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SPECIFIC HUMAN RIGHTS ISSUES: NEW PRIORITIES, IN PARTICULAR TERRORISM AND COUNTER-TERRORISM

Terrorism and human rights

Final report of the Special Rapporteur, Kalliopi K. Koufa*

* This document is submitted late pending approval of a waiver of the page limit imposed by the General Assembly.

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Summary

This final report is submitted pursuant to resolution 2003/6 of the Sub-Commission on the Promotion and Protection of Human Rights for the purpose of completing the ongoing conceptual study on terrorism and human rights. It proceeds from the conceptual bases and all the information contained in the successive reports and other documents prepared over the last several years by the Special Rapporteur. It should therefore be examined with all the previous work in mind.

The report notes at the outset that there are still issues which have either not yet been dealt with or which have not yet been fully explored for the purposes of the study mandated by the Sub-Commission. Prominent among these are issues such as accountability for acts of terrorism, and the need to distinguish between what is terrorism and what is something else, e.g. military operations and other facets of armed conflict, or fighting against colonial domination, alien occupation and racist regimes in the exercise of the right to self-determination. In this report, the Special Rapporteur regroups these remaining issues in order to explore and develop as many of them as possible. With respect to accountability, the report specifically addresses the questions of State terrorism, State-sponsored terrorism, and the continuing debate over the applicability of human rights norms to non-State actors.

The report concludes with a number of conclusions and recommendations. Among them, the Special Rapporteur emphasizes again the complexity of the issue of terrorism and human rights and the need to draw on disciplines other than international law for fuller understanding of terrorism and to fashion responses to terrorism and how to reduce acts or threat of acts of terrorism. She notes that two of the most important essential topics falling into this category are (i) examination of the many root causes of terrorism and (ii) review of strategies to reduce or prevent terrorism in all its manifestations. The Special Rapporteur recommends that study of these topics be undertaken either at the Sub-Commission level or by some other United Nations official or body. The Special Rapporteur also addresses numerous other issues in her conclusions, including extradition, impunity, the question of periodic review of national counter-terrorism measures and their compliance with human rights or humanitarian law norms, international guidelines for counter-terrorism measures, and the work of the General Assembly and the Security Council's Counter-Terrorism Committee.

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Introduction

Background

1. Concern about human rights in the context of terrorism did not receive much attention in the United Nations until the 1993 Vienna World Conference on Human Rights. That same year the General Assembly began to adopt resolutions on “human rights and terrorism” while continuing its annual resolutions on “measures to eliminate international terrorism”. Beginning in 1994, the Commission on Human Rights also began to adopt resolutions on “human rights and terrorism”, and requested the Sub-Commission on the Promotion and Protection of Human Rights to undertake a study on the issue of terrorism and human rights in the context of its procedures. That year, following suit to the urging of the Commission, the Sub-Commission, in its resolution 1994/18, requested one of its members to prepare a working paper on this topic. When in 1996 a paper had still not been submitted, the Sub-Commission, in its resolution 1996/20, entrusted this author to prepare it. In 1997, following submission of her working paper (E/CN.4/Sub.2/1997/28), the Sub-Commission appointed this author as Special Rapporteur to conduct a comprehensive study on terrorism and human rights. In the course of this mandate, the Special Rapporteur has submitted a preliminary report (E/CN.4/Sub.2/1999/27), a progress report (E/CN.4/Sub.2/2001/31), a second progress report (E/CN.4/Sub.2/2002/35), an additional progress report with two addenda (E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2), and now this final report.

2. The aforementioned earlier reports contained a detailed analysis of the inextricable link between terrorism and human rights and its broader international implications, investigated the complex nature of the human rights dimensions of terrorism, and identified the major issues of international controversy and concern involved in the study of the human rights effects and aspects of terrorism. This engagement by the Sub-Commission in the study of terrorism and human rights established and strengthened significantly the interest in this topic even prior to the events of 11 September 2001, and provided a solid basis for the post-11 September 2001 efforts within the United Nations and elsewhere to address the issue of protecting human rights while countering and combating terrorism.

3. Enhanced attention to terrorism and to the effects of counter-terrorism measures on the enjoyment of human rights is currently driven, of course, by the events of 11 September 2001 and their sequelae - i.e. the ensuing global war against terrorism, the significant unintended consequences to human rights, and the risk of damage to the cause of justice and the rule of law as a result of the adoption or implementation of anti-terrorist legislations and policies - along with the continuing failure to resolve some “hot spots” still fuelling the debate of “terrorists” versus “freedom fighters”, and vice versa.

4. The timely sensing by the Special Rapporteur of the surfacing new trends and developments in the shifting international environment resulting from the catalytic events of 11 September 2001 and the accelerated fight against terrorism led her to immediately include in her basically conceptual study of terrorism and human rights a more selective human rights-specific approach. Accordingly, and with a view also to assisting the Sub-Commission in its relevant deliberations and comments, she supplemented her work with a review of the relevant international anti-terrorist activities and initiatives undertaken since 11 September 2001, as well as of the relevant reactions by various human rights bodies and

mechanisms at the global and regional levels, and updated annually this review. In her 2003 report, referring to the quantity and diversity of national, regional and international counter-terrorism legislation and measures that should be examined and discussed for their conformity with international human rights norms and standards, the Special Rapporteur stated her view that there was now a dual task lying ahead of the Sub-Commission: in the first place, the completion of the basically conceptual in its inception of and approach to the study of terrorism and human rights and then, review and discussion of national, regional and international counter-terrorism measures with a view to indicating areas of concern and compatibility with States' human rights obligations.

5. The Sub-Commission, in its resolution 2003/6 entitled "Terrorism and human rights", requested the Special Rapporteur to complete her study on the conceptual aspects of terrorism and human rights and submit to it her final report at its fifty-sixth session. Then, in its resolution 2003/15 entitled "Effects of measures to combat terrorism on the enjoyment of human rights", it decided to rename the existing sub-item 6 (*c*) of its agenda "New priorities, in particular terrorism and counter-terrorism", in order to study the compatibility of counter-terrorism measures adopted at the national, regional and international levels with international human rights standards, giving particular attention to their impact on the most vulnerable groups, with a view to elaborating detailed guidelines. In that same resolution, the Sub-Commission decided also to appoint this Special Rapporteur as coordinator of this initiative, with a mandate to gather the necessary documentation to facilitate the effective work of the Sub-Commission.

6. The present final report is submitted pursuant to Sub-Commission resolution 2003/6, for the purpose of completing the ongoing conceptual study of terrorism and human rights. It proceeds from the conceptual bases and all the information contained in the successive reports and other documents prepared by the Special Rapporteur for the Sub-Commission on this topic. Therefore, it should be examined with all that previous work in mind. The Special Rapporteur wishes to emphasize not only that her successive reports and other documents prepared for the Sub-Commission should be considered as a whole, but also that she has not revised her opinion on any of the conceptual issues dealt with or the information contained in these documents and reports.

Scope and structure of the present report

7. The specific aim of this report is to fill in on matters that have already been identified for more analysis by the Special Rapporteur and to deal also with certain core issues that have been left open. Because of the recent limitations as to the size of Sub-Commission reports, the Special Rapporteur, regrettably, cannot provide herein a recapitulation or a brief summary of the analytical parts of her study contained in the documents presented to the Sub-Commission for consideration in the preceding years, as is habitually done in the final reports of the Sub-Commission. To allow for an easier understanding of the complete study, she plans to include such a recapitulation or summary of her earlier work in an addendum to this final report, after the completion and submission of the main report.

8. Most of the issues presented by the Special Rapporteur in her working paper and successive reports submitted to the Sub-Commission have already been sufficiently discussed and analysed, and almost thoroughly examined and debated by her colleagues in the Sub-Commission, in the course of this study. These include, for instance, such core issues as the nature and content of the relationship between human rights and terrorism; the direct and indirect impact of terrorism on the enjoyment of human rights, including an analysis of the major areas in which terrorism endangers those political and social values that most relate to the enjoyment of human rights and fundamental freedoms; the scope of application of human rights law as regards, in particular, the hesitancy of many States to hold non-State actors legally bound by human rights norms that are more traditionally held only by States; some definitional aspects of terrorists and acts of terrorism; the nature of contemporary terrorism, including whether the threat of terrorist groups having, developing or using weapons of mass destruction is real or exaggerated, and the issue of information technology; and the impact of counter-terrorism measures and of the "war on terrorism" on human rights and humanitarian law in general, and especially in the area of criminal justice systems.

9. There are still issues, however, which have either not yet been dealt with, or which, although discussed already at some length by the Special Rapporteur, have not yet been exhausted for the purposes of this study. Prominent among these stand, for instance, issues such as the accountability for acts of terrorism and the need to distinguish between what is terrorism and what is something else, e.g. military operations and other facets of armed conflict, or fighting against colonial domination, alien occupation and racist regimes in the exercise of the right to self-determination. In this report, the Special Rapporteur, with an eye to the existing restraints, has regrouped these remaining issues in order to explore and develop as many of them as is possible.

10. The Special Rapporteur does not address further here other issues presented in her mandate and raised in her previous work and in the debates of the Sub-Commission, which, although of great importance, require considerable resort to disciplines other than international law. In this context, she is thinking in particular of the big issue of the root causes of terrorism, which is not only a necessary component to understanding terrorism fully, but also to fashioning effective counter-terrorism measures and policies. In the long course of her work on this study, it has become apparent to the Special Rapporteur that addressing the problem of human rights violations in relation to the root causes of terrorism in her current work with the attention it merits would overtake almost all other aspects of the study. She has, therefore, concluded that this topic should be addressed in a separate study.

11. Accordingly, the present final report consists of an Introduction and three chapters, as follows: the Introduction refers to the background of the study and the scope of this final report; chapter I addresses and expands on issues that have not to date been as fully discussed as the Special Rapporteur would have wanted, owing to reasons ranging from imposed limitations on the length of the reports to her own intention that they be studied in an ongoing basis, or at a later stage; chapter II deals mainly with the issue of accountability, which has not been developed in her previous work for reasons such as those already mentioned; chapter III contains the concluding observations and recommendations.

I. ISSUES THAT NEED FURTHER CONSIDERATION AND CLARIFICATION

A. The haunting definition problem: being clear about what is and what is not terrorism

12. Throughout her mandate, the Special Rapporteur did not stop reflecting on the definition problem, and studying with great care the debates in the Sub-Commission about whether she should propose a definition or not. These debates have, inter alia, brought out the issue of whether a definition of terrorism should focus only on acts carried out by non-State actors, or whether it should incorporate as well the concept of State or State-sponsored terrorism.[1] While always sympathetic to the point of view that defining terrorism is too fraught with difficulties and overambitious,[2] and that it was not really necessary for this study to make use of a precise or generally acceptable definition,[3] the Special Rapporteur has throughout her work entertained the idea that scrutinizing the essential elements and manifestations of terrorism and attempting to elaborate with some precision on a delimitation of terrorism from the human rights and humanitarian law point of view would be valuable for the purposes of this study, in particular as regards the possible relationship of the criminal phenomenon of terrorism to the issue of accountability.[4] Thus, she proceeded with her work on the definitional components by exploring the controversial issue of the actors or potential perpetrators of terrorism.

13. In this connection, the Special Rapporteur approached analytically the dual conceptual distinction made between State and non-State (or sub-State or individual) terrorism - which is a generally acceptable component of the debate on terrorism in both the world of academia and ordinary parlance, including in the United Nations - and examined the different forms and manifestations of these two basic (i.e. State and anti-State) dimensions of terrorism. Identifying the actors or potential instigators of terrorism led the Special Rapporteur to distinguish also between armed conflict or war and terrorism, and between lawful combatants and terrorists. Further, in order to attend to the issue of the so-called “freedom fighters” - and the ever-present request of a number of Member States to clearly differentiate between terrorism and the struggle for self-determination - the Special Rapporteur initiated a preliminary discussion of relevant international humanitarian law, setting out thereby the necessary conceptual and normative background for lessening, if not removing, some of the existing definitional controversies related to armed conflicts from the terrorism debate.[5] Having thus laid the groundwork for a more definitive discussion of these human rights and humanitarian law concerns relating to the problem of definition, she continued her analysis with basic legal and especially human rights delimitations of terrorism and terrorist acts relating to definitional elements.[6]

14. In the following section, the Special Rapporteur will provide additional commentary to round off the discussion on human rights and humanitarian law concerns relating to the definition of terrorism. While she has no illusions that her discussion will resolve issues that have unfortunately become political rather than legal and, thus, continue to stand squarely in the middle of the political controversies impeding agreement on a definition,[7] she hopes at least that it contributes to further understanding and positive steps.

