definition and with respect to its jurisdictional, cooperation, and other procedural mechanisms.

Having said this, the following brief discussion will focus only on the potential effect on human rights of the scope of application of the

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[2] For activity within the United Nations system, *see Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the Secretary-General,* U.N. GAOR, 59th Sess., Agenda Item 105(b), U.N. Doc. A/59/404 (2004); and *Protection of human rights and fundamental freedoms while countering terrorism: Study of the United Nations High Commissioner for Human Rights,* U.N. GAOR, 59th Sess., Agenda Item 105(b), U.N. Doc. A/59/428 (2004). *See also Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism: Terrorism and human rights: Final report of the Special Rapporteur, Ms Kalliopi K. Koufa,* U.N. GAOR, 56th Sess., U.N. Doc. E/CN.4/Sub.2/2004/40 (2004). For a sample of the response of leading human rights organizations, *see* Amnesty International, *Building an international human rights agenda: Resisting abuses in the context of the 'war on terror'* (2004), *available at* http://web.amnesty.org/report2004/hragenda-1-eng (last visited Feb. 21, 2005); and Human Rights Watch, *Anti-terror Campaign Cloaking Human Rights Abuse: New Global Survey Finds Crackdown on Civil Liberties,* (2002), *available at* http://www.hrw.org/press/2002/01/wr2002.htm (last visited Feb. 21, 2005).

prohibition to be adopted in the convention. Specifically, it will address the question whether the convention, if adopted, should exclude from its coverage, as is currently proposed, the official actions of State actors. Not only has this question been one of the main obstacles to the completion of the negotiations, it also raises fundamental questions about how the convention will contribute to or detract from the progressive development of international law with respect to the efforts of the international community to ensure accountability for serious crimes.

II. A Crime of Terrorism and Other International Crimes

The claim that the world needs a comprehensive treaty-based definition of terrorism is based in part on the assumption that international law somehow fails to prohibit or otherwise to provide sufficient obligations with respect to the conduct such a treaty would address. Without exploring every nuance of the question, it might be useful to put the debate into perspective by sketching in broad strokes the definitional terrain wherein such a definition would find its place.[3]

International humanitarian law and the laws and customs applicable in armed conflict, and in particular the law of war crimes, imposes individual criminal responsibility in apparently complete overlap with any conceivable definition of acts of terrorism when committed in situations of armed conflict (as defined by this law as the primary condition of its application). Thus, the law of war crimes with respect to acts of "terrorism" taking place in situations of armed conflict is pertinent not just where humanitarian law instruments explicitly mention terrorism,[4] but also with respect to the many prohibited acts that, if committed with the appropriate intent and purpose, might be characterized as terrorist (hostage-taking, the using of human

[3] For a more in-depth discussion, *see* Helen Duffy, Interrights, *Responding to September 11: The Framework of International Law*, at Part IV (Oct. 2001); *available at* http://www.interights.org/about/Sept%2011%20Parts%20I-IV.htm#PART%20IV (last visited Feb. 21, 2005); some of the same arguments will be developed in a wider context in HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW (forthcoming 2005).

[4] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 33, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ("... Collective penalties and likewise all measures of intimidation or of terrorism are prohibited . . ."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June8, 1977, art. 51(2), 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("...Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(c) (prohibiting "acts of terrorism" against persons *hors de combat*) and 13(2) (spreading terror among the civilian population), 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

shields, indiscriminate targeting of civilians, etc.).[5] Whether on the basis of customary or conventional law, or with respect to international or internal armed conflicts, this law creates a solid basis for the imposition of individual criminal responsibility for acts of terrorism committed in the course of armed conflict.

In addition to the responsibility imposed by the law of war crimes, international law imposes criminal responsibility upon individuals for acts that can be characterized as crimes against humanity or genocide.[6] With respect to these crimes, such responsibility arises both in times of armed conflict and in times of peace, provided that the essential elements of these crimes are made out. This means, in brief, that in the case of crimes against humanity the underlying crimes must be committed in the context of a widespread or systematic attack against a civilian population pursuant to a State or organizational plan or policy to commit such an attack.[7] In the case of genocide, the underlying crimes must be committed pursuant to a specific intent to destroy in whole or in part an ethnic, national, racial or religious group as such.[8]

Where crimes do not attain the special gravity of genocide, war crimes or crimes against humanity, however, individual responsibility arises only under national, and not under international law. Thus, instead of being viewed as a crime under international law in the sense that genocide or crimes against humanity is (that is, partaking of the legacy of the Nuremberg principles and thus giving rise to individual responsibility as a matter of customary international law), 'terrorism' should be viewed at

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[5] To select only some examples from the two conventions: Geneva Convention IV, *supra* note 4, at art. 147 (grave breaches – "wilful killing, torture or inhuman treatment, . . . wilfully causing great suffering or serious injury to body or health, . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," if committed against persons or property protected by the Convention); Additional Protocol I,*supra* note 4, at arts. 51 (protection of civilian population), 52 (protection of civilian objects), 53 (protection of cultural objects and places of worship), 54 (protection of objects indispensable to the survival of the civilian population), 55 (protection of the natural environment), and 56 (protection of works and installations containing dangerous forces).

[6] *See generally*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, (2d ed. 1999); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000); and Antonio Cassese, *Genocide and Crimes against Humanity*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOL. 1, 335 & 353 (Antonio Cassese et al eds., 2002).

[7] ROME STATUTE OF THE INT'L CRIM. CT., July 17, 1998, art.7, U.N. Doc. A/Conf.183/9, 37 I.L.M. 999, *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf (last visited Feb. 21, 2005).

