

**“UMBRELLAS” OR “BUILDING BLOCKS”?:
DEFINING INTERNATIONAL TERRORISM
AND TRANSNATIONAL ORGANIZED CRIME
IN INTERNATIONAL LAW^ϕ**

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^ϕ Originally presented at the ELEVENTH ANNUAL YORK CENTRE FOR INTERNATIONAL AND SECURITY STUDIES CONFERENCE in conjunction with the FOURTH ANNUAL NATHANSON CENTRE FOR THE STUDY OF ORGANIZED CRIME AND CORRUPTION CONFERENCE: *Governance And Global (Dis)Orders: Trends, Transformations, And Impasses*, held February 5–6, 2004 at York University, Toronto, Canada.

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I. INTRODUCTION

This article considers the definition of “international terrorism” and “transnational organized crime” in international law. Our intent is not to offer our own suggestions as to what these definitions should be. Rather, the purpose (a more utilitarian one) is to discuss the difficulties encountered in recent efforts to arrive at comprehensive legal definitions of these phenomena, and, more generally, to highlight an alternative approach to the definitional exercise.

It is often claimed, and not without cause, that international terrorism and transnational organized crime constitute two of the most serious challenges currently facing the international community.¹ The United Nations (U.N.) Security Council regards international terrorism as “one of the most serious threats to international peace and security in the twenty-first century.”² Acts of terrorism pose a challenge confronting the entire global community, and “endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity.”³ Similarly, the U.N. General Assembly (UNGA) has expressed its deep concern with “the impact of transnational organized crime on the political, social and economic stability and development of societies.”⁴

1. See, e.g., Bruce Hoffman, *Rethinking Terrorism and Counterterrorism Since 9/11*, 25 *STUD. IN CONFLICT & TERRORISM* 303, 314 (2002); Melvyn Levitsky, *Transnational Criminal Networks and International Security*, 30 *SYRACUSE J. INT’L L. & COM.* 227, 227–28 (2003). For a discussion of the links between these two security threats see Louise I. Shelley, *The Nexus of Organized International Criminals and Terrorism*, 20 *INT’L ANNALS OF CRIMINOLOGY* 85 (2002).

2. S.C. Res. 1377, U.N. SCOR, 4413th mtg., Annex, at 2, U.N. Doc. S/RES/1377 (2001).

3. *Id.*

4. G.A. Res. 56/120, U.N. GAOR, 56th Sess., at 1, U.N. Doc. A/RES/56/120 (2002).

Why, though, is it important to define these phenomena in international law? Surely we know terrorism and organized crime when we see them, even if we cannot define them precisely.⁵ While seemingly an exercise in semantics, the definitional task is critical from the standpoint of the legal regulation of the phenomena and of lawful responses to them. Without precise definition, ambiguities are created that allow terrorists and organized crime members to “slip through the cracks” in the law. States, too, can take advantage of legal uncertainties to expand their room for maneuver, both in terms of the targets confronted in the fight against terrorism and organized crime and the methods used against these targets. States can also exploit these ambiguities to harness the “wars” on terrorism and organized crime for the pursuit of other unrelated—and, often, less creditable—ends.

Thus, there is a continuing need to elaborate the definitions of these phenomena in international law. But how should this be done? In general, two approaches have been tried. The first is to develop all-inclusive legal definitions of terrorism and organized crime within the context of comprehensive international anti-terrorism and anti-organized crime conventions, in effect, to set out overarching *umbrellas* for the legal regimes under which the international community combats terrorism and organized crime. The second is to focus on narrow operational legal definitions of specific terrorist and organized criminal conduct within the context of sectoral international conventions, using them as *building blocks* in the incremental construction of comprehensive legal frameworks to deal with terrorism and organized crime.

In this article, we examine recent international efforts taken under the umbrella approach to arrive upon all-inclusive legal definitions of international terrorism and transnational organized crime. In Part I, we consider the definitions of terrorism and organized crime found in two comprehensive international instruments—the *Draft Comprehensive*

5. In *Jacobellis v. Ohio*, Supreme Court Justice Potter Stewart stated that, while he could not define pornography precisely, “I know it when I see it.” 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

*Convention on Terrorism (the Draft Convention)*⁶ and the *U.N. Convention against Transnational Organized Crime (the Palermo Convention)*.⁷ We note that no all-inclusive definition of international terrorism has yet been agreed to in negotiations on the *Draft Convention*, while the consensus on the definition of organized crime found in the Palermo Convention is more apparent than real. This lack of international agreement on all-inclusive definitions of the two phenomena is not surprising given that states cannot even agree on these definitions at the level of domestic law, as we show in Part II in the case of the U.S. legal definition of terrorism and the Russian legal definition of organized crime. The difficulties in arriving upon precise all-inclusive definitions of these phenomena have been further compounded in the post-9/11 world with the blurring of the operational distinction between the two concepts, as we discuss in Part III in the context of the expansion of the Financial Action Task Force's (FATF) mandate to include anti-terrorist financing measures in the regime set up to deal with money laundering. Finally, in the Conclusion, we note that, regardless of the failure to date of the *umbrella* approach to produce all-inclusive legal definitions of international terrorism and transnational organized crime, there is still a continuing need to elaborate on the legal definitions of these phenomena, for the reasons that we subsequently set out. We complete the analysis with a discussion of the advantages and disadvantages of the *building block* approach as an alternative to the *umbrella* approach in the definitional task.

6. *Measures to Eliminate International Terrorism: Report of the Working Group*, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 166, at 7–16, U.N. Doc A/C.6/56/L.9 (2001) [hereinafter *Measures I*]. This is the Coordinator's informal text prepared during the meetings on October 15–26, 2001 of the Working Group of the Sixth Committee. It is a draft text serving as the basis for further discussion, pending conclusion of the Convention.

7. *United Nations Convention Against Transnational Organized Crime*, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 4, U.N. Doc A/Res/55/25 (2001) [hereinafter *Palermo Convention*].