B. Human rights and humanitarian law concerns relating to the definition of terrorism

1. Terrorism and armed conflict generally

15. Terrorism engages several issues under international humanitarian law, otherwise known as the law of armed conflict.[8] As is well known, international humanitarian law is the body of international law governing the actual conduct of armed conflict and military occupation,[9] whether lawful or not in their inception.[10] Moreover, it is commonly viewed as encompassing also the law on genocide and on crimes against humanity.[11] International humanitarian law outlaws the use of terrorism and of certain terrorist practices or terror but does not provide a general or a legal definition of "terrorism" or "terrorist acts" and the like practices.[12]

16. It should be clear from the start that humanitarian law deploys its effect in armed conflict,[13] and that the existence of armed conflict automatically invokes humanitarian law. As a general matter, humanitarian law covers three fundamental aspects of armed conflicts: separating legal military operations from illegal ones, protecting victims of armed conflict, and regulating the weaponry of armed conflict.[14] Issues of armed conflict law that have the strongest nexus with terrorism, many of which have fuelled the controversy relating to the definition of terrorism, include (i) distinguishing armed conflict from general violence that might have implications relating to terrorism; (ii) distinguishing types of combatants and types of armed conflicts that might have implications relating to terrorism; (iii) distinguishing terrorism in armed conflict from legal military operations.

(a) Defining armed conflict

17. In the application of humanitarian law, the distinction between international and non-international armed conflict is important, since legal rights and obligations under humanitarian law are broader or narrower in scope depending on whether the conflict is or is not of an international character. The distinction, however, between international and non-international armed conflict is, in practice, often difficult to draw, particularly since the end of the Second World War and the growing trend towards the internationalization of civil wars, with outside States intervening in support of one or more parties. Despite a recent trend towards the unification or assimilation of the applicable legal regime that covers situations of international armed conflict with the legal regime that covers situations of non-international armed conflict,[15] the distinction between these different categories of armed conflict - a distinction of utmost importance all along the development of humanitarian law from a legal regime principally dealing with armed conflicts between States to one dealing directly with internal armed conflicts - still continues to be today the first step in identifying the humanitarian law norms governing a given situation.

18. While the existence of an armed conflict is an essential precondition for the application of international humanitarian law, the precise delimitation or definition of the term "armed conflict" is not provided in any treaty instrument. Article 2 common to the four 1949 Geneva Conventions merely states in its first paragraph that the Conventions "shall apply to all cases of declared war or any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them", and provides in

its second paragraph that the Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". The International Committee of the Red Cross Commentary[16] offers a very broad view of the term "armed conflict" by interpreting common article 2 as "[a]ny difference arising between two States and leading to the intervention of armed forces … even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place".[17] Article 1, paragraph 3, of Additional Protocol I incorporates by reference article 2 common to the four Geneva Conventions.[18]

19. Article 3 common to the four 1949 Geneva Conventions and 1977 Additional Protocol II, which set out the rules applicable to non-international armed conflict or civil wars, also use the term with no definition. Thus, common article 3 provides that in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties to the Conventions, each party to the conflict shall be bound to apply, as a minimum, certain fundamental humanitarian provisions, and encourages the parties to the conflict to conclude special agreements to bring other provisions of the Conventions into force.[19] By distinguishing clearly the parties to the conflict from the "High Contracting Parties", common article 3 attempts to ensure that insurgents engaged in armed conflict would be bound to observe the same provisions as those which would bind a lawful Government.[20] In the view of an expert in the field, common article 3 prohibits "acts of terrorism … without actually using the word 'terrorism'".[21]

20. Further, Additional Protocol II, which develops and supplements common article 3 of the four Geneva Conventions, without modifying its existing conditions of application, merely states, in article 1, paragraph 1, that it applies to all armed conflicts which are not covered by article 1 of Additional Protocol I and which take place in the territory of a High Contracting Party "between its armed forces and dissident armed forces or other organized armed groups" meeting certain criteria.[22] In article 1, paragraph 2, it specifies in the negative that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". As a consequence, and given also the importance of the legal qualification of armed conflict and of related violence for the content of the applicable law, evaluation is necessary to determine, on a case-by-case basis, whether a particular situation can be considered terrorism or must be viewed as armed conflict.

21. Considering the existing customary threshold for armed conflict[23] - in the sense of not only the intensity but also the particular quality of hostilities amounting to armed conflict[24] - the Special Rapporteur, in her (first) progress report (E/CN.4/Sub.2/2001/31), described armed conflict as a situation requiring that there be military operations and the use of military materiel.[25] Long-accepted requirements for a showing of armed conflict include the use of military (rather than police) forces,[26] the use of military (as opposed to police) weaponry and materiel, and the use of military (as opposed to police) operations.[27] However, application of the term "armed conflict" is somewhat different in the case of armed conflict in defence of the right to self-determination and will be addressed as part of that discussion. The Special Rapporteur will also address the additional criteria provided in article 1 of Additional Protocol II that are

necessary for its field of application in her discussion of civil wars. In any case, she cannot provide an exhaustive review of the topic, especially as even the basic, long-accepted criteria for armed conflict have been subject to post-11 September 2001 controversies in the context of terrorism and counter-terrorism operations.[28]

(b) Terrorism in armed conflict

22. Terrorism in armed conflict is prohibited by a number of provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols. For example, the Fourth Geneva Convention, in its article 33, provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited". Additional Protocol I relating to international armed conflicts uses the word "terror" in article 51, paragraph 2, which reads: "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". Additional Protocol II relating to non-international armed conflicts contains an identical provision in article 13, paragraph 2, whereas in article 4, paragraph 2, it expressly prohibits "at any time and in any place whatsoever … acts of terrorism" against "all persons who do not take a direct part or who have ceased to take part in hostilities" (para. 1).

23. Because international humanitarian law applies in situations of armed conflict, only "terrorism" or "acts of terrorism" committed in the course of armed conflict are outlawed by international humanitarian law. Conversely, "terrorism" and "acts of terrorism" committed in "peacetime" (i.e. in situations which cannot be classified as armed conflicts) are accommodated (i.e. covered or outlawed) by other legal regimes. These other legal regimes, including, for instance, national legislation, international criminal law and human rights may, of course, also apply or overlap during armed conflict.

24. As noted already, neither the Fourth Geneva Convention nor the Additional Protocols define terrorism. Even so, acts widely viewed as terrorist acts have been specifically prohibited ever since the promulgation of the earlier humanitarian law instruments, giving at least some baseline for determining what acts could be considered terrorism in armed conflict. For example, the 1863 Lieber Code, written for and applied by the forces of the United States during the Civil War, provided that the use of poison in armed conflict is "[beyond] the pale of the law and usages of war".[29] The Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention No. IV of 1907 likewise prohibits the use of poison, the killing or wounding of enemies who have laid down their arms or who no longer have means of defence or have surrendered, the employment of arms and material calculated to cause unnecessary suffering, as well as the attacks against civilians in undefended areas.[30] The 1949 Geneva Conventions expand on prohibited acts that meet accepted criteria as terrorist: hostage-taking,[31] biological experiments on either civilians or combatants,[32] and rape of civilians.[33]

25. Combatants in recent wars have carried out a number of acts widely viewed as terrorist: physical mutilation and cutting off limbs; massive resort to detention and torture, extrajudicial killings and disappearances; attacks on whole villages; widespread and indiscriminate bombing; mass rape and gross violence against women; and the use of civilians as human shields, which is akin to hostage-taking. Unleashing hazardous substances or targeting a dam whose destruction would cause massive loss of life or withholding food and water from the civilian population

with large-scale deaths by starvation could also be considered terrorism in armed conflict.[34] International tribunals have for the first time recently accused or convicted individuals for acts of terrorism, or for the crime of terror committed during armed conflict against the civilian population. Thus, for example, the indictments issued by the Special Court for Sierra Leone, include counts of "acts of terrorism" as violations of common article 3 to the 1949 Geneva Conventions and of the 1977 Additional Protocol II thereto, punishable under article 3.d of its Statute, and in the majority judgement issued on 5 December 2003 on the *Galic* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia convicted the accused of the crime of terror against the civilian population as a violation of the laws or customs of war.[35]

26. The other side of an evaluation of what might be considered terrorism in armed conflict requires review of generally accepted views of what types of military actions or targets are considered lawful, and hence not to be viewed as terrorism. In this regard, the Special Rapporteur cannot provide an exhaustive account of either legal military operations or targets, but notes essential consensus that lawful military targets include military bases, warehouses, petroleum storage depots, ports, airfields, military aircraft, weapons, ammunition, buildings and objects providing administrative or logistical support, and military transport vehicles.[36] Civilian transportation systems as a whole, rail yards, power plants (excluding nuclear power plants) and fuel dumps may be legitimate targets in certain circumstances. In this light, the Special Rapporteur notes that in international treaties relating to individual types of terrorist acts, the texts specifically exclude situations in which humanitarian law would apply. For example, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation[37] expressly excludes military aircraft,[38] and applies only to civilian aircraft in flight and carrying civilians.[39]

2. Distinguishing terrorists from combatants

27. The most problematic issue relating to terrorism and armed conflict is distinguishing terrorists from lawful combatants, both in terms of combatants in legitimate struggles for self-determination and those involved in civil wars or non-international armed conflicts. In the former category, States that do not recognize a claim to self-determination will claim that those using force against the State's military forces are necessarily terrorists. In the latter, States will also claim that those fighting against the State are terrorists, and that rather than a civil war, there is a situation of "terrorism and counter-terrorism activity". A second area of concern in the context of civil wars is the situation of a *levée en masse* against a repressive regime. In the following discussion, the Special Rapporteur seeks to provide further analysis of these points so as to clarify usefully the distinction between lawful combatants and terrorists.

(a) Distinguishing terrorism from legitimate struggles for self-determination

28. The controversy over the exact meaning, content, extent and beneficiaries of, as well as the means and methods utilized to enforce the right to self-determination has been the major obstacle to the development of both a comprehensive definition of terrorism and a comprehensive treaty on terrorism. The ideological splits and differing approaches preventing any broad consensus during the period of decolonization still persist in today's international relations. In the course of promulgating treaties on aspects of international terrorism, in addition to providing the general exceptions relating to the application of humanitarian law, the

international community has often been compelled to include specific language that reaffirms the right to self-determination and upholds the legitimacy of the struggle of national liberation movements.[40] Moreover, several General Assembly resolutions on the subject of terrorism have consistently reaffirmed the legitimacy of self-determination and the struggle for national liberation against colonial, racist and alien regimes, while condemning terrorism.[41] Further, some of the regional instruments relating to the prevention and suppression of terrorism have made it clear that a prohibition of terrorist acts cannot prejudice the right to self-determination.[42]

29. The right to self-determination[43] is the individual and collective right of a people to determine their political status and to pursue freely their economic, social and cultural development.[44] The right has a prominent position in the Charter of the United Nations and in common article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966,[45] as well as in a number of major General Assembly resolutions, such as resolution 1514 (XV) of 14 December 1960, on the Declaration on the Granting of Independence to Colonial Countries and Peoples, and resolution 2625 (XXV) of 24 October 1970, on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations).[46] What distinguishes people having the right to self-determination from groups that do not include, generally, a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capacity to regain self-governance.[47]

30. A necessary component of the right to self-determination is the right to its realization and the right to take steps to that end.[48] However, the precise scope of this right as a right to use armed force (*jus ad bellum*) and engage in wars of national liberation has always been a major point of contention.[49] Prior to the extension, in 1977, of international humanitarian law to wars of self-determination, the General Assembly had passed a number of resolutions which hinted at the legality of the use of force in liberation conflicts through an interpretation that such uses of force were employed in self-defence against colonialism, and which indicated that international humanitarian law in full might be appropriate to regulate armed struggles for self-determination.[50]

31. Thus, in 1965, it adopted resolution 2105 (XX) in which it "[r]ecognize[d] the legitimacy of the struggle of colonial peoples against colonial rule to exercise their right to self-determination and independence", while in 1972, it adopted resolution 2936 (XXVII) in which it reaffirmed "its recognition of the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal". It further elaborated on this point in its resolution 3103 (XXVIII) of 12 December 1973 entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes", in which the Assembly recognized that combatants struggling for freedom and self-determination were entitled to the application of the provisions of the Third and Fourth Geneva Conventions of 1949.[51] This became the basis for Additional Protocol I, which expanded the protection of Geneva Convention rules governing international armed conflicts to include these three categories of combatants.[52]

32. However, an unlimited right to use armed force was never generally recognized, despite the acceptance that liberation movements have been given a "legal entitlement" to enforce their substantive right to self-determination by resort to war.[53] Nonetheless, some scholars insist that

there is an automatic link between the right of self-determination and the use of force,[54] while others require the occupying Power forcibly to deny self-determination before the right to use force ripens.[55] In either case, it has also been held that the application of both *jus cogens* and *erga omnes*[56] to the right to self-determination may justify the granting to those using force a higher status as combatants in humanitarian law.[57] Even if others do not accept this higher status theory, other States may at least politically and diplomatically support such combatants. Further, all States must assure that their foreign policies promote and protect the right to self-determination at issue.