[8] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277 [hereinafter 1948 Genocide Convention] *available at* http://www.ohchr.org/english/law/genocide.htm (last visited Feb. 21, 2005).

least at present as a catch-all category for a series of crimes within the domain of "suppression conventions" that regulate various crimes deemed serious by the international community. Such conventions define the crime with which they deal (torture,[9] hostage-taking, aircraft sabotage, etc.)[10] and impose on States Parties the obligation to prohibit the crime within their domestic jurisdiction (with the breadth of such jurisdiction being typically prescribed by the treaty), to prosecute offenders (if they are not extradited), and to cooperate with others in the prevention and suppression of the targeted acts. In the framework of such "transnational criminal law" treaties, however, and in distinction to the "international criminal law" of war crimes, crimes against humanity and genocide, individual criminal

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[9] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

[10] There are currently 12 international conventions related to terrorism: Conventions on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter 1973 Protected Persons Convention]; International Convention Against the Taking of Hostages, G.A. Res. 146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979) [hereinafter 1979 Hostages Convention]; European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93, 90 E.T.S. 3; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 125; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 303; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M 672; Convention on the Making of Plastic Explosives for the purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/52/653 (1997) [hereinafter 1997 Terrorist Bombings Convention]; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc A/54/109 (1999) [hereinafter Terrorist Financing Convention]; And regional conventions: Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195; SAARC Regional Convention on Suppression of Terrorism, U.N. GAOR, 44th Sess., U.N. Doc. A/51/136 (1989). The text of a thirteenth international convention was adopted by the UN General Assembly on April 13, 2005: see "General Assembly adopts convention on nuclear terrorism; will open for signature at Headquarters 14 September", Press Release GA/10340 (April 13, 2005), available at http://www.un.org/News/Press/docs/2005/ga10340.doc.htm (verified April 13, 2005); and *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996: International Convention for the Suppression of Acts of Nuclear Terrorism,* U.N. Doc. A/59/766 (4 April 2005) (available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/295/27/PDF/N0529527.pdf?OpenElement (verified 13 April 2005)).

responsibility arises for the proscribed crimes only under national law.[11] This makes it essential – if the principle of legality is to be respected – that governments establish appropriate jurisdiction over the relevant crimes within their national criminal justice systems – typically through the adoption of implementing legislation. If governments of States Parties to such treaties should fail to do so, they might be internationally responsible for having violated their obligations under a particular treaty, but no individual could be held criminally responsible for the particular crime in question without some properly adopted, non-retroactive law being applicable to their conduct.[12]

Speaking strictly on a definition level, the prohibitions contained in suppression conventions are needed only to fill 'impunity gaps' in times of peace (when international humanitarian law does not apply), where the crimes are not committed as part of a widespread or systematic attack against a civilian population pursuant to a plan or policy (as with crimes against humanity), and where the requisite intent to commit genocide is lacking. With respect to terrorism, the definitional terrain is clearly fairly extensively covered by instruments adopted to date, covering as they do seizure of aircraft and other unlawful acts against civilian aviation, attacks on internationally protected persons, hostage-taking, acts against maritime navigation, terrorist bombings and financing, and much more. At the same time, it bears noting that the 1973 Protected Persons Convention does not apply to all acts against all officials or to any attacks against civilians[13] (a gap only partly filled by the Terrorist Bombings Convention)[14] and that a number of acts not covered by the Terrorist Bombings or other international conventions could cause massive loss to civilian life (poisoning of water supplies, use of chemical, biological or other weapons of mass destruction not involving explosives, etc.). Thus, while it is true that existing counter-terrorist conventions cover a good part of what might be considered the most serious crimes of terrorism, some gaps do remain that fuel the efforts of those who advocate the adoption of a comprehensive definition.

Of course, there is more to the adoption of a Comprehensive Convention on International Terrorism than gap-filling on a definitional level. Clear, treaty-based obligations of suppression conventions – and particularly the obligation to extradite or prosecute, *aut dedere aut judicare* – can provide a powerful normative base that does not always exist (at all,

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[11] On the distinction between "transnational criminal law" and "international criminal law", *see* Neil Boister, *'Transnational Criminal Law'*, 14 EURO. J. INT'L L. 953 (2003).

[12] A more detailed discussion of the regime of suppression conventions and their place in international criminal law is contained in BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW, Part I (2003).

[13] 1973 Protected Persons Convention, *supra* note 10, at arts. 1 & 2.

[14] 1997 Terrorist Bombings Convention, *supra* note 10, at arts. 1 & 2.

or in clear and accessible form) for crimes under international criminal law. This is particularly the case with respect to the clear obligations typically present in suppression conventions to prohibit, to establish jurisdiction over, and to prosecute or extradite individuals accused of the crimes concerned.[15]

This being admitted, however, the benefit that any new, comprehensive convention against terrorism might have from the point of view of the set of uniform obligations it imposed would have to be balanced against the likely impact from a human rights perspective that international adoption of any given definition might have.