II. DEFINITIONS OF INTERNATIONAL TERRORISM AND TRANSNATIONAL ORGANIZED CRIME

A. *The Draft Comprehensive Convention on International Terrorism (the Draft Convention)*

The international community has grappled most recently with the challenge of defining international terrorism in the ongoing negotiations⁸ on the *Draft Comprehensive Convention on International Terrorism*.⁹ The definition of a terrorist offense is found in Article 2(1):

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

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

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

(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.¹⁰

8. G.A. Res. 51/210 (1996) established an Ad Hoc Committee with the mandate to: (1) create an international convention for the suppression of terrorist bombings; (2) create a convention for the suppression of acts of nuclear terrorism; and (3) to address a means of further developing a comprehensive legal framework of conventions dealing with international terrorism. *Measures to eliminate international terrorism*, G.A. Res. 51/210, U.N. GAOR, 51st Sess., 88th mtg., Agenda Item 151, at 5, U.N. Doc. A/RES/51/210 (1996) [hereinafter *Measures II*]. Work on a comprehensive anti-terrorism convention falls within the scope of the third task. G.A. Res. 54/110 (1999) called upon the Ad Hoc Committee to begin consideration of a comprehensive convention during its fourth session, held February 14–18, 2000. *Measures to Eliminate International Terrorism*, G.A. Res. 54/110, U.N. GAOR, 54 Sess., Agenda Item 160, at 4, U.N. Doc. A/RES/54/110 (2000) [hereinafter *Measures III*].

9. *Measures I*, *supra* note 6, at 7–16.

10. *Id.* at 16.

First, a general comment on this definition. Article 2(1) provides an operational definition of the conduct of a terrorist act, not a conceptual definition of the phenomenon of “terrorism.” During the Ad Hoc Committee’s fifth session (12–23 February 2001), the possibility of defining “terrorism” was discussed.¹¹ Some delegations supported the Organization of the Islamic Conference’s (OIC) proposal to include definitions of the terms “terrorism” and “terrorist crime” in Article 1.¹² They argued that the OIC definitions generalized the acts described in Article 2 and included others not covered by that article,¹³ for example, acts of violence “threatening the stability, territorial integrity, political unity or sovereignty of independent States.”¹⁴ Other delegations were reluctant to adopt this approach. They maintained that a definition of terrorism was not required. Article 2 provided an operational definition setting out the conduct of a terrorist act, an approach that had been used successfully in previous sectoral anti-terrorism conventions.¹⁵ Most elements in the OIC proposal were already contained in Article 2, in their view, and any new elements could be incorporated.¹⁶ Finally, they noted that, in treaty practice, Article 1 traditionally sets out the definition of terms used subsequently in the body of the treaty text, which was not the case with the term “terrorism.”¹⁷ The proponents of the operational definition approach prevailed in this instance, and Article 2(1) remains focused on the definition of the conduct of a terrorist act.

Moving next to more specific comments on the Article 2 definition, there are two key elements in this definition of a

11. *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, U.N. GAOR, 56th Sess., Supp. No. 37, at 2, U.N. Doc. A/56/37 (2001) [hereinafter *Ad Hoc Committee I*].

12. Malaysia submitted the proposal on behalf of the Organization of the Islamic Conference (OIC). The proposal is reproduced in *Measures to eliminate international terrorism: Report of the Working Group*, U.N. GAOR 6th Comm., 56th Sess., Annex 3, Agenda Item 164, at 37, U.N. Doc. A/C.6/55/L.2 (2000) [hereinafter *Measures IV*].

13. *Ad Hoc Committee I*, *supra* note 11, Annex 5, at 12.

14. *Measures IV*, *supra* note 12, Annex 3, at 37.

15. *Ad Hoc Committee I*, *supra* note 11, Annex 5, at 12.

16. *Id.*

17. *Id.*

terrorist offense. The first is the action element of the crime, or the *actus reus*. According to Article 2(1), a person commits a terrorist offense if the person uses “any means” that cause death or serious injury to any person, or serious damage or damage resulting in major economic loss to property, places, facilities, systems, or the environment.¹⁸ The term “any means” is an all-inclusive term that captures all conventional and non-conventional means of attack, including the use of weapons of mass destruction. This contrasts with sectoral anti-terrorist conventions that focus on specific means of attack, for example, “explosive or other lethal devices” referred to in the *International Convention for the Suppression of Terrorist Bombings* (1997).¹⁹ Being all-inclusive, however, this phrase questionably lumps together an exceedingly broad range of attack methods, from simple computer viruses to crude nuclear devices.

More ominously, a person could commit a terrorist offense under the Article 2 definition merely by expressing sympathy for the aims of an alleged terrorist group. Article 2(4)(c) states that “any person commits an offence if that person contributes to the commission of one or more offences . . . with the aim of furthering the criminal activity or criminal purpose of the group.”²⁰ In a joint letter published in January 2002, Amnesty

18. *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. GAOR, 57th Sess., Supp. No. 37, Annex 2, art. 2(1), at 6, U.N. Doc A/57/37 (2002) [hereinafter *Ad Hoc Committee II*].

19. *International Convention for the Suppression of Terrorist Bombings*, G.A. Res. 52/164, U.N. GAOR, 52nd Sess., Annex, art.2(1), at 3, U.N. Doc. A/Res/52/164 (1998).

20. *Measures I*, *supra* note 6. Article 2(4) reads as follows:

4. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1,2 or 3 of this article;
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1,2 or 3 of this article; or
 - (c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in

International and Human Rights Watch warned that this paragraph could be interpreted in ways that undermine freedom of expression. They gave as an example the case of people who publish articles putting forth political positions similar to those of an armed pro-independence or secessionist group.²¹ They argued that, under Article 2(4)(c), authors of such articles could be held to have committed an act that “contributes to the commission of an offence,” made “with the aim of furthering the criminal purpose of the group,” even if they are not members or participants in the activities of the alleged terrorist group.²²

The scope of the victims or targets of the terrorist offense set out in Article 2(1) is also quite broad. In earlier definitions found in the academic literature, the victims of terrorism were often referred to as “innocent civilians” or “noncombatants” (the latter often including off-duty military personnel).²³ Broadening the victim category to include “any person” suggests that attacks against on-duty military personnel now qualify as terrorist acts, thus blurring the distinction between legitimate resistance military operations and acts of terrorism. Again, Amnesty International and Human Rights Watch flagged this ambiguity in the text of the definition. In the joint letter mentioned above, they warned that Article 2(1) could be interpreted to make certain acts committed by armed political groups during a non-international armed conflict into international crimes, even though they are not currently prohibited under international humanitarian law.²⁴ Including the term “unlawfully” in reference to the acts constituting an offense under the Article 2

paragraph 1 of this article; or

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

21. Letter from Wilder Tayler, Director, Human Rights Watch, & Yvonne Terlingen, Representative to the United Nations Amnesty International, to John D. Negroponete, United States Ambassador to the United Nations (Jan. 28, 2002) [hereinafter Joint Letter], available at <http://www.hrw.org/press/2002/01/terror012802-ltr.htm> (last visited Jan. 24, 2005).