33. Expansion of the rules of international armed conflict to include full protection[58] for combatants fighting in the exercise of their right to self-determination or against racist regimes, however, does not free such combatants from fulfilling their obligations[59] under humanitarian law. Their duties, as set out above, include the obligation not, under any circumstances, to engage in terrorist acts.[60] A group claiming to be using force in defence of self-determination, and whose "military operations" are predominantly in violation of humanitarian law, could be considered a terrorist group, although an underlying claim of the people in question would not be affected.

34. In general, the extension of international humanitarian law to wars of self-determination in 1977 provided an additional legal framework through which to assess many acts of politically based violence, and in particular violent acts which otherwise might be characterized as acts of international terrorism.[61] As noted by an expert in the field, in view of article 1, paragraph 4, of Additional Protocol I, some national liberation struggles can now be recognized theoretically as "internationalized" from the start, while in view of article 96, paragraph 3, of the same Protocol, some indication of the willingness of liberation groups to comply with the provisions of humanitarian law can further facilitate a differentiation between "terrorists" and "freedom fighters", thereby allowing a recharacterization of some alleged terrorists for purposes of prosecution.[62]

(b) Distinguishing terrorists from combatants in a civil war

35. In her (first) progress report, the Special Rapporteur provided the generally recognized international test for when violence reaches such a point that humanitarian law governing civil wars applies.[63] The Special Rapporteur accepts that while set out in article 1, paragraph 1, of Additional Protocol II, the requirements of organized command and "sustained and concerted military operations", as opposed to "sporadic acts of violence",[64] are also requisites for application of common article 3 of the 1949 Geneva Conventions, which refers to "armed conflict not of an international character".[65] Clearly the concept of a "Party" in common article 3 suggests a minimum level of organization required to enable the entity to carry out the obligations of law.[66] Further, the use of the words "armed conflict" in common article 3 clearly means that the level of violence must look like a war, with the use of military materiel, even in situations not governed by Additional Protocol II.[67] However, application of common article 3 does not require control of a portion of the territory by the parties to the conflict, which is a necessary condition for the application of Additional Protocol II.[68]

36. An expert in the field has appropriately noted that while "a far more detailed code for application in internal armed conflicts", Additional Protocol II does not go as far as common article 3: first, because it seems to be "applicable only in a full-scale civil war", and, second,

because it applies only to a conflict between a Government of a State and a rebel movement, whereas common article 3 is broad enough to cover a conflict between "different rebel movements competing for power within a State where the government is not involved as such or has ceased to exist".[69] The point that common article 3 can apply to two groups fighting inside the territory of the State, neither of which represents the State, was also made during the Sub-Commission debate on the Special Rapporteur's (first) progress report (E/CN.4/Sub.2/2001/31).[70] While the Special Rapporteur agrees with these positions, which reflect and are verified by recent history,[71] she is not fully convinced by those who argue that a lower level of violence than the Additional Protocol II test can trigger common article 3 in order to increase the protection of victims[72] - if for no other reason than that automatic application of humanitarian law to groups engaged in such violence would likely be unacceptable to most States. In any case, objective review of the level of military violence is rare: some States in which the level of fighting clearly qualifies under the Additional Protocol II test prefer to mischaracterize the situation as one of "terrorism and counter-terrorism".[73]

37. Situations of violence not reaching minimum non-international armed conflict criteria,[74] however, are not necessarily terrorism either, for example, in a situation of spontaneous resistance or a *levée en masse*,[75] in which the scale and scope of military actions fall short of "sustained and concerted". As a matter of fact, there is a disturbing trend to label any group involved in a situation that might even be called "imperfect" or "defective" civil war as necessarily terrorist, even though a particular group may rarely or never engage in what would be viewed as terrorist acts in armed conflict. For this reason, in all situations falling short of the minimum non-international armed conflict criteria, the Special Rapporteur strongly encourages objective evaluation of the actual acts of the groups involved, looking at whether the acts are considered legal military operations or terrorist acts. If a mix is found, then there should be a balancing of legal military acts versus terrorist acts: only when the preponderance of acts are terrorist acts should the group be considered terrorist.[76] Persons or groups not considered terrorist can still be held accountable under national criminal laws as the situation does not invoke humanitarian law rights. But such fighters should not necessarily be tried using terrorism laws, nor should their supporters necessarily be considered as abettors.[77]

38. In any similar situation of violence that does not reach minimum non-international armed conflict criteria, the international community should be alerted that there may be serious violations of human rights carried out by the State that has generated the uprising, especially in light of the tendency of some States to obstruct international purview of the true internal situation by use of the "terrorist" rhetoric. As in civil wars, the State may seek to prop itself up with military aid from other States on the pretext of participating in the "war against terrorism". Thus arms-provider States may be contributing to further oppression of the populations in question, regrettably an all-too-frequent result in contemporary events.

39. Conceivably, a terrorist group can be a party to an armed conflict and a subject of humanitarian law.[78] As noted by a commentator, it is the lack of a commonly accepted definition of "terrorism" and "terrorist acts" that stands in the way of distinguishing terrorists from freedom fighters.[79] The need for distinguishing terrorism from freedom fighting is not merely rhetorical, but critical to the determination of whether humanitarian law is applicable and, if it is, whether it is the rules of international armed conflict or those of non-international armed conflict that will govern, for the simple reason that hostilities directed against a Government and undertaken by a belligerent group seeking self-determination may qualify as an international

armed conflict under Additional Protocol I, article 1, paragraph 4, while the same conduct by a group with different aims will not.[80] Further, even if the particular quality of hostilities does not meet the criteria of article 1, paragraphs 1 and 2, of Additional Protocol II on non-international armed conflicts, it may still trigger the application of humanitarian law under common article 3 of the Geneva Conventions, which is also applicable to non-international armed conflicts.

II. ISSUES THAT HAVE NOT BEEN DEVELOPED: ACCOUNTABILITY OF THE ACTORS

40. The Special Rapporteur first raised the crucial question of legal accountability of non-State actors involved in acts of terrorism in her working paper.[81] She continued to pursue this topic in her preliminary report, where she commented on the possible relationship of defining terrorism and its major aspects to the question of accountability.[82] In her (first) progress report, under the heading "The question of the actors involved in the exercise of terror or terrorism", she described a distinction between State terrorism and sub-State or individual terrorism,[83] and then between State terrorism as either regime or government terror, State-sponsored terrorism and international State terrorism, with clear implications for accountability.[84] Building upon this discussion, the Special Rapporteur will address, in this chapter, the issue of the accountability for acts of terrorism, beginning first with State actors and then with sub-State actors.[85]

A. State actors

1. Regime or government terror[86]

41. In her analysis of "regime" or "government" terror, the Special Rapporteur noted that this type of State terrorism conducted by the organs of the State against its own population or the population of an occupied territory does not generally fit within the scope of "international" terrorism, but comes into the ambit of international law by essentially raising problems of human rights or humanitarian law violations.[87] When carried out in peacetime, including during genuine situations of emergency, such terror raises problems of human rights law; when carried out during civil wars or occupation it raises problems relating to international humanitarian law, even though certain fundamental principles of international criminal law (including issues of concurrence between State and individual responsibility) may be pertinent to the extent that such terror practices amount to international crimes.

42. In her (first) progress report the Special Rapporteur indicated some characteristic acts of State terrorism, often carried out under the guise of security concerns (including, ironically, concerns relating to sub-State terrorism).[88] On occasion, the State may even declare a state of emergency, raising the issue of application of article 4 of the International Covenant on Civil and Political Rights relating to the abrogation of certain human rights in times of national emergencies.[89] As described in her second progress report (E/CN.4/Sub.2/2002/35), these conditions are all the more pertinent in the aftermath of the 11 September 2001 terrorist attacks and the plethora of national and international anti-terrorism legislation and measures adopted since that time which, in turn, generated a prompt response by United Nations bodies and mechanisms, regional human rights bodies and mechanisms and non-governmental organizations on the need to respect human rights while countering terrorism.

43. Instances of regime or government terror practices, such as those described above, are often carried out in situations of military occupation, as well as in internal armed conflicts, which are governed by rules set out above prohibiting terrorism in armed conflict. There are long-settled rules relating to accountability for such acts. For example, article 3 of the Hague Convention No. IV of 1907, which is recognized as declaratory of customary international law,[90] provides that:

> "A belligerent Party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[91]

A common article of the 1949 Geneva Conventions contains strong provisions relating to both an obligation to provide "effective penal sanctions" and to search for persons alleged to have committed serious violations ("grave breaches") to bring them before its own courts, even if not a party to the conflict.[92] This is reinforced by another common article that provides:

> "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches referred to …".[93]

44. Accountability for acts of State terrorism not undertaken during armed conflict lies within national legislation and jurisprudence, truth and reconciliation commissions, and within the purview of regional and international mechanisms.[94] Regarding national legislation, States engaging in acts of State terrorism are unlikely to allow the victims of these acts to seek legal remedies. The regional human rights forums can be utilized by victims, with at least Organization of American States and Council of Europe bodies awarding monetary compensation.[95]

2. State-sponsored terrorism

45. As the Special Rapporteur indicated in her progress report, State-sponsored terrorism occurs when a Government plans, aids, directs and controls terrorist operations in another country.[96] The remaining issue to be considered is at what point a State may be held responsible for such action of individuals or government officials directly or indirectly controlled by the sponsoring State.

46. If the action is that of a State organ, then its conduct is attributed to the State itself.[97] More difficult problems arise when it comes to the conduct of private persons acting as agents or on behalf of the State and the degree of requisite State control of their action. It is well accepted in international law that the conduct of private persons or entities is not attributable to the State unless there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Thus, according to article 8 of the International Law Commission's draft articles on State responsibility, such circumstances would arise if the person or group of persons are in fact acting on the instructions of,[98] or under the direction or control of a State in carrying out the conduct, the three terms being disjunctive.[99]

47. In its *Nicaragua* case, the International Court of Justice confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.[100] Such attribution would require effective control, by means of actual participation of and directions given by the State for the conduct of a specific operation. However, in its *Tadic* case, a lower threshold of the degree of control was accepted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.[101] The Chamber did not require the actual participation element but rather "*overall control* going beyond the mere financing and equipping of [armed] forces and involving also participation in the planning and supervision of military operations".[102] The International Law Commission, in its commentary on draft article 8, spells out that, in any event, it is "a matter for appreciation in each case" whether a particular conduct was or was not carried out under the control of the State to such an extent as to be attributable to the State.[103] For completeness, it should also be noted that according to article 11 of the draft text on State responsibility, the conduct of a person, group of persons or other entities which is not attributable to a State under the other draft articles shall also be considered as an act of that State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". In its relevant commentary, the International Law Commission clearly distinguishes "acknowledgement and adoption" from "mere support or endorsement", the express or inferred "acknowledgement and adoption" of conduct by a State being cumulative conditions.[104]

48. Anyway, there is a clear international law requirement for a substantially high threshold of conduct to be attributable to the State: the mere harbouring of or sympathizing with terrorists does not seem to fall within any of the above categories. However, a view that the high threshold required by international law seems to be abandoned after the 11 September 2001 terrorist attacks against the United States and the war in Afghanistan has met with a certain degree of support by a number of commentators and with little objection from Governments.[105] Whether this one instance is sufficient to change the existing norm of customary international law on the imputability to States of acts of non-State actors, time will tell, as time will also tell in what direction States go.