III. Recent Efforts to Arrive at a Comprehensive Definition of Terrorism

In a process potentially touching the jurisdictions of all United Nations members States, and not that of an institution like the International Criminal Court alone,[16] the General Assembly has (through its Sixth or Legal

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[15] Thus, while grave breaches of the Geneva Conventions are subject to an *aut dedere, aut judicare* mechanism, crimes related to internal armed conflict and some crimes based only on customary law of war crimes are not: compare the provisions applicable to situations of international armed conflict through the four Geneva Conventions and their Additional Protocol I with those applicable to non-international armed conflicts: for international conflicts, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49 & 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50 & 51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 129 &130, 6 U.S.T. 3316, 75 U.N.T.S. 135, ; Geneva Convention IV, *supra* note 4 , at arts. 146 & 147; Additional Protocol I, *supra* note 4, , at arts. 11, 85, 86 & 88; for non-international conflicts, Article 3 common to these four conventions, as well as the Additional Protocol II, *supra* note 4, (both of which lack such mechanisms); also Theodor Meron, *International Criminalization of Internal Atrocities, in* WAR CRIMES LAW COMES OF AGE 248 (Theodor Meron, ed. 1998). Crimes against humanity take no suppression-convention form, leaving the rules on the exercise of jurisdiction with respect to this crime to its (less stringent) bases in customary international law: *see* the author's own discussion of this point in BROOMHALL, *supra* note 12, at 109-112. The same is true of genocide, since the Genocide Convention does not oblige States other than the territorial one to exercise jurisdiction over this crime: 1948 Genocide Convention, *supra* note 8, at art. 6.

[16] During the negotiations that led to the adoption of the Rome Statute of the International Criminal Court in July 1998, States discussed the inclusion of the crime of 'terrorism' within the Rome Statute, alongside genocide, crimes against humanity, and war crimes, and a definition was proposed. An optional definition of 'crimes of terrorism' was included in the final Draft Statute produced by the Preparatory Committee: *Report of the Preparatory Committee on the establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22A, art. 5, at 33, U.N. Doc. A/Conf.183/2/Add.1 (1998); *reprinted in* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 129 (1998). At the Rome Diplomatic Conference, a definition of

Committee) charged an Ad Hoc Committee and a Working Group with the task of drafting a Comprehensive Convention on International Terrorism. The Committee has been examining the question since 1998,[17] although it has been unable to conclude these negotiations even under the enormous political pressure generated by the world-wide response to the destruction of the World Trade Center and other attacks within the United States on September 11, 2001, owing mainly to differences over the place of national liberation and similar struggles, the responsibility of State actors, and the relationship of the Comprehensive Convention to other counter-terrorism instruments.[18] Nonetheless, the work of the General Assembly committees

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'act of terrorism', to be included within the definition of crimes against humanity, was submitted, then later modified: *Proposal submitted by Algeria, India, Sri Lanka and Turkey,* U.N. Doc. A/CONF.183/C.1/L.27 (June 29, 1998); *Proposal submitted by India, Sri Lanka and Turkey,* U.N. Doc. A/CONF.183/C.1/L.27/Rev. 1 (July 6, 1998). As it became apparent that the proposal did not have the needed support, a 'place-holder' provision was proposed that would require the Preparatory Commission to elaborate definitions of these crimes later: *Proposal submitted by Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey,* U.N. Doc. A/CONF.183/C.1/L.71 (July 14, 1998). The only result was the commitment made, in the Final Act of the Diplomatic Conference, to re-consider the definition and inclusion of this crime, along with that of drug-trafficking, at the first Rome Statute Review Conference (to be held seven years after entry into force, or in 2009): *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,* U.N. Doc. A/Conf.183/10 , Resolution E, July, 17, 1998.

[17] The Ad Hoc Committee was established by General Assembly Resolution 51/210 of 17 December 1996 in order "to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism." G.A. Res. 51/210, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/210 at par. 9 (1996). The mandate of considering a Comprehensive Convention on International Terrorism was first assigned to the Ad Hoc Committee in 1998, and has been renewed annually since: G.A. Res. 51/210, U.N. GAOR, 53rd Sess., Supp. No. 49, U.N. Doc. A/RES/53/108 (1998) ("as a matter of priority"), G.A.Res. 54/110, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/110 (2000), G.A. Res. 55/158, U.N. GAOR, 55th Sess., U.N. Doc. A/RES55/158 (2001), G.A. Res. 56/88, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES56/88 (2002) ("as a matter of urgency"), G.A. Res. 57/27, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/27 (2003), G.A. Res. 58/81, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/81 (2003), G.A. Res. 59/46, U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/46 (2004) ("on an expedited basis"), and has been renewed in subsequent resolutions. The Working Group of the General Assembly's Sixth Committee was first called for by G.A. Res. 52/165, U.N. GAOR, 52d Sess. U.N. Doc. A/RES/52/165(1998) and renewed subsequently essentially to accelerate the work of the Ad Hoc Committee, allowing for negotiations to be held twice instead of only once per year.

[18] *See 2002 Ad Hoc Committee Report, supra* note 1. *See also* the Committee's subsequent reports: *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996,* U.N. GAOR, 58th Sess., Supp. No. 37, U.N. Doc. No. A/58/37 (2003); *Report of the Ad Hoc Committee established by General Assembly*

remains underway (having been widely urged to adopt a Comprehensive Convention in the near future),[19] and the recent adoption of international and regional instruments defining terrorism,[20] as well as domestic laws passed since September 11,[21] indicate that (for better or worse) a comprehensive definition of terrorism may yet emerge.

Such a definition may, as already mentioned, raise a number of objections from a human rights perspective, serving to legitimate an expansion of executive and police powers without clearly articulated limits and in the context of a vaguely-worded and overbroad definition. Some of the difficulties encountered in trying to craft consensus about a definition are notorious, such as the place of national liberation struggles in this context.[22] Other problems are less well-known, and appear to be subject to

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resolution 51/210 of 17 December 1996, U.N. GAOR, 59th Sess., Supp. No. 37, U.N. Doc. No. A/59/37 (2004). For the work in the Sixth Committee, *see Measures to Eliminate International Terrorism: Report of the Working Group,* U.N. Doc. A/C.6/56/L.9 (Oct. 29, 2001); *Measures to Eliminate International Terrorism: Report of the Working Group,* U.N. Doc. A/C.6/57/L.9 (Oct. 16, 2002); *Measures to Eliminate International Terrorism: Report of the Working Group,* U.N. Doc. A/C.6/58/L.10 (Oct. 10, 2003); *Measures to Eliminate International Terrorism: Report of the Working Group,* U.N. Doc. A/C.6/59/L.10 (Oct. 8, 2004).