22. *Id.*

23. ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES AND LITERATURE 79–82 (1983).

24. Joint Letter, *supra* note 21. These would include armed attacks by rebel groups against government soldiers or property, if carried out in keeping with the rules of war.

definition did not allay these organizations' concerns, as they said it was unclear whether "unlawfully" in the Convention equated with unlawfulness under international law.²⁵

As well, the spectrum of physical targets listed in Article 2(1) is quite expansive, including essentially any property, place, facility, or system that has some public dimension to it.²⁶ Examples would be state- or government-used or occupied facilities or conveyances; public or private infrastructure facilities that provide or distribute services for the benefit of the public such as water, sewerage, and energy; or any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is accessible or open to the public.²⁷ Likewise, the general reference to "the environment" is extremely broad.²⁸ Finally, subsections 2(1)(b) and 2(1)(c) can be applied to vandalism and destruction of property or the environment that does not involve personal injury.²⁹ According to these subsections, the damage inflicted on these physical targets must be "serious" or result in "major" economic loss.³⁰ However, these are relative terms and are not spelled out in the *Draft Convention*, thus potentially providing domestic courts with a great deal of latitude in their interpretation.

The second key element in the definition of a terrorist offense is the intent element or the *mens rea*. Article 2(1) sets out a two-pronged requirement for establishing *mens rea* for a terrorist offense, that is, it is committed (i) "unlawfully and intentionally" to cause the death, injury, or damage described in Article 2(1)(a)–(c), and (ii) with the intent "to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."³¹ Both sub-elements must be present for an act to constitute a terrorist offense. For example, violent acts resulting in unintentional

25. *Id.*

26. *Ad Hoc Committee II, supra* note 18.

27. *Id.* at 4–6.

28. *Id.* at 6.

29. *Id.*

30. *Id.*

31. *Id.*

injury or damage during, say, a legal protest that escalates out of control would seem to be excluded since the intent to cause injury or damage—that is, sub-element (i)—is missing. While these acts may otherwise be criminal offenses under domestic law, they would not be acts of international terrorism.

Similarly, this would seem to exclude by implication state military operations conducted in keeping with the laws of war but nevertheless resulting in collateral damage, that is, incidental and unintended death or injury to civilians, or destruction of civilian objects. Assuming that the purpose of such operations is to engage only combatants or military objectives and not to deliberately harm civilians or destroy civilian objects, the fact that civilians are accidentally killed or injured, or that civilian property is unintentionally destroyed does not transform these operations into war crimes or, under the proposed definition in the *Draft Convention*, acts of terrorism. Nevertheless, the exclusion of state military forces from the scope of the Convention remains a point of contention in the negotiations, as will be discussed below.

The second prong of intent—to intimidate a population or to compel a government or an international organization to do or abstain from doing any act—must also be present for an act to constitute a terrorist offense. For example, the intent to cause death, as in Article 2(1)(a), is not enough to qualify an act as terrorism. Alone, it is just murder. There must be a further intent to intimidate or coerce a population or governmental organization through the commission of the act before that act would fall under the rubric of terrorism.

It is important here to distinguish between intent and motive with respect to terrorist acts. As mentioned above, “intent” is defined as “the determination or resolve to do a certain thing, or the state of mind with which something is done.”³² “Motive,” on the other hand, is defined as the “inducement, cause or reason why a thing is done.”³³ Through its exclusion from Article 2(1), it is clear that motive is irrelevant to the definition of a terrorist offense. It does not matter how

32. BLACK'S LAW DICTIONARY 813 (7th ed. 1999).

33. *Id.* at 1034.

laudable the political, ideological, religious, or other cause behind the terrorist act. “Bad” means cannot be used to advance “good” causes, in so far as terrorist offenses are concerned.

Disagreement over this element of motive is one of the reasons why negotiators have failed to date to arrive upon a consensus definition and to finally conclude the *Draft Convention*. Many states, especially in the OIC, argued for the exclusion of acts committed in the name of peoples’ struggle from the scope of the *Draft Convention*.³⁴ The OIC proposed that an additional paragraph be included in Article 2:

Peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.³⁵

Delegations supporting the inclusion of this additional paragraph argued that:

- The legitimacy of armed struggle had been reaffirmed by various UNGA resolutions (for example, UNGA Res.46/51). Indeed, the right to self-determination had attained the status of *jus cogens*.
- Precedents existed in the inclusion of the paragraph in other instruments, for example, the 1979 Hostage Convention and the 1999 OIC Convention on Combating Terrorism.
- The phrase “in accordance with the principles of international law” provided a safeguard against abuse.
- The new paragraph was necessary to maintain balance

34. Halberstam argues that the position of United Nations (U.N.) Member States on terrorism has shifted over the past thirty years from a qualified toleration of terrorist acts carried out in the name of peoples’ struggles for self-determination to an unequivocal condemnation of terrorism “wherever and by whomever” committed. Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT’L L. 573, 573–81 (2003). However, this shift is more apparent than real. “[T]he unanimity of government opposition to terrorism, particularly in the aftermath of 9/11, masks strong disagreements.” Joanne Mariner, *Good and Bad Terrorism?*, Findlaw’s Legal Commentary, at <http://writ.news.findlaw.com/mariner/20020107.html> (last visited Jan. 29, 2005). These disagreements are highlighted in the remainder of this Part.

35. *Measures IV*, *supra* note 12, at 37–38.

within the convention, especially in light of Article 18(2)'s exclusion of the activities of armed forces.