3. International State terrorism

49. In her progress report, the Special Rapporteur presented the phenomenon of international State terrorism as one of "coercive" diplomacy that produces a sense of terror in the populations of targeted States.[106] Cognizant of disagreements in both the scholarly and policy fields regarding such an expansion of the concept of State terrorism, the Special Rapporteur nonetheless pointed out that, as with the case of State-sponsored terrorism, international State terrorism requires the identification of the international law norms violated, a coherent articulation of specific charges and, of course, attention to the question of responsibility.[107] The Special Rapporteur must point out, however, a paucity of international action on accountability regarding coercive diplomacy, leaving her to question international safeguards in this regard.

4. Due diligence[108]

50. Liability for terrorist acts can also be attributed to States that have failed, under the doctrine of due diligence, to protect all persons within their jurisdiction from the conduct of non-State actors. Virtually all human rights instruments impose a wide range of obligations that require States to act with due diligence to prevent violations: States have a positive obligation to regulate and control certain activities of non-State actors in order to avoid, prevent and protect

against human rights abuses, including acts of terrorism.[109] The failure of the State to do so becomes an act of omission.[110] States must also ensure respect for human rights through, for example, the enactment and effective enforcement of relevant legislation, mainly in the area of criminal law. This duty is explicitly set out in several human rights and humanitarian law instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide (art. V), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 4), the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. IV) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 4), as well as in the above-mentioned grave breaches provisions of the Geneva Conventions.

51. Under a due diligence standard, then, it is the omission on the part of the State, not the injurious act by the private actor, for which the State may be responsible.[111] The jurisprudence of the human rights treaty bodies fully supports the due diligence doctrine.[112] Moreover, cases in international and regional tribunals have reinforced due diligence. Thus, for example, in its *Diplomatic and Consular Staff* case, the International Court of Justice held the Islamic Republic of Iran responsible for the "inaction" of its authorities which "failed to take appropriate steps" in circumstances where such steps were evidently called for.[113] The Inter-American Court of Human Rights held Honduras responsible for the seizure and disappearance of a person even though these acts were committed by private persons unconnected with the Government.[114] The European Court of Human Rights recognizes that States even have a responsibility to control criminals and terrorists on their territory who may cause harm to another State.[115]

5. Concurrence between individual criminal responsibility of State agents and State responsibility for international crimes

52. Traditionally, State responsibility was separated from the legal responsibility of the individual whose responsibility was a matter for national, not international law.[116] With the development of international criminal law over the past decades, a limited number of acts - terrorism, aggression, crimes against humanity, war crimes and torture, to name some - can lead to both State and individual responsibility.[117] This was also reaffirmed in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which states that none of its provisions relating to individual criminal responsibility shall affect the responsibility of States under international law.

53. Concurrent State and individual responsibility applies also to State-sponsored terrorism. This was recently reaffirmed in both the *La Belle* and *Lockerbie* cases involving acts of terrorism; the conviction of agents of the Libyan Arab Jamahiriya courts in Germany and Scotland respectively did not preclude Libya's responsibility and the payment of compensation.[118]

B. Non-State actors

1. Are non-State actors accountable under human rights law?[119]

54. Throughout her reports, the Special Rapporteur noted modern trends in human rights practice that indicate some modification of the traditional position that private individuals or groups do not have the legal capacity to violate human rights. In paragraphs 44-45 of her

preliminary report (E/CN.4/Sub.2/1999/27), the Special Rapporteur identified the question of legal accountability of non-State actors under human rights law for acts of terrorism as a vital one and among the most crucial for her study as a whole - an opinion that was urged upon her by both the Sub-Commission and the Commission.[120] It will also be recalled that all General Assembly and Commission resolutions on "human rights and terrorism", as well as some of the early Sub-Commission resolutions under the same title, speak of terrorism as a violation of human rights.[121] Notwithstanding the adverse consequences for the enjoyment of human rights of all acts, methods and practices of terrorism, the exact meaning, scope, pertinence and legal implications of an assertion that terrorists and other non-State actors are bound by human rights law and may be held accountable for violating it remain very controversial.

55. The major argument against application of human rights obligations to non-State actors stresses that this would carry the risk that States might defer their responsibility to these actors, which might diminish existing State obligations and accountability. In fact, the development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations.[122] Accordingly, officials in the United Nations have cautioned about giving terrorist groups the quality of violators of human rights as "dangerous" and potentially amounting to "a sort of justification of human rights violations committed by Governments",[123] and maintained that a distinction should be made between "citing such groups as human rights violators" and the "adverse effects their action might have on the enjoyment of human rights".[124] On the other side of the evaluation, there is reasonable concern, however, about preventing the scrutiny by the international community of actions by armed insurgencies and individuals that would, within the present interpretations of international human rights and humanitarian law, clearly constitute massive violations of human rights if committed by a State. Furthermore, as has been pertinently observed in a Sub-Commission discussion on human rights and terrorism, the overall human rights movement may have been concentrating, possibly for too long, on the repressive measures adopted by Governments only, without paying much attention to the means used by those opposing them.[125]

(a) Duties of individuals in human rights instruments

56. Some of those urging liability for human rights violations of sub-State actors do so because both universal and regional human rights instruments impose duties on individuals.[126] Article 29 of the Universal Declaration of Human Rights provides that everyone has "duties to the community". Article 30 denies to groups or persons any right to "engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein". Similar provisions are in common article 5, paragraph 1, of both International Covenants on Human Rights, the American Declaration of the Rights and Duties of Man (arts. 29-38), the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 10, para. 2), the American Convention on Human Rights (arts. 13, 17 and 32) and the African Charter of Human and People's Rights (arts. 27-29).[127] However, these provisions are widely considered and evaluated as of a moral nature and with no direct accountability for sub-State actors; they are mere guidelines for the behaviour of both individuals and States.[128]

57. Jurisprudence on these provisions has also been rather scarce. The Committee on the Elimination of Racial Discrimination, however, has commented that a person's exercise of the right to freedom of opinion and expression carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, "among which the obligation not to disseminate racist ideas is of particular importance".[129]

(b) Accountability of sub-State actors for human rights in the context of application of humanitarian law

58. Recent developments in United Nations practice indicate that there are certain types of situations involving armed groups that are addressed in a way that implies at least some human rights obligations for sub-State actors. Almost all of these situations include a situation of internal armed conflict in which opposition forces are accountable under humanitarian law norms or one of a de facto division of a State maintained by actual or threat of the use of force.[130] The types of situations outside these contexts to which there is an ascribed accountability for sub-State groups are generally limited to situations with large-scale atrocities.[131]

59. Part of the rationale for calls to sub-State groups to observe human rights as well as humanitarian law norms is that many of them are parallel - that is, they exist in both bodies of law. For example, both bodies of law require armed groups - whether of the State or an opposition group - to respect the right to life. Some calls in international bodies for respect for both human rights and humanitarian law single out these parallel rights.[132]

60. A broader rationale for calling for the parties in internal armed conflict to respect human rights is that no party to the conflict, the Government included, exercises control over the whole of the territory: the opposition group (or groups, in certain situations) have de facto control over at least some of the territory of the State sufficient to invoke humanitarian law. In that portion of territory, only the opposition group can protect the human rights of the persons living there and an appeal about their rights made only to the Government would be fruitless. In any case, opposition groups usually either carry out civil governance directly or appoint civilians to do so.[133] In this context, then, appeals for human rights tend broadly to address human rights, not merely those that are parallel to rights in humanitarian law.[134]

61. Examples showing recognition of human rights obligations exist at all levels of the United Nations. Thus, for instance, in his first report on the protection of civilians in armed conflict (S/1999/957), the Secretary-General recommended that the Security Council "call on Member States and non-State actors, as appropriate, to adhere to international humanitarian, human rights and refugee law, particularly the non-derogable rights enumerated in article 4 of the International Covenant on Civil and Political Rights".[135] In his second report (S/2001/331), he had emphasized that "international instruments require not only Governments but also armed groups … to take measures to ensure the basic needs and protection of civilian populations", adding that "in order to promote respect for international humanitarian and human rights law in these situations" it is indispensable "to engage these groups in a structured dialogue", and in this respect he "welcomed the growing tendency of the Security Council to address all parties to armed conflicts".[136]

62. Indeed, the Security Council has frequently called on opposition groups to uphold human rights, and condemned "human rights violations" committed by them,[137] as has also the High Commissioner for Human Rights.[138] The Commission and its Special Rapporteurs have also addressed this in nearly all situations under review where there is an armed conflict. For example, the Commission called upon all parties to the conflict in the Papua New Guinea island of Bougainville to "respect strictly all human rights and fundamental freedoms",[139] and urged all parties in Sierra Leone to "respect human rights and international humanitarian law, including the human rights and welfare of women and children"; "to respect the rights of refugees and internally displaced persons and to facilitate their return, voluntarily and in safety, to their homes".[140] The Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo examined the human rights situation in both Government-controlled territory and territory controlled by each of two opposition groups, concluding that the opposition groups, as the de facto authorities, must put an end to human rights violations.[141] In a similar vein, the Committee on the Rights of the Child emphasized "the responsibilities of several other States and certain other actors" for the negative impact of the armed conflict in the Democratic Republic of the Congo upon children, and for violations of some provisions of the Convention and international humanitarian law within areas of the State party outside of the control of the Government.[142] The Security Council, in its resolution 1417 (2002) of 14 June 2002, also referred to the Rassemblement Congolais pour la Démocratie-Goma as the de facto authority.

63. Such calls seem to be in line with a number of relatively recent pronouncements by quasi-judicial and judicial bodies. Thus, for instance, the Committee against Torture has observed in *Elmi v. Australia* that:

> "some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1."[143]

64. A conclusion to the same effect has been reached by a United States court in the case *Kadic v. Karadzic*, involving the Aliens Tort Claims Act. The court held that as the leader of a de facto regime, the Republika Srpska (despite its non-recognition), Karadzic acted under colour of law, since "the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority".[144] Finally, it is worth mentioning also that the Commission on the Truth of El Salvador had gone even further to hold the Farabundo Marti National Liberation Front subject to international human rights law in the following terms: "[w]hen insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding for the State under international human rights law".[145] However, such statements are still rather exceptional.