[19] UN Secretary General Kofi Annan has made the adoption of a Comprehensive Convention part of his comprehensive strategy against terrorism and urged the General Assembly to adopt such a Convention before the end of summer 2006: *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General,* A/59/2005 (March 21, 2005), para.91 at p.26; "Secretary-General congratulates General Assembly on adoption of international convention on nuclear terrorism", Press Release SG/SM/9817 (April 13, 2005), available at http://www.un.org/News/Press/docs/2005/sgsm9817.doc.htm (verified April 13, 2005). The High-Level Panel on Threats, Challenges and Change, appointed by the Secretary-General, had shortly before urged adoption of the Convention: *A More Secure World: Our Shared Responsibility* (2004), para. 163 at p.52. In addition, heads of government and others gathered at the Madrid Summit urged "the speedy conclusion" of a Comprehensive Convention: *The Madrid Agenda,* adopted by the International Summit on Democracy, Terrorism and Security ("The Madrid Summit"), March 11, 2005 (available at http://english.safe-democracy.org/).

[20] *See* Terrorist Financing Convention, *supra* note 10, at art. 2(1); The Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, arts. 1 & 2; Convention of the Organization of the Islamic Conference on Combating International Terrorism, July, 1 1999, arts. 1 & 2; Organization of African Unity Convention on the Prevention and Combating of Terrorism, July 14, 1999, arts. 1 & 3; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, art. 1.

[21] The best source currently available for primary comparison of national laws is the web-site containing the country reports deposited with the Counter-Terrorism Committee established pursuant to Security Council Resolution 1373 (Sept. 28, 2001), *available at* http://www.un.org/Docs/sc/committees/1373/submitted_reports.html (last visited Feb. 21, 2005).

[22] For a brief discussion of some of the problems, see *Terrorism and Human Rights: Progress Report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur,* U.N. GAOR, 53rd Sess., U.N. Doc. E/CN.4/Sub.2/2001/31 (2001).

wider (perhaps unexamined) consensus in the negotiations to date. These include the proposed definition's breadth, going causing death and serious bodily harm to include broadly "[s]erious damage to public or private property" and "[d]amage ... resulting or likely to result in major economic loss", with "the purpose ... to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act".[23] Not only could such a definition include a far wider set of acts than are normally considered to compromise 'terrorism' – including many potentially legitimate forms of protest and resistance – but by including certain acts committed in armed conflict or in situations of concerted resistance against oppression – as discussed below – the effects could be perverse and undesirable as a matter of international public policy.

Adoption of an overbroad definition of terrorism focused exclusively on non-State actors – as currently envisioned – runs the risk of making a Comprehensive Convention the inheritor of the dark legacy of the 'national security' legislation that has leant and continues to lend a veneer of legitimacy to widespread abuses of human rights in many countries. Nonetheless, it appears that the international community is determined to press ahead with the formulation of a Comprehensive Convention. If so – and while recognizing that some of the problems arising from the definition itself, although not discussed in this brief note, also need urgent attention – strenuous efforts should be made to ensure that the debate concerning crimes by State actors be resolved in a principled and fair way.

IV. Can State agents commit terrorism?

In the negotiations that have taken place on a Comprehensive Convention on International Terrorism under the auspices of the United Nations, one major point of contention has been whether such a convention should exclude itself from regulating the actions of State agents and should instead encompass only non-State terrorists. This issue of the intended target *ratione personae* of the definition to be established has proven to be one of the most enduring issues of the negotiations. It is an issue with potentially serious consequences for the effectiveness and the very legitimacy of the Convention.

While public discourse about terrorism frequently focuses on non-State actors, the possibility that State agents might directly or indirectly support or perpetrate acts of terrorism is something that a number of States feel has to be included in a Comprehensive Convention. The United States

[23] See "Informal texts of articles 2 and 2*bis* of the draft comprehensive convention, prepared by the Coordinator", *2002 Ad Hoc Committee Report, supra* note 1, at Annex II, art. 2(1)(b-c).

and its supporters,[24] however, insist that State violence should not be within the scope of the Convention. In an effort to dampen the resulting criticisms, language providing for the State-actor exclusion was put forward that implied (without really stating) that such exclusion was not tantamount to an endorsement of impunity for State agents. The text circulated by the Coordinator as a basis for negotiation reads:

> 1. Nothing in this 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 this 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 this Convention.[25]

The Coordinator borrowed the language of this "military carve-out" (as it is known in diplomatic jargon) from the Terrorist Bombings Convention,[26] although the 1979 Hostages Convention provided an earlier precedent to similar effect.[27] To make clear the legal terrain navigated by

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[24] In this case, including the Secretary-General: see *In Larger Freedom*, n.19 above, para.91 at p.26 (stating that "[i]t is time to set aside debates on so-called 'State terrorism'").

[25] "Texts relating to article 18 of the draft comprehensive convention," *in 2002 Ad Hoc Committee Report*, *supra* note 1, at Annex IV. This text served equally as the basis for the 28 March – 1 April 2004 discussions.

[26] Article 19 of the Terrorist Bombings Convention reads as follows:

> Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.
>
> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by 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 this Convention.

1997 Terrorist Bombing Convention, *supra* note 10, at art. 19.

[27] 1979 Hostages Convention, *supra* note 10, at art. 12. This provision is discussed in detail below.

the Coordinator's text and the importance of the issues that arise, the following discussion will focus first on paragraph two of the Coordinator's text, which is limited to situations of armed conflict, and then will turn to paragraph three, which has broader application.