· Peoples engaged in legitimate armed struggle were entitled to fight by whatever means, including those not condoned by the Occupying Power.³⁶

Other delegations opposed the inclusion of this paragraph on several grounds:

· Legitimate armed struggle cannot be carried out by whatever means. It must be conducted within the rules of armed conflict, with no exception. The OIC proposal undermines the existing rules by creating a loophole in the application of the Fourth Geneva Convention, in violation of Article 41 of the *Vienna Convention on the Law of Treaties*. Moreover, the First Protocol to the Geneva Conventions applies to armed struggles, Article 51 of which prohibits attacks on civilians.

· Article 12 of the 1979 Hostage Convention does not provide an exemption for armed struggles, but, rather, excludes the question of legitimate struggles from the scope of the convention.

· The comprehensive convention is not the proper place to contemplate the question of peoples' legitimate struggle. This should be dealt with in the context of international humanitarian law (IHL).

· IHL applies to all combatants. Blurring the distinction between combatants and civilians is unacceptable.³⁷

The proposal's supporters did not succeed in having the new paragraph inserted into Article 2. Subsequently, the battleground shifted to the savings clause and exclusions in Article 18.³⁸ At the sixth session of the Ad Hoc Committee (January 28 – February 1, 2002), two competing texts of Article 18(2) were introduced:

Text circulated by the Coordinator for discussion

2. The activities of *armed forces* during an armed

36. *Ad Hoc Committee I*, *supra* note 11, at 13.

37. *Id.*

38. *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. GAOR, 58th Sess., Supp. No. 37, at 10, U.N. Doc. A/58/37 (2003) [hereinafter *Ad Hoc Committee III*].

conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

Text proposed by the Member States of the Organization of the Islamic Conference

2. The activities of *the parties* during an armed conflict, *including in situations of foreign occupation*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.³⁹

The key textual differences (in italics above) between the two proposals are the phrases “armed forces” versus “the parties.” The Western group of states favoring the Coordinator’s draft felt that the phrase “armed forces” was sufficiently broad to include armed resistance forces that conducted themselves according to the rules of war and cited in support of this interpretation the distinction drawn between “armed forces” and “military forces of a State” referred to in Article 18(3) (see below).⁴⁰ Moreover, they believed that reference to “the parties” was “overly broad in scope, inappropriate for a law enforcement instrument and could be construed as sanctioning terrorism.”⁴¹ The OIC, on the other hand, felt that, unlike “the parties,” the phrase “armed forces” was too restrictive and could exclude resistance forces that did not adhere strictly to the requirements on paramilitary forces set out in the Fourth Geneva Convention and its Protocols.⁴² The OIC proposal also included the phrase “including in situations of foreign occupation” so as to “doubly” ensure that resistance movements fighting against foreign occupiers, principally in Palestine and Kashmir, could not be labelled “terrorist” under the Convention.⁴³

A second disagreement that has stymied the negotiations

39. *Ad Hoc Committee II*, *supra* note 18, Annex 4, at 17 (emphasis added).

40. Interview with Nadia Ahmad, Policy Officer, International Crime and Terrorism Division, Department of Foreign Affairs and International Trade, in Ottawa, Can. (Nov. 20, 2003). Ms. Ahmad is a member of the Canadian team in the Draft Convention negotiations.

41. *Ad Hoc Committee III*, *supra* note 38, at 9.

42. *Id.*

43. *Ad Hoc Committee II*, *supra* note 18, Annex 4, at 17.

centers on the question of state terrorism. Article 2 begins with the words that “any person” can commit a terrorist act.⁴⁴ This would seem *prima facie* to include government agents—for example, a state’s military or paramilitary forces—if they engage in the acts described in the remainder of the article. However, the Western group of nations sought to explicitly exempt a state’s military forces from the scope of the Convention.⁴⁵ Again, there were two competing versions of the relevant paragraph, Article 18(3):

Text circulated by the Coordinator for discussion

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

Text proposed by the Member States of the Organization of the Islamic Conference

3. The activities undertaken by the military forces of a State in the exercise of their official duties, *inasmuch as they are in conformity with international law*, are not governed by this Convention.⁴⁶

In this case, the key textual differences (in italics above) between the two proposals are the phrases “inasmuch as they are governed by other rules of international law” versus “inasmuch as they are in conformity with international law.” The Western group of nations maintained that the Coordinator’s draft does not “condone impunity by the military forces of a State.”⁴⁷ Rather, as crimes committed by a state’s military forces fall under other corpora of international law, for example, international humanitarian or human rights law, there is no need to include them within the scope of the *Draft Convention*. The OIC, on the other hand, was less sanguine about the prospects that such state crimes would be captured elsewhere in international law and saw the wording in their proposal as a “back-up” to catch any such crimes that threatened to otherwise

44. *Id.* Annex 2, at 6.

45. *Id.* Annex 4, at 17.

46. *Id.* (emphasis added).

47. *Ad Hoc Committee III*, *supra* note 38, at 9.

slip through the cracks.⁴⁸

The net result of these two definitional disputes is that negotiations on the *Draft Convention* have stalled. The wording in Article 2 has largely been accepted.⁴⁹ But that article is part of a “package deal” with Article 18, and it is this latter article that remains at the heart of the impasse.⁵⁰ The differences on the questions of peoples’ struggle and state terrorism are so fundamental that there is no scope for bargaining or trade offs.⁵¹ Indeed, progress on these definitional issues and, more generally, on the *Draft Convention* is unlikely until there is at least some progress at the broader political level on the Palestine and Kashmir issues.⁵² Until that time, discussion of the *Draft Convention* will continue, however perfunctorily. In UNGA Res. 58/81 (2003), the General Assembly decided that the Ad Hoc Committee on terrorism should meet from June 28 to July 2, 2004 to continue efforts to elaborate a draft comprehensive convention on international terrorism.⁵³

B. UN Convention Against Transnational Organized Crime (2000) (the Palermo Convention)

The situation is different with respect to the definition of transnational organized crime. Although there is ostensibly a consensus definition in the Palermo Convention, its drafting was not a high priority in the treaty negotiations. Thus, there are serious weaknesses in the resulting compromise definition.

48. Interview with Nadia Ahmad, *supra* note 40. Amnesty International and Human Rights Watch also expressed concern with the distinction drawn between “the activities of armed forces during an armed conflict” in Article 18(2) and “activities undertaken by the military forces of a State in the exercise of their official duties” in Article 18(3). According to these organizations, this wording seems to suggest that military activities carried out in times of peace, which are not covered under international humanitarian law, would also be excluded from the scope of the Convention, opening up the possibility that military personnel may carry out serious human rights violations with impunity. Joint Letter, *supra* note 21.