III. CONCLUSIONS AND RECOMMENDATIONS

65. The Special Rapporteur has been deeply affected by acts of terrorism carried out during her work on this study. Acts of terrorism not only terrorize people at the moment, they linger in the mind and are not easy to assimilate with healing perspective. Part of this is due to the fact that terrorists seek both to surprise and shock by means of truly horrific or gruesome acts and to keep persons in a state of constant fear. Terrorist regimes and acts are barbarous, and are the sort referred to in the preamble to the Universal Declaration of Human Rights. The preamble also states that freedom from fear of such acts is one of the highest aspirations of humankind. The Special Rapporteur is convinced that a condition of constant fear is far from that of "inherent dignity" also recognized in the preamble. Taking also into consideration the doctrine of due diligence, the Special Rapporteur **recommends that the international community fully recognize the universal right to be free of terrorists and terrorist acts of all kinds.**

66. Throughout this study the Special Rapporteur has commented on the scale and scope of the topic of terrorism and human rights in the context of human rights and humanitarian law. Review of the human rights dimension of terrorism alone shows that terrorism itself as well as counter-terrorism measures can be seen as falling under the mandate of every mechanism and procedure of the United Nations human rights organs and bodies, and the various human rights treaty bodies. The Special Rapporteur **recommends that all these mechanisms and procedures of human rights incorporate the issue of terrorism and human rights into their work.**

67. The Special Rapporteur has also commented on the complexity of the issue of terrorism and human rights and the need to draw on disciplines other than international law for fuller understanding of terrorism and to fashion responses to terrorism and how to reduce acts or threat of acts of terrorism. Two of the most important essential topics falling into this category are (i) examination of the many root causes of terrorism and (ii) review of strategies to reduce or prevent terrorism in all its manifestations. The Special Rapporteur **recommends that study of these topics be undertaken either at the Sub-Commission level or by some other United Nations official or body.**

68. Extradition, an important counter-terrorism measure and a key feature of most international and regional treaties relating to terrorism, is problematic for a number of reasons: conflicts in the internal law of the State parties; potential political abuses of extradition in relation to asylum law; uneven compliance with human rights or humanitarian law norms and standards between States involved (death penalty issues and the like); and other problems raised by the Special Rapporteur. The Special Rapporteur therefore **recommends that States parties to international and regional treaties relating to terrorism undertake thorough review of barriers to the effective implementation of extradition provisions.**

69. The issue of impunity relates to both State and non-State actors. The issue of impunity for State actors involves issues such as (i) sovereign immunity and act of State doctrines which, when abused, result in impunity and (ii) international tribunals that do not explicitly include State terrorism outside the context of war crimes, crimes against humanity or genocide. The question of impunity for non-State actors involves issues related to extradition and internal legal issues, such as impaired legal standing for victims either to compel prosecution or to obtain remedies, politically motivated selective prosecution or judicial barriers to effective prosecution

of persons alleged to have engaged in terrorist acts. The Special Rapporteur therefore **recommends that the international community undertake efforts to incorporate directly State terrorism into the jurisdiction of international or regional tribunals, and that all States review national practices that effectively result in impunity for terrorist acts and barriers for victims seeking remedies.**

70. A number of States have national counter-terrorism measures or practices within their criminal justice systems and other national institutions that unduly (and on occasion severely) violate human rights and humanitarian law norms as well as long-established principles of criminal law, such as *nullum crimen sine lege.* Many of these measures or practices are being used to curtail rights of persons accused of ordinary crimes unrelated to terrorism. Some of these measures have also been shown to be ineffective in countering terrorism. This issue has now been raised by the United Nations at all levels, and plans have been proposed to address this. While it is premature to propose a specific plan, due to potentially conflicting or duplicative proposals now before United Nations bodies, the Special Rapporteur nonetheless **recommends that a method and mechanism for effective periodic review of national counter-terrorism measures and practices be adopted and that ways be developed to ensure modification of those measures and practices that violate human rights or humanitarian law norms.**

71. The Special Rapporteur has found that fear of terrorism out of proportion to its actual risk and generated either by States themselves or by other actors can have undesirable consequences such as being exploited to make people willing to accept counter-terrorism measures that unduly curtail human rights and humanitarian law. Undue fear can foster religious or ethnic intolerance. Exploitation of fear of terrorism can also damage international solidarity, even to the degree of impairing cooperation regarding reducing or preventing terrorism. Fear of terrorism is heightened by repeated and often exaggerated if not unlikely references to weapons of mass destruction potentially in the hands of terrorist groups or certain States, even though nearly all terrorist acts have been carried out by traditional methods. The Special Rapporteur therefore **recommends that States' responses to terrorism accurately reflect real risk and, to avoid adverse consequences, that they refrain from generating undue fear of terrorism.**

72. The Special Rapporteur has analysed the distinction between armed conflict and terrorism, with particular attention to conflicts to realize the right to self-determination and civil wars. This is an issue of great international controversy, in need of careful review due to the "your freedom fighter is my terrorist" problem and the increase in the rhetorical use of the expression "war on terrorism", labelling wars as terrorism, and combatants in wars as terrorists, and it has an extremely undesirable effect of nullifying application of and compliance with humanitarian law in those situations, while at the same time providing no positive results in combating actual terrorism. At the same time, she has also shown that use of terror in any type of armed conflict violates humanitarian law. In an effort to reinstate appropriate application of humanitarian law and to keep the efforts to combat terrorism focused on actual terrorism, the Special Rapporteur **recommends that the international community, in any review of situations in which armed violence is occurring, pay strict attention to humanitarian law rules, including impartial evaluation of whether they apply to any such situation. She further recommends that the international community consider review of these situations on a periodic basis.**

73. Bringing violators to justice for acts of terrorism, whether State or non-State actors, is essential to maintain the integrity of human rights and humanitarian law, to deter or prevent terrorism and to provide remedies for victims. The Special Rapporteur addressed the issue of accountability of both types of actors. State actors are, of course, directly accountable under international law - both human rights and humanitarian law. Non-State actors are directly accountable under humanitarian law governing both wars of national liberation and civil wars. She has also shown that use of terror in armed conflict violates humanitarian law. While able to agree fully that non-State actors who carry out acts identified as crimes under national or international criminal law are accountable under criminal law, she is unable to support fully suggestions that non-State actors are directly accountable under human rights law, even when the crime (such as slavery) is also identified as a human rights violation. In any case, she cannot resolve this question within the confines of this report. However, the Special Rapporteur makes the case that the international community increasingly requires non-State actors engaged in armed conflicts to promote and protect human rights in the areas over which they exercise de facto control. All measures undertaken to bring violators to justice should be carried out with impartiality, fundamental fairness, and in full cognizance of the rights of victims of terrorist acts to remedies. The Special Rapporteur therefore **recommends that further stocktaking on the issue of direct application of human rights law to non-State actors be carried out. She further recommends that methods and mechanisms for addressing State terrorism in all its manifestations be reviewed and strengthened. Finally, she recommends that much more attention be paid by the international community as a whole to addressing violations of humanitarian law, including acts of terrorism, in armed conflicts.**

74. The Special Rapporteur found that a number of crimes not related directly or indirectly to terrorism have been included in national counter-terrorism legislation or are being treated by investigative authorities as being under that legislation. Additionally, a number of international problems involving international criminal syndicates or operators are being treated as terrorism. She also notes that acts, sometimes merely symbolic ones or vandalism at the most, targeting economic entities, are being considered as terrorist acts. Addressing these merely criminal problems, while necessary, is not countering terrorism and the national or international public is not made any safer from terrorist risks. Authorities can take advantage of counter-terrorism measures to engage in both investigative and prosecutorial actions that violate the rights of criminal defendants. The Special Rapporteur therefore **recommends that the international community de-link any automatic designation of criminal groups as terrorist and the acts they engage in as terrorist acts. States must make certain that their national counter-terrorism legislation defines terrorist groups and terrorist acts with sufficient clarity so that there is clear distinction between the two. Finally, national and international authorities should ensure that there is no undue investigative or prosecutorial advantage in criminal cases due to improper confusion with terrorist cases.**

75. The Special Rapporteur has followed and reported on the developments at the Sixth Committee of the General Assembly and in sessions of the Ad Hoc Committee established by the General Assembly in its resolution 51/210. She has commented that, in the process of drafting a comprehensive treaty on international terrorism, attention be paid to human rights and humanitarian law in drafting the most controversial articles relating to definition as well as to legitimate concerns about the principle of non-refoulement and impunity. In this regard, she also

points out the possibility that language could limit application of the treaty to non-State actors. Accordingly, the Special Rapporteur **recommends that the committees of the General Assembly ensure that appropriate attention is given to both human rights and humanitarian law, and that due care be taken to define perpetrators of terrorism in a comprehensive way.**

76. The Special Rapporteur has followed and reported on the Security Council's Counter-Terrorism Committee (CTC) established shortly after the events of 11 September 2001, and commented on the paucity of consideration of human rights and humanitarian law concerns in relation to its work. She has also been concerned that there are dangers to international affairs because of potential undue encroachment upon the internal affairs of States and the principle of sovereign equality of States. Because of this, the Special Rapporteur **recommends that the Counter-Terrorism Committee fully incorporate human rights and humanitarian law obligations into its directives and that due attention be paid to the principle of self-determination of States and the sovereign equality of States.**

77. The Special Rapporteur is aware of the difficulties in evaluating the rights of States to derogate from universally accepted human rights norms and whether isolated acts of terrorism even allow such derogation. While she has studied and cited the general comments of the Human Rights Committee and other relevant material (including the important study by then Sub-Commission member Ms. N. Questiaux submitted as Sub-Commission document E/CN.4/Sub.2/1982/15), there is no specific evaluation of the right to derogate relative to threats posed by actual or perceived threats of terrorism. In this regard, the Special Rapporteur welcomes the call for guidelines in this area and other areas relating to counter-terrorism measures. Therefore, the Special Rapporteur **recommends that the international community identify a method and mechanism to draw up guidelines for counter-terrorism measures, and that these guidelines take into account determination of actual or perceived threat, the degree to which the threat constitutes a threat to the existence of the State, the degree to which responses to the acts or risks of acts meet strict exigency requirements, the time frame for derogations, and reporting and periodic review of any derogations.**

78. In spite of intense work over the course of her mandate, the Special Rapporteur is aware that, due to imposed limitations, she has had to address the topic of terrorism and human rights on an issue-by-issue basis, with some issues in one report, others in another, and so on. In this sense, her whole report has been cumulative and even her final report has, because of these limitations, less the character of a final report and more that of a progress report due to the need to provide further analysis of some issues and to present a major topic that had not yet been addressed. Thus, full understanding of her study requires review of all the documents that she has, to date, submitted - itself a rather daunting task. A brief overview of her work, while useful to pinpoint where in the many documents a particular issue is addressed, would not suffice as a stand-alone document. Therefore, the Special Rapporteur **recommends that the Sub-Commission consider requesting her to draw up a comprehensive document based on all her work.**

Notes

[1] See, for instance, paras. 28 and 29 of the Special Rapporteur's first progress report (E/CN.4/Sub.2/2001/31).

[2] See E/CN.4/Sub.2/1997/28, paras. 11 and 17; E/CN.4/Sub.2/1999/27, paras. 42-43; E/CN.4/Sub.2/2001/31, para. 25; and E/CN.4/Sub.2/2003/WP.1, paras. 22-23, in which the Special Rapporteur underscored the difficulties standing in the way of consensus and the "high political stakes" attendant upon the task of definitions.

[3] Ibid.

[4] See E/CN.4/Sub.2/1999/27, paras. 42-43, and E/CN.4/Sub.2/2003/WP.1, para. 23.

[5] E/CN.4/Sub.2/2001/31, paras. 71-81.

[6] E/CN.4/Sub.2/2003/WP.1, paras. 49 et seq.

[7] In this respect, the Special Rapporteur is grateful for observations from members of the Sub-Commission acknowledging the serious legal and political considerations in preparing this study. See, for example, Ms. Hampson calling the mandate "a poisoned chalice" (E/CN.4/Sub.2/2001/SR.22), and Mr. Guissé characterizing this the "most difficult study ever undertaken" (E/CN.4/Sub.2/2001/SR.21, para. 54).

[8] Or "*jus in bello*", or "laws of war", or simply "humanitarian law". These terms are interchangeable in contemporary international law, merely reflecting changes and developments from past times. In the same sense, see G. Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'", *The Fletcher Forum of World Affairs*, vol. 27, No. 2 (Summer/Fall 2003), p. 70, note 1. See also, explaining some of the merits and disadvantages of the synonymous use of these different terms, A. Roberts and R. Guelff (eds.), *Documents on the Laws of War*, 3rd edition, Oxford University Press, 2000, pp. 1-2.

[9] The basic sources of humanitarian law are international agreements and customary international law. There are presently over 30 international instruments of humanitarian law, of which the main ones are:

> The Conventions adopted by the International Peace Conference at The Hague of 1899 and 1907;
>
> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva, 17 June 1925) (League of Nations, *Treaty Series*, vol. XCIV, p. 65);
>
> Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948), *United Nations Treaty Series*, vol. 78, p. 277;

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949):

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;

Geneva Convention relative to the Treatment of Prisoners of War;

Geneva Convention relative to the Protection of Civilian Persons in Time of War (*United Nations Treaty Series*, vol. 75, pp. 31 et seq.);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) (*United Nations Treaty Series*, vol. 1125, pp. 3 and 609);

Convention for the Protection of Cultural Property in the Event of Armed Conflict, and Protocol thereto (The Hague, 14 May 1954) (*United Nations Treaty Series*, vol. 249, pp. 240 and 358, respectively);

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 10 October 1980) (*United Nations Treaty Series*, vol. 1342, p. 137);

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) (General Assembly resolution 39/46, annex);

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997) (*United Nations Treaty Series*, vol. 2056, p. 241);

Rome Statute of the International Criminal Court (Rome, 17 July 1998) (A/CONF.183/9).