Upon a first reading of the Coordinator's second paragraph, the proposal to exclude "the activities of armed forces during an armed conflict" by duplicating Article 19 of the Terrorist Bombings Convention might seem unproblematic. It is true, for example, that in situations of armed conflict the rules of international humanitarian law – whatever their problems of practical application – provide a fairly fine-grained tissue of norms related to prohibited conduct, as well as a growing body of jurisprudence for the regulation of conduct during hostilities. Leaving armed conflict situations to the exclusive regulation of this law might therefore seem entirely justified. However, such an initial impression would be deceptive for two reasons.

The first relates to the unlimited nature of the proposed exclusion for conduct of armed forces "governed" by "humanitarian law". One could note by comparison that the language of the 1979 Hostages Convention[28] avoided the vagueness of such a reference and required instead, as a precondition to the exclusion of the Hostages Convention's norms, that the Geneva Conventions be applicable to the *particular act* in question and that the State be under an obligation to prosecute or to hand over the individual(s) involved. This ensures not just that there are norms governing the area but that they *require* a specifically *penal* response.

That activities of armed forces are "governed" by humanitarian law might mean significantly less than this, particularly in situations of non-international armed conflict.[29] To thus exclude armed forces (and notably

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[28] 1979 Hostages Convention, *supra* note 10, at art. 12:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention 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 of 1977, 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 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[29] For example, Additional Protocol I, *supra* note 4, applicable to *international* armed conflict applies the "extradite or prosecute" obligations characteristic of the grave breaches regime of the 1949 Conventions to the Hague Law norms that regulate the targeting of

those of States) in time of armed conflict from *inter alia* the extradite or prosecute regime of the Comprehensive Convention would be to lose an opportunity to introduce clear and rigorous norms into the normative framework that determines how States respond to violations taking place within internal armed conflict – an as yet underdeveloped area of IHL. Of course, such an argument may be open to the objection that the adoption of a Comprehensive Convention on International Terrorism is intended to strengthen norms against terrorism, not to change or improve policy choices made in the course of developing international humanitarian law. This may be true; but if it *is* true, the principle should be applied consistently, since it is precisely such changes to IHL policy that a Comprehensive Convention would introduce with respect to non-State actors (as explained below).

The second and more serious concern relates to the restriction of the Coordinator's (and Terrorist Bombings Convention's) text to "armed forces". Such an exclusion covers the main State actors, but not all others[30]

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civilians and other methods and means of warfare (and which are incorporated within the substantive provisions of this Protocol), ensuring that an ample scope of humanitarian law is "governed" by norms that require individual criminal accountability: Additional Protocol I, *supra* note 4, at art. 85(3) & (4). The same is not true of internal conflicts. Thus, Common Article 3 of the 1949 Conventions was not covered by the grave breaches regime establishing individual responsibility, and Additional Protocol II, *supra* note 4, does nothing to extend such a regime to acts committed in internal armed conflict. Thus, while such acts are increasingly affirmed as being criminal according to customary international law (based on their inclusion in the Rome Statute and on the jurisprudence of the ICTY and ICTR), it is normally assumed that, while customary law creates permissive or optional universal jurisdiction for international crimes, it does not carry over the firm "extradite or prosecute" obligations familiar from the treaty regime: For further information *see supra* note 15.

[30] "Armed forces" are defined in art. 43(1) of Additional Protocol I as comprising:

> "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." Additional Protocol I, *supra* note 4, at art. 43(1).

> "Party" here refers either to a High Contracting Party, i.e. a State, or exceptionally to forces representing "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" as envisioned by art. 1(4) of this Protocol. *Id.* at art. 1(4). Additional Protocol II does not contain a definition of "armed forces" as such, although it does refer to "armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . . under responsible command" in art. 1(1), implying that the adverse party in an internal armed conflict may or may not comprise "armed forces". Additional Protocol II, *supra* note 4, at art. 1(1).

(non-State armed groups not reaching the standard of "armed forces", as well as civilians who become directly involved in hostilities, particularly in situations of non-international armed conflict). Such non-State actors would simultaneously be exposed to both the Comprehensive Convention on International Terrorism and IHL. This area of overlap would create friction between the provisions of international humanitarian law and the Comprehensive Convention and, more fundamentally, a dissonance between the policies underlying each. This friction is seen most clearly when one realizes, for example, that the acts of non-State armed groups engaged in (probably internal) armed conflict could be labeled as terrorist when the group engaged in e.g. targeting of government installations – which might be legitimate military objectives under IHL when attacked by armed forces – with the ultimate intent of forcing the national government to grant autonomy to their region.[31] From a humanitarian law perspective, this kind of attack is a classic example of the type of scenario intended to fall within Additional Protocol II's exhortation that national governments at the conclusion of internal armed conflicts grant to the participants in opposition armed groups the broadest possible amnesty.[32] A Comprehensive Convention on International Terrorism that instead imposed on States Parties the obligation to prosecute or extradite such participants in internal conflicts would undermine this rule of IHL – a rule which has an important role in ensuring the return to normalcy in the post-conflict period – would potentially give non-State groups a strong incentive to block or delay peace negotiations, and would criminalize what might have been lawful acts under the laws of war.[33] To avoid this interference with what the vast majority of the international community probably continues to view as the legitimate policy objectives of IHL, it would be far better to create a more absolute separation between IHL and international counter-terrorist law. This would be one result of what the Organization of the Islamic Conference proposed during the 2001-2002 negotiations of the Comprehensive Convention as a variation on paragraph two of the Coordinator's discussion text:

> 2. The activities of *the parties* during an armed conflict, including in situations of foreign occupation, as those terms are understood under

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[31] *See* n.23 above and related text.