49. *Ad Hoc Committee III*, *supra* note 38, at 10.

50. *Id.*

51. Interview with Nadia Ahmad, *supra* note 40.

52. *Id.*

53. *Press Release GA/10218*, U.N. GAOR, 59th Sess., 72nd mtg., U.N. Doc. GA/10218 (2003).

Article 2(a)–(c) of the Palermo Convention deals with the concept of “organized crime” in the following manner:

(a) “[o]rganized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

(b) “[s]erious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

(c) “[s]tructured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.⁵⁴

The definition of an “organized criminal group” refers to several elements integral to such an entity. Some of these elements are as follows. An “organized criminal group” is deemed to be a “structured group.”⁵⁵ While Article 2(c) makes it clear that an organized criminal group, due to its composition, is distinguishable from a group that is formed without any prior conspiracy, it also stipulates that a “structured group” does not necessarily have to possess a “developed structure.”⁵⁶ The *travaux préparatoires* to the Palermo Convention indicate that the term “structured group” must be used in a broad sense, so as to include “both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.”⁵⁷ Such a contradictory definition is arguably a result of trying to accommodate divergent views of organized crime, which may

54. Palermo Convention, *supra* note 7, at 4.

55. *Id.*

56. *Id.*

57. *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. GAOR, 55th Sess., Agenda Item 105, Addendum, at 2, U.N. Doc A/55/383/Add.1 (2000) [hereinafter *Interpretative Notes*].

include hierarchical as well as non-hierarchical groups. Such compromising allows for the term “structured group” to refer to almost every kind of formation, thus rendering it practically meaningless.

Furthermore, the definition of an “organized criminal group” refers to the commission of one or more serious crimes as one of the key elements that characterizes such a group. However, is the commission of just one crime (unless the crime is ongoing), no matter how grave, enough to view an entity as part of organized crime? Many authors agree that what distinguishes organized criminal entities from other groups is systematic, ongoing criminal activity—criminal activity as a business.⁵⁸

Additionally, the Article 2 definition contained in the Palermo Convention refers to the aims pursued by organized criminal groups as obtaining “financial or other material benefit[s].”⁵⁹ While the reference to “financial benefits” is an attempt to capture the profit-oriented, enterprising nature of organized crime, the inclusion of the term “other material benefits” is rather questionable. This term has the potential of being interpreted very broadly to include non-economically motivated crimes such as environmental or politically-motivated offenses.⁶⁰ The *travaux préparatoires* to the Convention call for a broad interpretation of the term “other material benefits.”⁶¹ Such a broad interpretation invites the possibility of inclusion within the scope of organized crime various expressions of “organized protests,”⁶² thus punishing ideological dissent under the guise of organized crime. The inclusion of reference to “serious crimes” is also not without problems. Article 2(b) defines “serious crime” as “conduct constituting an offence punishable by a maximum

58. See MICHAEL WOODIWISS, *ORGANIZED CRIME AND AMERICAN POWER* (2001); see also Margaret E. Beare & R.T. Naylor, *Major Issues Relating to Organized Crime: Within the Context of Economic Relationships*, L. COMM'N OF CAN., Apr. 14, 1999.

59. Palermo Convention, *supra* note 7.

60. Susan Tiefenbrun, *A Seismic Approach to a Legal Definition of Terrorism*, 9 J. INT'L & COMP. L. 357 (2003).

61. *Interpretive Notes*, *supra* note 57.

62. Valsamis Mitsilegas, *From National to Global, from Empirical to Legal: The Ambivalent Concept of Transnational Organized Crime*, in *CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION* 80 (Margaret E. Beare ed., 2003).

deprivation of liberty of at least four years or a more serious penalty.”⁶³ Categorization of offenses and their respective punishments vary greatly from country to country.⁶⁴ Hence, reference to a four-year threshold has the potential of blurring the line between serious and other types of crimes, thus calling into question which offenses should be prosecuted as organized criminal activities.⁶⁵

The above-discussed problems make the definition of an “organized criminal group” contained in Article 2(a)–(c) of the Palermo Convention overly broad. However, the definition is at the same time under-inclusive. It is notable that while the definition of an “organized criminal group” refers to some elements that characterize such groups, other equally valid elements, frequently discussed in legal and academic debates, are omitted. For example, no references are made to the potential for the utilization of violence and corruption, which are arguably some of the most commonly utilized methods by organized criminal entities.⁶⁶ In part, the omissions are understandable as it is rather difficult and arguably not that useful to create a “check-list” definition of organized crime that incorporates all possible elements of organized criminal groups. The challenge of creating a comprehensive “check-list” stems in part from the lack of consistency between organized criminal groups as well as their constantly changing and evolving nature as a response to changes in legitimate societal structures.⁶⁷ If other elements were to be included, the difficulties that were encountered defining the term “structured group” could be similarly encountered with many other elements. However, the selection of certain elements to describe organized criminal

63. Palermo Convention, *supra* note 7.

64. *See, e.g.*, Ugolovnyi Kodeks Rossiiskoi Federatsii (Deistvuyuschaya redaktsiya) § 15(3) (Russ.). This section deems intentional and negligent acts, for the commission of which the maximum penalty does not exceed five years deprivation of liberty, to constitute crimes of average gravity, as opposed to grave or especially grave crimes.

65. Mitsilegas, *supra* note 62, at 81.

66. *See* Beare & Naylor, *supra* note 58, at 5.