As already noted, many other treaties deal with aspects of armed conflict and, thereby, indirectly with terrorism.

There are also peacetime obligations under international humanitarian law, but those are not relevant to the present discussion. See, for example, D. Burp, “L’application du droit international humanitaire en temps de paix”, in *Au service de l’Humanité,* Ed. de la Chapelle, 1996, pp. 45 et seq. Relevant, however, to the present discussion is the fact that the 1949 Geneva Conventions and the Additional Protocols cover and distinguish between two categories of armed conflict: international armed conflict and internal, or non-international, armed conflicts.

[10] The entitlement to engage in hostilities or the rules governing the resort to armed conflict (*jus ad bellum*), do not concern humanitarian law even though *jus ad bellum* and *jus in bello* may overlap at a number of points. See Roberts and Guelff, op. cit. (see note 8 above), pp. 1-2.

[11] Ibid., p. 2.

[12] See paragraphs 59 and 60 of the Special Rapporteur's additional progress report (E/CN.4/Sub.2/2003/WP.1). See also H.-P. Gasser, "Acts of terror, 'terrorism' and international humanitarian law", *International Review of the Red Cross*, vol. 84, No. 847 (September 2002), p. 547, at p. 560.

[13] Ibid., p. 554.

[14] A number of international instruments forbidding certain types of weapons are cited in note 9 above. There are, however, other "weaponry specific" treaties as well. The use of weapons viewed as illegal could have a strong nexus with terrorism in armed conflict, but as it has been addressed elsewhere by the Sub-Commission it will not be analysed here.

[15] Ample evidence of this trend and the tendency to gradually erode the distinction between the rights and obligations applicable in international (versus non-international) armed conflicts can be found in the work of the ad hoc criminal tribunals as well as in the adoption of the Rome Statute of the International Criminal Court. See also the Summary report on the XXVIIth Round Table on Current Problems of International Humanitarian Law: "International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence", organized by the International Institute of Humanitarian Law and the International Committee of the Red Cross (ICRC), *Supplement to the Report prepared by the International Committee of the Red Cross entitled "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*", November 2003, p. 2.

[16] As statutory guardian and interpreter of humanitarian law, ICRC has published extensive commentaries to the four Geneva Conventions and their Additional Protocols.

[17] J.S. Pictet, *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, International Committee of the Red Cross, 1952), p. 32, cited by Rona, op. cit., p. 58. See also the ICRC Summary report, op. cit. (see note 15 above), p. 3 and note 5, referring to the Commentaries on the Third and Fourth Geneva Conventions.

[18] "This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions."

[19] In the language of common article 3:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> "(*a*) violence to life and person, in particular murder of all kinds, mutilations, cruel treatment and torture;
>
> "(*b*) taking of hostages;
>
> "(*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> "(*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> "2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the parties to the conflict."

See, generally, on international humanitarian law applicable to internal armed conflicts, D. Momtaz, "Le droit international humanitaire applicable aux conflits armés non-internationaux", in *Collected Courses of the Hague Academy of International Law*, 2001 (Leiden, Martinus Nijhoff, 2002), vol. 292, p. 9.

[20] Roberts and Guelff, op. cit. (see note 8 above), p. 24.

[21] Gasser, op. cit. (see note 12 above), p. 560.

[22] "which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

[23] See, for instance, H.-P. Gasser, “Prohibition of terrorist acts in international humanitarian law”, *International Review of the Red Cross*, July-August 1986, at p. 4: “The term ‘armed conflict’ as defined in international law covers any conflict, between States or within a State, which is characterized by open violence and action by armed forces.” It will be of interest to also recall here what the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in the *Tadic* case (Jurisdiction): “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” See *Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 70.

[24] See Rona, op. cit. (note 8 above), p. 63 and the ICRC Summary report (note 15 above), pp. 3-7.

[25] See E/CN.4/Sub.2/2001/31, para. 73.

[26] While use of military personnel is a commonly accepted criterion, the Special Rapporteur is aware that even in a number of undisputed armed conflict situations, police forces are used in combat operations, and therefore function as military personnel.

[27] This latter requirement is essential because military forces of many countries engage in non-military operations such as rescue, provision of emergency services in natural disasters, and even what is generally viewed as police activities. The use of military personnel in these activities does not invoke humanitarian law. For discussion of the threshold question, see, generally, J. Stewart, “Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict”, *International Review of the Red Cross*, vol. 85, No. 850 (June 2003), pp. 313-350.

[28] The ongoing relevant debate among international lawyers and other experts has already produced abundant literature on the subject.

[29] See *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, 24 April 1863 (the Lieber Code), United States War Department classification No. 1.12, 8 October 1864, art. 70, reproduced in H.S. Levie, *Terrorism in War - The Law of War Crimes* (Dobbs Ferry, Oceana Publications, 1993), p. 532. The Lieber Code, which was the most famous early example of a national manual outlining the laws of war for the use of armed forces and one of the first attempts to codify the laws of land warfare, became the model for other manuals adopted by a number of States, and prepared the way for the calling of the two Hague Peace Conferences of 1899 and 1907.

[30] See articles 23 and 25. The text of 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and annexed Regulations is reproduced in *American Journal of International Law*, vol. 2 (1908), Supplement, pp. 90 et seq.

[31] See common article 3, and articles 34 and 147 of Convention IV.

[32] See article 50 of Convention I, article 51 of Convention II, article 130 of Convention III, and article 147 of Convention IV.

[33] See article 27 of Convention IV.

[34] During the Sub-Commission debate on the Special Rapporteur's first progress report, Mr. Sorabjee stated that any violence against civilians is indefensible, implying that he would view such violence necessarily as terrorism (E/CN.4/Sub.2/2001/SR.21, para. 82).

[35] All the indictments of the Special Court for Sierra Leone can be found at www.sc-sl.org. For the *Galic* case, see *Prosecutor* v. *Stanislav Galic*, IT-98-39-T, Judgement and Opinion (5 December 2003), paras. 133-137.

[36] See, for instance, the concise and thorough compilation of the relevant body of both customary and treaty-based humanitarian law contained in the latest updated and modified version of the Canadian Forces Law of Armed Conflict Manual (Second Draft), Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level - Annotated*, Government of Canada document B-GG-005-027/AF-21, chapter 4.

[37] *United Nations Treaty Series*, vol. 974, p. 177.

[38] See ibid., art. 4.

[39] See ibid., article 1, paragraph 1, subparagraphs (*a*) and (*b*), as well as article 2. Civilian aircraft carrying combatants are legal targets. The 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 (*United Nations Treaty Series*, vol. 1589, p. 474), expands coverage to civilian aircraft or airports only when an action taken "endangers or is likely to endanger safety at that airport" (art. II).

[40] See, for example, article 12 and the third preambular paragraph of the International Convention against the Taking of Hostages of 1979 (*United Nations Treaty Series*, vol. 1316, p. 205). The Special Rapporteur would like to point out that the inclusion of the specific language on protecting the right to self-determination does not mean, of course, that national liberation movements can lawfully engage in hostage-taking, as that is prohibited under humanitarian law. Also, the fact that a national liberation movement may have engaged in hostage-taking does not turn that movement into a terrorist organization. Those involved in hostage-taking, however, could be held accountable under humanitarian law for this violation. Further, as national liberation movements engaged in armed conflict would be able to detain civilians under existing humanitarian law rules, such detention could not be characterized as hostage-taking as would be the case of non-combatant sub-State groups who detain civilians. For a penetrating analysis of this Convention, see J.L. Lambert, *Terrorism and Hostages in International Law: a commentary on the Hostages Convention 1979* (Cambridge,

Grotius Publications, 1990), and for a detailed account of the debates, see W.D. Verwey, “The International Hostages Convention and National Liberation Movements”, *American Journal of International Law*, vol. 75, No. 1 (January 1981), pp. 69-92.

[41] See, for instance, General Assembly resolutions 3034 (XXVII), 32/147, 34/145, 36/109, 38/130, 40/61, 42/159, 44/29 and 46/51. See also M. Halberstam, “The Evolution of the United Nations Position on Terrorism: from Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed”, *Columbia Journal of Transnational Law*, vol. 41, No. 3 (2003), p. 573, especially pp. 575-577.

[42] See, for example, article 2, subparagraph (*a*), of the Arab Convention on the Suppression of Terrorism of 1998, article 2, subparagraph (*a*), of the Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted in 1999, and article 3 of the OAU Convention on the Prevention and Combating of Terrorism, adopted in 1999.

[43] See, generally, the studies prepared for the Sub-Commission by A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (E/CN.4/Sub.2/404/Rev.1) (Sales No. E.80.XIV.3) and H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* (E/CN.4/Sub.2/405/Rev.1) (Sales No. E.79.XIV.5). According to Gros Espiell, “[n]o one can challenge the fact that, in light of contemporary realities, the principle of self-determination necessarily possesses the character of *jus cogens*.” Research and writing on self-determination in its variety of dimensions is immense.

[44] In its advisory opinion concerning Western Sahara, the International Court of Justice referred to the right to self-determination as a right held by people rather than a right held by States alone (*Western Sahara, Advisory Opinion, International Court of Justice Reports, 1975*, p. 31). Self-determination can be either “external” or “internal”. “External” self-determination refers to the ability of a people to choose freely in the field of international relations its independence or union with other States, whereas “internal” self-determination refers to the right to authentic self-government within a sovereign State, in other words, it refers to the right of a people to elect and keep a government of its choice in the domestic field.

[45] *United Nations Treaty Series*, vol. 999, p. 171, and ibid., vol. 993, p. 3.

[46] On the evolution of the right to self-determination through the perspective of resort to violence, see E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Martinus Nijhoff, The Hague/Boston/London, 1996), pp. 15 et seq. See also A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal* (Cambridge University Press, 1995), pp. 2 et seq., for an extensive discussion of the political as well as the historical and legal context of self-determination.

[47] Cristescu stresses the relationship to territory, op. cit., p. 31 (see note 43 above). The territory component of the definition helps distinguish people with the right to self-determination from ethnic minorities. Land and occupancy of land was a key factor in the *Western Sahara* case (see note 44 above). See also C. Tomuschat, “Das Recht auf die Heimat: neue rechtliche

Aspekte", in *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch zum 75. Geburtstag*, J. Jekewitz (ed.) (Berlin, Duncker & Humblot, 1989), p. 183, discussing the necessary link to a definable territory using the term "territorial homestead of populations", cited in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, M. Nijhoff, 1993).

[48] One commentator refers to this as an aspect of the right to self-liberation - see Ofuatey-Kodjoe, *The Principle of Self-determination in International Law* (New York, Nellen Publishing Company, 1977), p. 169.

[49] The Special Rapporteur is not surprised that the right to use force to realize self-determination received extensive commentary from members of the Sub-Commission, especially in response to her first progress report in which she first provided a detailed analysis. Ms. Motoc used this point to press for a working definition of terrorism (E/CN.4/Sub.2/2001/SR.21, para. 62), Mr. Guissé stressed that liberation movements consider the use of force justified (ibid., para. 54), Mr. A. Eide focused on the validity or lack thereof of some claims of self-determination (ibid., para. 62). The Special Rapporteur had also stressed that certain claims may not hold up to scrutiny (E/CN.4.Sub.2/2001/31, para. 81) but is convinced that the failure of a self-determination claim would not reduce armed conflict to terrorism if the test for a civil war is met.

[50] See Chadwick, op. cit., p. 34 (see note 46 above).

[51] This last resolution also recognized that armed conflicts resulting from liberation struggles "are international conflicts in the sense of the Geneva Conventions", a conclusion which sought to reduce the ability of States to interpret and characterize many civil wars autonomously.