[32] "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." Additional Protocol II, *supra* note 4, at art. 6(5).

[33] Even if a State Party to the Comprehensive Convention that was engaged in an internal armed conflict chose to ignore its obligations to prosecute the "terrorist" crimes of its citizens in order to promote the end of the conflict, other States Parties would continue to be obliged to extradite or prosecute those individuals if they appeared on their territory.

> international humanitarian law, which are governed by that law, are not governed by this Convention.[34]

Obviously this proposal has other purposes (namely, to ensure that situations of foreign occupation are understood as included within "armed conflict", no doubt with an eye to the Palestine/Israel conflict), but the greater breadth of its exclusion (expressly covering both State and non-State parties to a conflict, and thus encompassing in particular more situations of non-international armed conflict) would essentially leave international humanitarian law to deal with conduct in armed conflicts and international counter-terrorist law to deal with conduct in times of peace.[35]

To conclude with respect to the second paragraph of the Coordinator's 2001-2002 discussion text – and while recognizing that IHL could bear further improvement with respect to its enforcement – on balance it appears best to leave the area of armed conflict outside the range of a Comprehensive Convention with respect to *all* parties (indeed, of all participants) to any such conflicts. To the extent that the overall design of international humanitarian law represents policy choices concerning how to deal with armed conflict to which the international community is still committed, the adoption of a provision such as that just examined would represent a serious revision of those policies by criminalizing conduct viewed through the sole lens of "terrorism" where it might otherwise be dealt with by more a nuanced and appropriate range of concepts and mechanisms in the context of IHL.

Essentially the same criticism applies where paragraph 3 of the Coordinator's text above is concerned. Here, the language borrowed from the Terrorist Bombings Convention would exclude from the coverage of an eventual Comprehensive Convention activities of the military forces of a State in the exercise of their official duties "inasmuch as they are governed by other rules of international law". Here the over-breadth of the word "governed" is manifest. The "other rules of international law" that "govern" here would include a wide range of norms, from the prohibitions of genocide and crimes against humanity to the regional and international instruments of human rights law (as applicable), as well as the fundamental human rights norms protected under customary law. The results flowing

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[34] *2002 Ad Hoc Committee Report*, *supra* note 1, at Annex IV (emphasis added).

[35] Presumably the term "armed forces" would encompass the "dissident armed forces" mentioned in Art. 1(4) of Additional Protocol I, *supra* note 4, at art. 1(4) while the OIC language referring to "parties" would expand this to include the "other organized armed groups." It appears however that not even the OIC language would encompass less "organized" fighting formations, leaving such individuals to be labeled as terrorists in application of the CCIT (which might be justified in some cases, but not in others); to avoid this anomaly and leave the whole area of armed conflict to IHL, the exclusion would have to use "all those who directly engage in hostilities" or a similar formulation.

from such norms vary widely. If a given act of terrorism amounted to a crime of genocide or torture, then the 1948 Genocide Convention or the 1985 Convention against Torture would require the State to establish jurisdiction over and prosecute the offense.[36] No such conventional obligation exists with respect to crimes against humanity (although the argument for a customary law obligation to the same effect is certainly strong). Moreover, of these crimes, only with torture does a clear conventional obligation to extradite in the event of a failure to prosecute arise, while with genocide and crimes against humanity the view of the majority of commentators is that only a permissive universal jurisdiction exists at customary international law, without any "extradite or prosecute" obligation to serve as a bulwark against impunity.[37]

As for human rights norms, their rules may "govern" a situation at a considerable level of generality, with potential enforcement often through only the sporadic and relatively weak supervision of international oversight bodies with their reporting requirements, special rapporteurs and sometimes visiting rights. Notwithstanding the important role that such supervision has to play, its weaknesses are well known and will not be outlined here. Moreover, it has typically been in situations that do not clearly meet the threshold of armed conflict, but which are not quite situations of 'normality' – labeled variously as "states of emergency", "gray zone conflicts" or "states of exception" – that human rights are most flagrantly abused by States. This abuse often either closely resembles terrorism itself or takes place while the government in question is invoking a battle against terrorists to legitimate their actions, and often takes place within the legal framework of 'national security' legislation that grants wide discretion and reduces effective judicial oversight of security forces.[38]

The legacy of efforts to improve respect for human rights in 'gray zone' conflicts or states of emergency by increasing international regulation of these situations is substantial, and might arguably be one of the most important ongoing contemporary objectives in the field of human rights.

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[36] Such obligations are imposed, with respect to the 1948 Genocide Convention, *supra* note 8, at arts. 5 & 6, for crimes taking place within the State Party's own territory, and with respect to the Convention Against Torture, *supra* note 9, at arts. 4 & 5, for crimes taking place within the territory of all States Parties.

[37] For further information *see supra* note 15.

[38] Tom Hadden & Colin Harvey, *The Law of Internal Crisis and Conflict: An Outline Prospectus for the Merger of International Human Rights Law, the Law of Armed Conflict, Refugee Law, and the Law of Humanitarian Intervention*, 833 INT'L R. OF THE RED CROSS 119 (1999); U.N. Human Rights Comm., General Comment 29, *States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); *Minimum Humanitarian Standards: Analytic Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21*, U.N. Doc. No. E/CN.4/1998/87 (1998); Jean-Daniel Vigny & Cecilia Thompson, *Standards Fondamentaux d'Humanité: Quel avenir?*, 840 INT'L R. OF THE RED CROSS 917 (2000).