67. *See generally*, Louise I. Shelley, *Organized Crime, Terrorism, and Cyberspace*, in SECURITY SECTOR REFORM: INSTITUTIONS, SOCIETY, AND GOOD GOVERNANCE (Alan Bryden & Phillip Flun eds., 2003) (discussing how transnational criminals and terrorists have benefited from globalization).

entities and the omission of other equally valid elements poses a danger in itself. The danger consists of allowing the selected elements to take precedence in identifying what constitutes organized crime, while structures lacking some of those elements and possessing others that are not mentioned would be disregarded and not identified as part of organized crime. Such an approach may ultimately lead to “tunnel vision” with respect to organized crime.⁶⁸

One of the reasons that may in part explain the above problems with the definition of an organized criminal group in Article 2, is that, according to the chief Canadian negotiator of the Palermo Convention, Keith Morrill, defining organized crime in the Convention was really a secondary issue.⁶⁹ The primary concentration was on working out the “co-operation provisions” of the Convention (that is, extradition, mutual legal assistance and police co-operation).⁷⁰ In other words, what was hoped would be accomplished was not a convention that provides a comprehensive definition of organized crime, but rather a convention that serves as a “tool box” to enable the functioning of various “co-operation provisions.” Thus, the definition of an organized criminal group, contained in Article 2, alongside other provisions of the Convention, serves the utilitarian purpose of accommodating the provisions dealing with extradition, mutual legal assistance and police co-operation. Keeping this narrow purpose of the Convention in mind, Mr. Morrill’s view was that it would have been preferable to entirely omit a broad definition of organized crime from the Convention and instead only keep the definitions of the specific offenses associated with transnational organized crime, such as money laundering and corruption, as the Convention was not designed to tell the signatories what organized crime was.⁷¹

68. See WOODIWISS, *supra* note 58, at 14 (discussing the damaging effects at local, national and international levels due to the adoption of a particular ‘frozen’ vision of organized crime).

69. Interview with Keith Morrill, Director, United Nations, Criminal and Treaty Law Division, Department of Foreign Affairs and International Trade, in Ottawa, Can. (Oct. 23, 2003).

70. *Id.*

71. *Id.*

Despite the definition of an organized criminal group in Article 2 not being a primary focus of negotiations, some states, such as Pakistan, India, and Iran, were concerned about creating a broad definition of organized crime.⁷² Their concern stemmed from the fact that the Convention may be utilized to deal with terrorist issues. Other countries, such as Canada, the United States and Turkey, desired a broad definition of organized crime precisely for this reason, although it was understood that the Convention may only be utilized to deal with terrorist groups when they act for gain (that is, when their actions resemble the actions of organized criminal groups).⁷³ What constitutes gain, however, can be very broadly interpreted under the phrase “other material benefits” contained in Article 2.

Due to the wide consensus between countries regarding the necessity of fighting transnational organized crime, the more controversial, politically-charged issues, such as human trafficking, migrant smuggling, and the illicit manufacturing and trafficking of firearms, were moved to the Protocols to the Convention.⁷⁴ Hence, if strong political disagreements resulted in a stalemate over a particular issue, such disagreements would result in the death of one of the Protocols rather than the death of the Convention itself.⁷⁵ In terms of the major debates surrounding the Convention, the discussions (as was previously mentioned) did not center around varying perceptions of organized crime but rather on the need to accommodate varying legal systems.⁷⁶ The results of such compromises are apparent in numerous articles of the Convention, Article 5 being one of them. Article 5(1) of the Convention deals with participation in an organized criminal group. It allows the parties to the Convention a choice as to what model of participation will be criminalized at the national level, that is, a “conspiracy offence” or a “criminal association” offense.⁷⁷ For example, if a particular

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Report of the Ad Hoc Committee on the Elaboration of a Convention Against*

domestic legal system does not permit a simple criminalization of an agreement between two or more people to commit a serious crime for the purpose of gain, the Convention provides for the possibility of including a further act by one of the participants in furtherance of such an agreement.⁷⁸

By examining the definition of organized crime in the Palermo Convention, it may be concluded that, despite its presence, the definition does not represent a real agreement between signatories as to the nature of organized crime. However, the very presence of a definition in Article 2, regardless of its narrow purpose, is not insignificant. This particular definition is binding under international law for those countries that ratified the Convention and serves as an authoritative guidance for the rest of the international community by simple virtue of its appearance in a high-profile international legal instrument. Arguably, due to the serious implications of including a definition of organized crime in a high-profile international instrument dealing with transnational organized crime, it would have been better to entirely omit the Article 2 definition of an organized criminal group from the Convention rather than create a definition that is arguably both overly broad and under-inclusive.

III. DOMESTIC DEFINITIONS OF TERRORISM AND ORGANIZED CRIME

It is not surprising that, as the preceding discussion has shown, there are no satisfactory definitions of international terrorism and transnational organized crime at the international level. Domestic agencies and institutions within the same state often cannot agree on single acceptable national legal definitions of these terms.

A. *U.S. Domestic Definitions of Terrorism*

In the United States, for example, there are almost as many competing definitions of terrorism as there are agencies involved

Transnational Organized Crime on the Work of Its First to Eleventh Sessions, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 27, U.N. Doc. A/55/383 (2000).

78. *Id.*

in the counterterrorist campaign. The following are a sample of these definitions:

Department of Defense

Terrorism is “the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”⁷⁹

Federal Bureau of Investigation

Terrorism is “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”⁸⁰

State Department

Terrorism is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”⁸¹

USA PATRIOT ACT (2001)

Section 802. Definition of Domestic Terrorism.⁸²

(5) the term “domestic terrorism” means activities

79. DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (as amended through June 9, 2004), available at <http://www.dtic.mil/doctrine/jel/doddict/data/t/05373.html> (last visited Jan. 24, 2005). The *DOD Dictionary* does not distinguish between domestic and international terrorism.

80. U.S. FEDERAL BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 1994 24 (2004). Terrorism is defined as domestic or international depending upon the origin, base, and objectives of the terrorist organization. *Id.* International terrorism involves persons or groups based or operating in part outside the United States or who receive foreign direction and who direct their violent acts against the U.S. government or population. *Id.*

81. 22 U.S.C. § 2656f(d) (2000). In that same statute, “international terrorism” is defined as “terrorism involving citizens or the territory of more than one country.” *Id.* The U.S. government has used these definitions for statistical and analytical purposes since 1983. U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2002 xiii (2003). The U.S. intelligence community also uses these definitions. U.S. CIA, *The War on Terrorism: Terrorism FAQs*, at <http://www.cia.gov/terrorism/faqs.html> (last visited Jan. 24, 2003).

82. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT ACT] (amending 18 U.S.C. § 2331 (2000)).

that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

Subcommittee on Terrorism and Homeland Security, House Permanent Select Committee on Intelligence (2002)

“Terrorism is the illegitimate, premeditated use of politically motivated violence or the threat of violence by a subnational group against persons or property with the intent to coerce a government by instilling fear amongst the populace.”⁸³

There are significant problems with these definitions. First, they define terrorism in very general terms and do not list specific terrorist acts. As mentioned above in the discussion of organized crime, there is an advantage in avoiding check-list definitions, in that more general definitions will be able to cover new forms of terrorism if and when they arise. However, as Law Professor Susan Tiefenbrun notes, the disadvantage to using general definitions is that the decision concerning who is committing “terrorist acts” is consequently left up to the discretion of policy makers.⁸⁴

Moreover, these definitions do not define the phenomenon in precisely the same way. We can analyze these differences by

83. SUBCOMM. ON TERRORISM & HOMELAND SEC., HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE ON COUNTERTERRORISM INTELLIGENCE CAPABILITIES & PERFORMANCE PRIOR TO 9-11, i (2002) [hereinafter INTELLIGENCE CAPABILITIES]. The Report does not distinguish between domestic and international terrorism.

84. Tiefenbrun, *supra* note 60, at 370.

examining the definitions along six key attributes:

- The perpetrators of the act of violence;
- The method of combat;
- The victims of the act (the *targets of violence*);
- The targets of the act (the *targets of terror*, *targets of demands* and *targets of attention*);
- The purpose or function of the act; and,
- The motive of the act.⁸⁵

The comparative analysis of the five definitions is presented in Table 1.⁸⁶ From the table, the following differences are immediately apparent. Only two of the definitions—the State Department and Subcommittee definitions—refer explicitly to the perpetrators of terrorist acts. These are described as being “sub-national groups,” thus effectively eliminating as terrorism acts of violence committed by agents of the state. That is unless, as Tiefenbrun suggests, the term “agents” in the State Department definition is understood to include “agents of the State.”⁸⁷

From the definitions, three elements in the method of combat emerge. An act of terrorism is (1) premeditated or calculated; (2) unlawful, illegitimate or criminal; and (3) an

85. We have derived these attributes from Schmid's definition of terrorism presented in his seminal study on political terrorism and from Bruce Hoffman's more general discussion on defining terrorism. See SCHMID, *supra* note 23, at 111; see also BRUCE HOFFMAN, *INSIDE TERRORISM* 13–44 (1998). Schmid's definition of terrorism reads as follows:

Terrorism is a method of combat in which random or symbolic victims serve as instrumental target [sic] of violence. These instrumental victims share group or class characteristics which form the basis for their selection for victimization. Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear (terror). This group or class, whose members' sense of security is purposively undermined, is the target of terror. . . . The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to mobilize secondary targets of demands (e.g. a government) or targets of attention (e.g. public opinion) to changes of attitude or behavior favoring the short or long-term interests of the users of this method of combat.

SCHMID, *supra* note 23, at 111 (underlining in original).

86. See Table 1 *infra* p. 310

87. Tiefenbrun, *supra* note 60, at 367.

actual or threatened use of violence. The five definitions incorporate these three elements to varying degrees. The FBI, USA PATRIOT ACT and State Department definitions are the least comprehensive of the five. The FBI and PATRIOT Act highlight only the unlawful or criminal nature of the terrorist act, while the State Department definition emphasizes the premeditated element of the act. The Department of Defense (DoD) and Subcommittee definitions, on the other hand, are the most comprehensive in that both incorporate all three elements of the terrorist act.

As for the victims of the terrorist act (or the *targets of violence*), the DoD and USA PATRIOT ACT definitions are silent on this score. The State Department definition refers to “noncombatant targets” that “include, in addition to civilians, military personnel who at the time of the incident are unarmed and/or not on duty”⁸⁸ but excludes, by implication, on-duty, armed military personnel. The FBI and Subcommittee definitions are the most inclusive of the five in that they refer to “persons” in general, suggesting that on-duty military personnel fall within the victim category. As well, they both extend this category to include property, which is missing from the other three definitions.

Four of the five definitions agree that the basic purpose of the terrorist act is to intimidate or coerce a *target of terror*, whether that target is a government, civilian population, or society. The State Department definition is the one outlier in that it speaks in exceedingly vague terms of “influenc[ing] an audience.” Finally, all definitions but the USA PATRIOT ACT cite the political motive of terrorism. Additionally, the FBI definition recognizes possible social motives, while the DoD definition recognizes religious or ideological motivations but does not mention social motives. All these motives, however, are not elaborated upon in the definitions, leaving them open to broad interpretation.

As the preceding brief analysis has demonstrated, there is not a single agreed-upon definition of terrorism in U.S. domestic law. Indeed, this is not surprising given that each of the

88. U.S. DEPT OF STATE, *supra* note 81, at xiii.

definitions “reflects the priorities and particular interests of the specific agency involved.”⁸⁹ This is not just a matter of stylistic difference. There are significant divergences in substance depending on which elements each definition includes or excludes. And these definitional divergences can pose serious problems. In its review of the counterterrorism capabilities and performance of the U.S. intelligence community prior to 9/11, the House of Representatives Subcommittee on Terrorism and Homeland Security noted that practically every U.S. government agency involved in counterterrorism had its own definition of terrorism.⁹⁰ The Subcommittee urged that all agencies agree to one definition so that there would be no confusion as to who was a terrorist or what activities constituted acts of terrorism.⁹¹ Without such a standard definition, it maintained, “terrorism might be treated no differently than other crimes.”⁹² The lack of a consensus definition can also open up the potential for governmental abuse. As Tiefenbrun warns, “[t]he absence of a generally-accepted definition of terrorism in the United States allows the government to craft variant or vague definitions that can result in an erosion of civil rights and the possible abuse of power by the state in the name of fighting terrorism and protecting national security.”⁹³ Finally, with respect to the main argument of this article, the lack of consensus at the national level regarding the definition of terrorism can make it problematic for states to advance consistent positions on such a definition at the international level, much less to come to agreement with other states on a consensus definition.