[52] See also A.Cassese, "Terrorism and Human Rights", *American University Law Review*, vol. 31 (1982), p. 945.

[53] See Cassese, op. cit. (see note 46 above), pp. 153 and 198. According to Cassese, this notion of "legal entitlement" or "legal licence", which is less than a "right" proper, encapsulates the idea that wars for self-determination are surely taken into account by international law but not upgraded to the status of manifestations of *jus ad bellum* proper. However, there seems to be agreement that such *jus ad bellum* exists in the case of peoples "forcibly" denied or deprived of their right to self-determination by the oppressive State (i.e. its refusal, backed up by armed force or even coercive measures short of military violence, to grant self-determination to the subjected peoples). See also G. Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", *Recueil des cours de l'Académie de droit international de La Haye, 1979–IV* (The Hague, Nijhoff, 1981), vol. 165, p. 371; R. Gorelick, "Wars of National Liberation: Jus ad Bellum", *Case Western Reserve Journal of International Law*, vol. 11, No. 1 (Winter 1979), p. 71; M.R. Islam, "Use of Force in Self-Determination Claims", *Indian Journal of International Law*, vol. 25, Nos. 3-4 (July-December 1985), pp. 436-437; and J.G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Dordrecht/Boston/London, Martinus Nijhoff, 1993), p. 75.

[54] For example, J. Frowein, "Self-Determination as a Limit to Obligations under International Law", in Tomuschat, *Modern Law of Self-Determination* (note 47 above), p. 213. Frowein also views that this right applies also to repressed ethnic minorities.

[55] See, for example, K. Doehring who states: "Only oppression of a very brutal kind, thus constituting a severe violation of human rights, could justify armed self-help" ("Self-Determination", *The Charter of the United Nations - A Commentary*, B. Simma (ed.), Oxford University Press, 1995, p. 70). See also Cassese, op. cit. (note 46 above).

[56] On the issue of self-determination as a part of *jus cogens* and as imposing obligations *erga omnes*, see extensively Cassese, op. cit., p. 133 (note 46 above), providing an abundant bibliography. See also H. Gros Espiell, "Self-Determination and Jus Cogens", *United Nations Law/Fundamental Rights: Two Topics in International Law*, A. Cassese (ed.) (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979), pp. 167-173; and the same author, *The Right to Self-Determination ...* (note 43 above).

[57] I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 83. While not necessarily disagreeing with Brownlie, the Special Rapporteur is uncertain what practical effects this could have, especially due to the intense politicization of self-determination and differing political agendas of States. In United Nations history, of course, SWAPO (the combatant force in Namibia) was given observer status, clearly beneficial to the resolution of that situation. In all cases, combatants are covered under relevant provision of humanitarian law discussed below. Some authors argue that the nature of struggles for self-determination make the use of some terrorism by the combatants directed at the oppressing power defensible. See, for example, B. Ate, "Terrorism in the Context of Decolonization", *Terrorism and National Liberation*, H. Köchler (ed.) (Frankfurt am Main, Peter Lang, 1988), pp. 79-93, referring to this at p. 87 as "liberation terrorism". As is apparent here, the Special Rapporteur does not accept this position.

[58] Full protection includes, of course, the right to be treated as a prisoner of war and not as a common criminal for acts that are legal acts of war - see, for example, K. Hailbronner, "International Terrorism and the Laws of War", *German Yearbook of International Law*, vol. 25 (1982), p. 173.

[59] Additional Protocol I provides for full application of the Geneva Conventions in its fifth preambular paragraph: "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict". And, as with all other combatants, those fighting for national liberation or against racist regimes are bound by the Martens Clause, originally set out in the Hague Conventions and added to the 1949 Geneva Conventions and Additional Protocols. In Additional Protocol I, the Martens Clause is reflected in article 1, paragraph 2, which reads: "In cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience." See, generally, on the Martens Clause, S. Miyazaki, "The Martens Clause and international humanitarian law",

Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet, C. Swinarski (ed.) (Geneva/The Hague, International Committee of the Red Cross, Martinus Nijhoff, 1984), pp. 433 et seq.

[60] See Gasser, loc. cit. (note 12 above), p. 559, and Cassese, loc. cit. (note 52 above), p. 958.

[61] See the report of the International Law Association Committee on International Terrorism, cited in Chadwick, op. cit. (note 46 above), p. 43 and note 3.

[62] Ibid.

[63] E/CN.4/Sub.2/2001/31, para. 75.

[64] See Additional Protocol II, article 1, paragraph 2.

[65] The requirements that combatants distinguish themselves from the civilian population and openly carry arms are generally accepted as customary law principles and would apply in either case. As with the situation of groups carrying out "military operations" in defence of the right to self-determination, the preponderance of such "military operations" must be legal ones. A group claiming to be fighting a civil war could not viewed as having combatant status if the preponderance of their operations are acts of terrorism or that violate humanitarian law in other areas.

[66] Rona, loc. cit. (note 8 above), p. 60, and G. I. A. D. Draper, "The Geneva Conventions of 1949", in *Recueil des cours de l'Académie de droit international de La Haye, 1965–I* (Leiden, Sijthoff, 1965) vol. 114, pp. 63 and 90. See also the ICRC Summary report (note 15 above), pp. 5-6.

[67] See also G. I. A. D. Draper, "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978", in *Recueil des cours de l'Académie de droit international de La Haye, 1979-III* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980), vol. 164, p. 26 and F. Kalshoven, *Constraints on the Waging of War* (Geneva, International Committee of the Red Cross, 1987), pp. 137-138.

[68] See also the Summary report of ICRC (see note 15 above), p. 6, and Rona, loc. cit. (note 8 above), p. 60.

[69] C. Greenwood on the scope of application of humanitarian law, *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck et al.(eds.) (Oxford University Press, 1995), p. 48. F. Kalshoven, op. cit. (note 67 above), however, excludes such a case as being covered by the language of Additional Protocol II, article 1, paragraph 1 (p. 138).

[70] By Ms. Hampson.

[71] For example, in the conflicts in Lebanon during the 1980s, in Somalia after 1991, and in Afghanistan in 2001-2002.

[72] See also the Summary report of ICRC (note 15 above), p. 5. In the 1990s, the existence of conflicts with a substantial civil war dimension led to increased consideration of the issue of international legal standards applicable in the different types of situations varying between civil peace, in which isolated acts of violence are being dealt with by human rights law, internal disturbances and tensions characterized by more collective yet still not organized violence that have not reached the threshold of applicability of international humanitarian law (article 1, paragraph 2 of Additional Protocol II,) eventually authorizing the Government to declare a state of emergency, and the complete transition to an armed conflict situation, in which international humanitarian law is applicable. Among the various initiatives to address situations that were entirely or partly non-international, the non-binding 1994 Declaration on Minimum Humanitarian Standards (see A. Eide et al., "Combating Lawlessness in Grey Zone Conflicts through Minimum Humanitarian Standards", *American Journal of International Law*, vol. 89, No. 1 (January 1995), pp. 215-223) and subsequent United Nations reports on "minimum standards of humanity" should be noted. See also the Rome Statute of the International Criminal Court, which in article 8, paragraph 2, subparagraphs (*c*), (*e*) and (*f*), draws a succinct outline of rules applicable in non-international armed conflicts, including hostilities between organized armed groups within a State.

[73] Besides facilitating weapons procurement such States seek to avoid application of humanitarian law as well as the duty of neutrality of third party States arising from the prohibition on intervention in the internal affairs of another State. A civil war is quintessentially internal. Regarding weapons, laws in some States forbid provision of weapons to States in civil wars, or where there are serious violations of human rights. Referring to the situation as "terrorism" can free up weapons to fight the "war" on terrorism. As stated by the Special Rapporteur in her first progress report, this mislabeling has also been detrimental to efforts to define terrorism (para. 80).

[74] See ICRC Summary report (note 15 above), pp. 5-7, and Rona, loc. cit. (note 8 above), pp. 60 et seq.

[75] See K. Ipsen, commenting on combatants and non-combatants in *The Handbook of Humanitarian Law in Armed Conflicts* (note 69 above), pp. 71 and 79-80.

[76] The Special Rapporteur aligns her argument with that of Mr. Eide, who cautioned that not all groups that have committed terrorist acts are therefore necessarily terrorist organizations (E/CN.4/Sub.2/2001/SR.21, para. 63).

[77] These points are stressed because of Mr. Joinet's extremely valid concern for the need to protect the principle of the right to rebel against tyranny and oppression (ibid., para. 76).

[78] Rona, loc. cit. (note 8 above), p. 60. Prior to 11 September 2001, acts of international terrorism were not generally viewed as crossing thresholds of intensity sufficient to trigger international humanitarian law (see Chadwick, op. cit. (note 46 above), p. 128. See also an extensive analysis and references on this issue by Rona, as well as M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", *Harvard International Law Journal*, vol. 43, No. 1 (Winter 2002), pp. 97 et seq.).

[79] See Rona, loc. cit. (note 8 above), pp. 60-61.

[80] Ibid., p. 61.

[81] E/CN.4/Sub.2/1997/28, para. 16.

[82] In particular, with respect to the Rome Statute of the International Criminal Court which enumerates a number of acts that could form part of a terrorist campaign, as well as to regional and global instruments identifying certain acts of international crime as terrorist acts (E/CN.4/Sub.2/1999/27, para. 42).

[83] E/CN.4/Sub.2/2001/31, para. 35.

[84] Ibid., paras. 42-67.

[85] The Special Rapporteur uses the term “accountability” rather than “responsibility” because to her, accountability is a wider notion and embraces a broader range of means of redress. This is mostly the case with respect to non-State actors, since there is still debate over whether they can be held directly responsible under human rights law. Besides, with respect to individuals, responsibility has come to be used frequently as a synonym of criminal responsibility. Indeed, there are a wide range of civil, political, administrative and disciplinary measures, along with civil suits, that can be used against those who commit human rights atrocities, to which can be added mechanisms such as truth and reconciliation commissions or strategies such as diplomatic isolation or economic sanctions. See, for instance, V.P. Nanda, “Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights”, *Denver Journal of International Law and Policy*, vol. 26, No. 3 (Spring 1998), p. 389, and, generally, S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, Clarendon Press, 1997), pp. 13-15 and 133 et seq. On the other hand, when States are the actors or otherwise involved in acts of terrorism, their accountability will be judged and dispensed of in accordance with the by now well-established and elaborate rules of State responsibility. The draft articles on State responsibility for internationally wrongful acts adopted by the International Law Commission (ILC) in 2001 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), mentioned in the following paragraphs, are considered to reflect customary law unless otherwise indicated. On this set of articles see, generally, J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002). Bearing these in mind, the two terms accountability and responsibility may sometimes be used interchangeably without any distinct legal connotations attached to them.

[86] This raises the issue of imputability: regime or government terror requires the involvement of persons acting on behalf of State organs whose acts are considered as acts of the State and are imputable to it even if they exceed their authority or contravene instructions. See, for example, articles 4 and 7 of the ILC draft on State responsibility.

[87] E/CN.4/Sub.2/2001, paras. 47-50.

[88] Ibid., paras. 42-45.

[89] There are similar provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 15) and the American Convention on Human Rights (art. 27). As regards the application of article 4 of the International Covenant on Civil and Political Rights, see general comment No. 29 on states of emergency adopted by the Human Rights Committee on 24 July 2001. The Special Rapporteur commented on permissible conditions of restriction on the right to take part in the conduct of public affairs, the right to freedom of expression, association and information and the right to strike in her additional progress report (E/CN.4/Sub.2/2003/WP.1, paras. 73-78.)

[90] See, for instance, Roberts and Guelff (note 8 above), p. 68.

[91] Article 91 of Additional Protocol I repeats this two-part rule of compensation and general responsibility. See S. Rosenne, “War Crimes and State Responsibility”, *Israel Yearbook on Human Rights*, vol. 24 (1995), pp. 86-87. See also, generally, F. Kalshoven, “State Responsibility for Warlike Acts of the Armed Forces”, *International and Comparative Law Quarterly*, vol. 40, Part 4 (October 1991), p. 827.