This impetus towards the progressive development of international human rights protection is undermined to the extent that States are not held to account for what they do in situations of exception. This is precisely what an overbroad exemption to the application of a Comprehensive Convention would condone, inasmuch as it would leave to the soft mechanisms of international human rights law the abuses committed by State actors, while imposing a far more stringent framework of obligations on non-State actors for what might be precisely the same types of conduct. One cannot really argue that this sanctions impunity for the conduct of State actors, since they remain subject to an extensive tissue of human rights norms, but it certainly foregoes a rare opportunity to impose increased international obligations and increased international scrutiny on States with respect to an important area of international concern. In this respect, the Coordinator's text would, like the Terrorist Bombings Convention before it, leave a serious void.[39] If governments were serious about adopting an instrument that would contribute to the suppression of political violence *as such*, and by whomever committed, this text would be seen as unacceptably broad.[40]

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[39] It should be noted here that the threshold defining the application of the proposed Comprehensive Convention does not exclude acts committed by a government against its own nationals and in its own territory *if* the accused leaves the jurisdiction of that State. Article 3 as currently drafted reads:

> This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1 [mandatory jurisdiction over crimes by a national, on the territory, or on board a ship or aircraft of the State], or article 6, paragraph 2 [optional jurisdiction *inter alia* over crimes against a national, a facility abroad, of the State], of this Convention to exercise jurisdiction, except that the provisions of articles 8 and 12 to 16 [inter-state cooperation obligations] shall, as appropriate, apply in those cases. 1997 Terrorist Bombing Convention, *supra* note 10, at art. 3.

When the accused leaves the jurisdiction of the crime and this paragraph becomes inapplicable, article 6(4) becomes relevant:

> Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 2 in cases where the alleged offender is present in its territory and where it does not extradite such a person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2. *Id.* at art. 6(4).

Thus, even isolated acts in a single-State scenario are subject to the "extradite or prosecute" obligation, except to the extent that a "military carve out" is adopted: "Texts of articles 3 to 17 bis and 20 to 27 of the draft comprehensive convention, prepared by the Friends of the Chairman", *2002 Ad Hoc Committee Report, supra* note *1, at* Annex III. The language is borrowed virtually verbatim from the Terrorist Bombings Convention, articles 3 and 6; the Terrorist Financing Convention, *supra* note 10, at arts. 3 and 7, are to the same effect.

[40] The third paragraph of the OIC recommendation, *supra* note 32, addresses this:

Here, two nuances must be introduced. The first pertains to the wording of paragraph 3 of the Coordinator's text above where, like the Terrorist Bombing Convention, it would define the military exclusion clause by reference to the "activities undertaken by the military forces of a State in the exercise of their official duties". A debate has, of course, been sparked by the United Kingdom's House of Lords proceedings in the *Pinochet* affair[41] on the question of what constitutes the exact scope of the official duties of State personnel and, more importantly, whether crimes prohibited under international law can ever form a part of such duties.[42] If such crimes could not form part of such official duties as a matter of international law, then the third paragraph of the Coordinator's text would presumably open the door to the argument that all "terrorist" crimes of State actors were subject to the Comprehensive Convention's provisions. The view that would exclude international crimes from the scope of the 'official functions' of State actors has recently been lent some support, in the context of defining the immunities available in the face of such crimes, by the separate concurring decision of three judges in the International Court of Justice's *Belgian arrest warrant* case.[43] Yet despite the hopeful assertions of these distinguished judges, the *Pinochet* case itself cannot be said uniformly to support the view that international crimes are outside the scope of what international law recognizes as the official acts of State functionaries, and the more widely held view remains to the contrary.[44] Assuming the same logic is valid in determining the applicability of counter-terrorist conventions as applies in determining the scope of official immunities, the proposed exclusion clause of the Comprehensive

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> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are *in conformity with* international law, are not governed by this Convention [emphasis added]. *2002 Ad Hoc Committee Report, supra* note 1, at Annex IV.
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> Of course, since virtually no acts of terrorism by State agents could be in conformity with international law, this proposed amendment to the Coordinator's text is the effective equivalent to its deletion.

[41] R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (Amnesty Int'l & Others intervening) (No. 3), [1999] 2 All E.R. 97 (H.L.).

[42] J. Craig Barker, *The Future of Former Head of State Immunity after Ex parte Pinochet*, 48 INT'L & COMP. L.Q. 937 (1999); Eileen Denza, *Ex parte Pinochet: Lacuna or Leap?*, 48 INT'L. COMP. L.Q. 949 (1999); John Hopkins, *Case and Comment: Former Head of Foreign State: Extradition;Immunity*, 58 CAMBRIDGE. L.J. 461 (1999), Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (2000).

[43] *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo* v. *Belg.)*, 2002 I.C.J. 121 (Feb. 14,) , General List No. 121, *Joint separate opinion of Judges Higgins, Kooijmans, Buergenthal,* at para.85.

[44] The author details his own close analysis of this question in BROOMHALL, *supra* note 12, at 133-134.