[92] Article 49 of Convention I, article 50 of Convention II, article 129 of Convention III, and article 146 of Convention IV.

[93] Article 51 of Convention I, article 52 of Convention II, article 131 of Convention III, and article 148 of Convention IV. See also article 4 of the ILC draft on State responsibility, setting out the first principle of attribution for the purposes of State responsibility in international law, namely that the conduct of an organ of the State is attributable to that State. In regard to humanitarian law obligations, the Special Rapporteur regrets the nearly total abandonment of the rules of accountability by both parties to armed conflicts and the international community as a whole, thereby increasing the likelihood of grave breaches in general, especially acts of terrorism in armed conflict.

[94] The Special Rapporteur of the Sub-Commission, Mr. van Boven, has fully explored the topic of remedies for gross violations of human rights committed by States. From the forty-second to the forty-fifth sessions of the Sub-Commission, he provided not only thorough discussion but also drew up draft guidelines. The Commission on Human Rights has taken up these guidelines, and both Mr. van Boven and Mr. Bassiouni provided revised drafts. At its sixtieth session, the Commission had before it the report of the second consultative meeting on the draft (E/CN.4/2004/57).

[95] The Special Rapporteur deems it unnecessary to provide further review of accountability for State terrorism except to note the continuing need for improvement at all levels in this regard.

[96] E/CN.4/Sub.2/2001/31, paras. 51-61.

[97] See article 4 of the ILC draft articles on State responsibility and Crawford, op. cit. (note 87 above), pp. 95 et seq.

[98] Such cases would include, for example, individuals sent as "volunteers" or instructed to carry out particular missions abroad. See the commentary to article 8 of the draft articles on State Responsibility, *Yearbook of the International Law Commission ...* (see note 85 above), p. 104.

[99] Ibid., p. 108.

[100] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, pp. 62 and 64-65, paras. 109 and 115. The Court here did not find that the requisite control by the United States of the "contras" was demonstrated.

[101] *Prosecutor v. Tadic* (see note 23 above), para. 117.

[102] Ibid, para. 145 (emphasis in original).

[103] *Yearbook of the International Law Commission ...* (see note 103 above).

[104] Ibid.

[105] See, for instance, M. Cogen, "Terrorism and the Laws of War: September 11 and its Aftermath", www.crimesofwar.org/expert/attack-cogen.html, 7 November 2001; M. Matheson, "Terrorism and the Laws of War: September 11 and its Aftermath", www.crimesofwar.org/expert/attack-math.html, 21 September 2001. Cassese, in "Terrorism is also Disrupting Some Crucial Legal Categories of International Law", *European Journal of International Law*, vol. 12, No. 5 (2001), p. 993, noted that "aiding and abetting international terrorism is equated with an 'armed attack' for the purpose of legitimizing the use of force in self-defence" (p. 997), but maintained that the Afghan authorities should have shown by words or deeds that they approve and endorse the actions of terrorist organizations for terrorists to be treated as State agents and the Afghan State to bear international responsibility for their actions (p. 999).

[106] E/CN.4/Sub.2/2001/31, para. 63.

[107] E/CN.4/Sub.2/2001/31, para. 67.

[108] Due diligence derives from traditional State responsibility doctrine governing protection of aliens from private violence. An early articulation of this standard can be found, for example, in the *Tellini* case of 1923, involving the assassination, in Greek territory, of the chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In this case it was stated that: "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal." League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524.

[109] See S. Farrior, "State Responsibility for Human Rights Abuses by Non-State Actors", American Society of International Law, *Proceedings of the 92nd Annual Meeting*, vol. 92 (1998), p. 299.

[110] See, generally, G.A. Christenson, "Attributing Acts of Omission to the State", *Michigan Journal of International Law*, vol. 12, No. 2 (Winter 1991), p. 312.

[111] See the preliminary report by the Special Rapporteur, Ms. Barbara Frey, on the prevention of human rights violations committed with small arms and light weapons (E/CN.4/Sub.2/2003/29, para. 39).

[112] There is abundant relevant jurisprudence and comments of the human rights treaty bodies. The Committee against Torture, for instance, in *Hajrizi Dzemajl et al.* v. *Yugoslavia* (161/2000), reiterated its concern about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" (CAT/C/29/D/161/2000, para. 9.2). The Committee on the Elimination of Racial Discrimination, in its concluding observations on the report of the Federal Republic of Yugoslavia (Serbia and Montenegro) in 1993, expressed particular concern at the fact that the State party "had not ensured that public security and law enforcement officials took steps effectively to prohibit such criminal activities, punish the perpetrators and compensate the victims, as required under article 6 of the Convention" (A/48/18, para. 539). The Committee made recommendations in this regard to Brazil (A/51/18, para. 308) and Mexico (A/52/18, para. 321) (in the context of indigenous people). Similarly, the Human Rights Committee, considering the second periodic report of Algeria, expressed concern "at the lack of timely or preventive measures of protection to the victims from police or military officials in the vicinity" and urged that the State party adopt effective measures of prevention, inquiry and sanctions (A/53/40, vol. I, para. 354).

[113] *United States v. Islamic Republic of Iran*, *United States Diplomatic and Consular Staff in Tehran Judgment, I.C.J. Reports 1980*, p. 3. Provisional Measures, *I.C.J. Reports*, 1980, pp. 3, 31-32, paras. 63, 67.

[114] *Velásquez-Rodríguez* case. The Court stated that "an illegal act which violates human rights and which is initially not directly imputable to the State can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention" (*Compensatory damages, (art. 63 (1) American Convention on Human Rights*), Inter-American Court of Human Rights, Judgement of 21 July 1989, Series C, No. 7, para. 172).

[115] See the judgements of the European Court of Human Rights in *Lawless* v. *Ireland* and *McCann and Others* v. *United Kingdom*, cited in S. Skogly and M. Gibney, "Transnational Human Rights Obligations", *Human Rights Quarterly*, vol. 24, No. 3 (August 2002), p. 794. For further case law of regional courts, see Ms. Frey's preliminary report (note 111 above), paras. 41-42.

[116] See A. Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly*, vol. 52, No. 3 (July 2003), p. 617. The same author dealt more extensively on this subject in his lectures at the thirty-first annual session of the Institute of International Public Law and International Relations of Thessaloniki, on "Concurrence between State Responsibility and Individual Responsibility in International Law" (to be published in *Thesaurus Acroasium,* vol. XXXIV, *State Responsibility and the Individual*, forthcoming).

[117] Ibid., pp. 618-619. The Nürnberg Statute and Judgement affirmed that for certain international crimes, especially crimes against humanity, the individuals who commit them bear individual criminal responsibility under international law regardless of their official position as heads of State or government officials. This is reaffirmed in the Statutes of both the International Criminal Tribunal for the Former Yugoslavia (art. 7, para. 2) and the International Tribunal for Rwanda (art. 6, para. 2), as well as in the Rome Statute (art. 27, "Irrelevance of official capacity"). With respect to international criminal responsibility of States, the International Law Commission, in its monumental work on State responsibility, generated much controversy over the attempt to draw a distinction between international "crimes" and international "delicts" with respect to State responsibility. See, generally, A. Pellet, "Le crime international de l'Etat. Un phoenix juridique", *Thesaurus Acroasium*, vol. XXXII, *The New International Criminal Law*, K. Koufa (ed.) (Athens and Thessaloniki, Sakkoulas, 2003). pp. 314-322. The issue seems settled by the omission of the provision of the former draft article 19 in the draft text on State responsibility.

[118] See Nollkaemper (note 116 above), pp. 619, 630.

[119] Of course, non-State actors are accountable under international law as set out above, and under national criminal law for terrorist acts - a point so obvious that the Special Rapporteur will not address it further. As she set out in her progress report, non-State actors are also legally accountable for violations of humanitarian law (E/CN.4/Sub.2/2001/31, paras. 79-80).

[120] Thus, for instance, the Commission on Human Rights, in its resolution 1998/47, noted "in particular the need to study further the role and responsibility of non-State actors in the sphere of human rights".

[121] See General Assembly resolutions 48/122, 49/185, 50/186, 52/133, 54/164 and 56/160. See also resolutions 1994/46, 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35 and 2003/37 of the Commission on Human Rights; and Sub-Commission resolutions 1994/18, 1996/20 and 1997/39. It is also interesting to recall that in 1993, the Sub-Commission had even condemned "the violations of human rights by the terrorist groups Sendero Luminoso and Movimiento Revolucionario Tupac Amaru" in Peru (resolution 1993/23).

[122] See the analytical report of the Secretary-General on minimum humanitarian standards submitted pursuant to Commission on Human Rights resolution 1997/21 (E/CN.4/1998/87), para. 64.

[123] E/CN.4/1997/3, annex, para. 44.

[124] Ibid.

[125] See comments by Mr. Eide (E/CN.4/Sub.2/1995/SR.11), and the Special Rapporteur's preliminary report (E/CN.4/Sub.2/1999/27), para. 46.

[126] See, in this sense, J. Paust, "Human Rights Responsibilities of Private Corporations", *Vanderbilt Journal of Transnational Law,* vol. 35, No. 3 (May 2002), pp. 810-815.

[127] In her preliminary report, the Special Rapporteur indicates the inclusion of duty language in common article 5, paragraph 1, of the International Covenants (E/CN.4/Sub.2/1999/27, paras. 22-25.

[128] See the study prepared for the Sub-Commission by the Special Rapporteur, Ms. E.-I.A. Daes, *Freedom of the Individual under Law* (Sales No. E.89.XIV.5), para. 2. See also A. Kiss, "La définition des devoirs des individus par les instruments internationaux protégeant les droits de l'homme", in *Des Menschen Recht ...* (see note above), pp. 22-23.

[129] General recommendation XV on article 4 of the Convention, para. 4.

[130] See, generally, L. Zegveld, *The Accountability of Armed Opposition Groups in International Law,* Cambridge University Press, 2002.

[131] See, generally, Ratner and Abrams, op. cit. (note 85 above). An apparent exception to this is found in Sub-Commission resolution 1993/23 (see note 121 above), but this could, arguably, have resulted from a hesitation to apply humanitarian law directly.

[132] See, for example, the report of the Special Rapporteur on the situation of human rights in Burundi (A/58/448), calling on all parties to the conflict in Burundi to respect the rights of the civilian populations, especially the right to life, security and inviolability of the person (para. 104).

[133] While humanitarian law provisions relating to internal armed conflict does not alter the political status of the State, the fact that opposition forces can function as a "quasi-State" cannot be ignored.

[134] See, for example, the requests of the Special Rapporteur on the situation of human rights in the Sudan to representatives of the Sudan People's Liberation Army/Movement (SPLM/A) to, inter alia, develop democratic structures, schools and medical care for the people living in areas under its control, particularly where peace has been established (A/56/336, paras. 57-58, 65-66 and 117, and E/CN.4/2002/46, para. 91).

[135] Recommendation No. 2.

[136] Para. 7.

[137] See, for example, resolutions 1214 (1998) on Afghanistan, 1198 (1998) on Sierra Leone, 1001 (1995) on Liberia, 1464 (2003) on Côte d'Ivoire, 1797 (2003) on the Democratic Republic of the Congo.

[138] See, for example, E/CN.4/2002/38 (para. 105), E/CN.4/2001/36 (para. 46). See also A/56/36, on the situation in the Republic of Chechnya of the Russian Federation (paras. 26 et seq.), and on ethnic Albanian armed opposition groups, including the National Liberation Army, operating in the former Yugoslav Republic of Macedonia (paras. 18 et seq.).

[139] Resolution 1994/81, paragraph 3. See also Sub-Commission resolution 1994/21 on the situation in Bougainville.

[140] Resolution 2000/24. See also resolutions 2001/20 and 2002/20 of the Commission.

[141] A/57/437, para. 83. See also General Assembly resolution 56/173 and Commission resolutions 2002/14 and 2001/19.

[142] Democratic Republic of the Congo, Committee on the Rights of the Child, CRC/C/108 (2001) 31, para. 155.

[143] A/54/44, annex VII, sect. II, para. 6.5

[144] *International Legal Materials*, vol. 34 (1995), p. 1615.

[145] S/25500, annex.