Convention will ensure that the large bulk of terrorist acts committed by the military forces of a State will remain outside the scope of the Convention.[45]

The second nuance bears on the wording of article 1(4) of the Terrorist Bombings Convention:

> "Military forces of a State" means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility.[46]

This definition excludes from the "military carve out", and therefore includes within the Convention's ordinary scope of application, acts by States agents that do not form part of the "military forces of a State" as here defined. This would appear to give the assurance that only the State's military forces would be left to the "governance" of international humanitarian law (in wartime), or of international criminal and international human rights law (in times both of war and of peace), while police, internal security forces and internal intelligence services, as well as other agencies, would be subject to the rules laid out in the Convention. Yet this distinction is likely to be clearer on paper than in practice. Governments engaged in the repression of their own populations are prone to invoke national security or foreign infiltration in attempted justification for their actions, and the distinction between 'external' military forces and 'internal' police services is highly porous in a great many countries where these bodies are either structurally inter-woven or where the former is called in to supplement the latter, whether to provide added capacity on a routine basis or in response to real or perceived emergencies. The definition of "military forces of a State" from the Terrorist Bombing Convention contemplates excluding these forces notwithstanding this dual function through its reference to the *primary purpose* of the forces. The result in practice, for purposes of the exclusion from the Terrorist Bombings Convention or the proposed Comprehensive Convention, would be to exclude from the relevant convention's obligations the conduct of what is all too often a key player in situations of internal repression. It also creates an anomaly inasmuch as it would make police, internal security and various para-police forces subject

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[45] Of course, the scope of "official duties" in the Comprehensive Convention context would ultimately be determined (if ever) through the dispute resolution processes of the proposed Convention (i.e. initially through diplomatic channels, secondly through arbitration and, finally, through decision of the International Court of Justice). *2002 Ad Hoc Committee Report, supra* note 1, at Annex III, art. 23.

[46] 1997 Terrorist Bombings Convention, *supra* note 10, at art. 1(4). Discussion paper draft Article 1(2) of the draft Comprehensive Convention is identical: *2002 Ad Hoc Committee Report, supra* note 1, at Annex I.

inter alia to the obligation to extradite or prosecute the individuals in question, while leaving untouched the military personnel who might in fact have been working alongside or even informally directing them on the grounds that the latter are "under [the] formal command, control and responsibility" of the military forces of the State. In the face of this disparity of treatment, the fact that the States involved are subject to obligations to respect and ensure international human rights norms with respect to the conduct of the excluded military officials seems cold comfort.

The logic of the above arguments dictates that, if Member States of the United Nations are determined to adopt a Comprehensive Convention on International Terrorism, the second paragraph of the Coordinator's text above should nevertheless respect more fully the rules and principles of humanitarian law by excluding both the armed forces of the State and non-State combatants from the coverage of the Convention, while the Coordinator's third paragraph should be deleted entirely. The latter measure would result in the inclusion of State terrorism in "gray zone" conflicts or states of emergency, thus responding to and commemorating the many abuses that ravaged countries *inter alia* in Central and South American in the late 20th century. Rather than being an inheritor of tradition of the so-called 'national security' legislation that has so often been used to justify the abrogation of the rule of law and abuses of human rights, a principled approach to armed conflict and to the responsibility of State actors – if accompanied by sufficient attention to issues relating to the overbreadth of the definition[47] – would serve to increase the legitimacy of the Comprehensive Convention, and might eventually intensify the light that international law casts into places that some might prefer be left in the dark. As advisable as the course of action just prescribed might be, it may well be for precisely this latter reason that the government of the United States, among others, opposes the inclusion of State terrorism in a Comprehensive Convention.

V. Conclusion

Of course, to the extent that some of the objections just enunciated focus on the potentially "lost opportunity" to impose clearer obligations or clearer means of enforcement on States with respect to the abuses of their own personnel than currently exist at international law, it might be said in

[47] In essence, it is the author's view that the draft definition currently under discussion (n.23 above and related text) should eliminate its reference to purely economic harm and should impose restrictions on the reference to property damage (perhaps by requiring a link to harm to persons), thus shifting the emphasis towards the death and serious bodily harm that is normally associated with terrorism. Both the Secretary-General and the High-Level Panel focused on such harm in their expressions of support for a comprehensive definition: *In Larger Freeedom*, n.19 above, para. 91 at p.26; *A More Secure World*, n.19 above, para. 164 p.52.

response that if the Comprehensive Convention fails to deal with these matters then future efforts aimed at the progressive development of international law or at the reduction of impunity for serious crimes could take up these issues. This may be true in a theoretical way, but experience tends to show that opportunities to advance international law have to be taken up when they present themselves if sometimes decades-long intervals are not to intervene.

Perhaps more importantly, if more intangibly, the adoption of a Comprehensive Convention aimed largely at the conduct of non-State actors would appear likely to reinforce a distinction common to the political discourse of States engaged in real or ostensible counter-terrorist campaigns. This is, namely, the tendency to characterize the conduct of non-State opponents as "terrorist" while depicting the State's own conduct as purely defensive of the "public order" or "national security". It need hardly be said that of course States sometimes *are* engaged in genuine counter-terrorist campaigns where defensive motives *are* genuinely in play, but there is a wide penumbra of situations in which these characterizations are deployed for essentially illegitimate political purposes. The draft definition of a crime of terrorism currently under discussion threatens to reinforce this tendency by imposing on all States Parties to the Comprehensive Convention the obligation to cooperate in the prosecution of a wide range of offences that might represent lawful acts of war committed in internal armed conflict or which might represent legitimate acts of dissent or resistance when committed in peacetime (including in states of exception). Among the latter situations, one thinks for example of a group of indigenous people engaging in sabotage of installations intruding into lands for which they are seeking autonomy in the face of an oppressive central government. In such situations, a good portion the international community might see the struggle as in line with overall international trends towards democracy or the rule of law. Nonetheless, by having ratified the Comprehensive Convention, these States would be left with the choice either of ignoring their treaty obligations – undermining the legitimacy of the Convention and perhaps in time rendering it a dead letter – or of adopting a repressive criminal-law approach contrary to their wider international public policy objectives. In this respect, to adopt the Comprehensive Convention on International Terrorism as currently designed would represent a choice by the international community of an extremely blunt policy instrument likely to have serious negative repercussions for a long time to come.