B. Russian Domestic Definitions of Organized Crime

The 1996 Criminal Code⁹⁴ is the primary Russian legislative instrument to define what constitutes “organized crime.” Prior

89. HOFFMAN, *supra* note 85, at 38.

90. INTELLIGENCE CAPABILITIES, *supra* note 83, at i.

91. *Id.*

92. *Id.*

93. Tiefenbrun, *supra* note 60, at 364.

94. *Ugolovnyi Kodeks Rossiiskoi Federatsii (Deistvuyuschaya redaktsiya)* No. 63–FZ (Jan. 1, 1997) (Russ.).

to the Code's coming into force, there were numerous legislative efforts (by way of failed federal laws) and extensive vigorous debates concerning the definition of "organized crime."⁹⁵ Subsequent to the passage of the Code, however, the legislative efforts to define what constitutes "organized crime" have ceased for the most part.⁹⁶ The Criminal Code deals with the question of "organized crime" in subsections 35(3) and 35(4) as well as in section 210.

Section 35 of the Criminal Code deals with crimes committed by various groups. There is generally wide agreement between Russian legal scholars that the two concepts—"organized group" and "criminal organization" (criminal society)—referred to in subsections 35(3) and 35(4) were enacted specifically to address the issue of organized crime.⁹⁷ These subsections read as follows:

3. A crime shall be deemed to be committed by an organized group, if it has been committed by a stable group of persons, who united in advance for the commission of one or more offences.

4. A crime shall be deemed to be committed by a criminal society (criminal organization), if it has been committed by a cohesive⁹⁸ organized group created for the commission of grave or especially grave crimes or by an association of organized groups created for the same

95. As a matter of fact, at the base of the 1996 Criminal Code sections dealing with organized crime lies the 1995 federal law entitled "On Combating Organized Crime," which was approved by the State Duma but rejected by then-President Yeltsin. However, several provisions of the law "On Combating Organized Crime" were nevertheless reflected in various sections of the new Criminal Code. L.N. Boitsov & I. Ya. Gontar', *Ugolovno-Pravovaya Bor'ba s Organizovannoi Prestupnost'u: Illuzii, Real'nost I Vozmozhnaya Al'ternative*, 11 GOSUDARSTVO I PRAVO 35 (2000).

96. *Id.*

97. See Eugene Solomonov, Comment, *U.S.-Russian Mutual Legal Assistance Treaty: Is There a Way to Control Russian Organized Crime?*, 23 FORDHAM INT'L L.J. 165, 165, 194-95 (1999); see also L. Gauhman & S. Maksimov, *Otvettvennost' za Organizatsiu Prestupnogo Soobchestva*, 2(748) ZAKONNOST' 12 (1997); Boitsov & Gontar', *supra* note 95 (stating that criminal responsibility for the activities of organized crime has been incorporated into section 35, which defines what constitutes an "organized group" and a "criminal organization").

98. Another translation for the term "cohesive" is "united."

purposes.⁹⁹

There are several significant problems inherent in these definitions. For example, the terms “stable” and “cohesive” are so vague as to provide no meaningful distinction between various organized criminal entities.¹⁰⁰ The problem of vagueness stems from the fact that both terms are evaluative ones and, hence, the only reasonable way to discuss stability and cohesiveness is in terms of degree (that is, an entity is either more or less stable or cohesive).¹⁰¹ Moreover, the current definitions allow for the potential inclusion of formations that are not normally considered to be part of organized crime such as entities motivated by political, religious, and social concerns rather than by profit in any form. Such definitional confusion is exemplified by the courts’ (including the Russian Supreme Court’s) inability to clearly distinguish between “organized groups” and “criminal organizations” in their reasoning. This confusion results in somewhat arbitrary sentencing.¹⁰²

While subsections 35(3) and 35(4) deal with the question of definition, section 210 criminalizes the creation and direction of a criminal organization as well as participation in a criminal organization.¹⁰³ As the terms “creation,” “direction” and

99. *Ugolovnyi Kodeks Rossiiskoi Federatsii (Deistvuyuschaya redaktsiya)*, *supra* note 94.

100. See Boitsov & Gontar’, *supra* note 95; see also V.G. Grib, et al., *Organizovannaya Prestupnost’ - Razlichnye Podhody k Eyo Ponimaniyu*, 1 GOSUDARSTVO I PRAVO 48 (2000); A. Mordovets, *Prestupnoe Soobshchestvo: Utochnenie Uslovii Otvetstvennosti*, 9(803) ZAKONNOST’ 41 (2001).

101. N.G. Ivanov, *Gruppovaya Prestupnost’: Soderzhanie i Voprosy Zakonodatel’nogo Regulirovaniya*, 9 GOSUDARSTVO I PRAVO 70–71 (1996).

102. See Boitsov & Gontar’, *supra* note 95, at 36; see also V. Nikeshkin, *Dokazyvanie Po Delam, Svyazannym s Organizovannoi Prestupnost’u*, 8(802) ZAKONNOST’ 36 (2001).

103. *Ugolovnyi Kodeks Rossiiskoi Federatsii (Deistvuyuschaya redaktsiya)* §§ 210(1), (2) (Russ.). The sections read:

1. The creation of a criminal society (criminal organization) in order to commit grave or especially grave offences, and likewise the direction of such a criminal society (criminal organization) or its structural subdivisions, and also the creation of an association of organizers, leaders, and other representatives of organized groups for the purpose of working out plans and conditions for the commission of grave or especially grave offences, shall be punishable by deprivation of liberty for the term of seven to fifteen years

“participation” are not defined (combined with a vague definition of what constitutes a criminal organization in subsection 35(4)), depending on the courts’ interpretation of these terms, section 210 may be utilized for a number of ulterior purposes to that of combatting organized crime.¹⁰⁴ For example, there exists a possibility of exploiting section 210 to prosecute certain “undesirable” ethnic, religious, or political groups.¹⁰⁵

Apart from the legal confusion surrounding the concept of organized crime as defined in the Russian Criminal Code, the Russian Ministry of Internal Affairs (Ministerstvo Vnutrennykh Del or MVD), which is charged with responsibility for combating organized crime and is one of the agencies responsible for domestic law enforcement,¹⁰⁶ possesses its own distinct operational definition of this phenomenon. It is particularly telling to examine the definition of “organized crime” utilized by the MVD.

The Chief Directorate for the Fight Against Organized Crime (GUBOP) in the MVD defines organized criminal groups as possessing the following attributes:

- Engagement in criminal activity with the aim of obtaining

with or without a fine in the amount of up to one million roubles or in the amount of earnings or other revenue of a convicted person for a term of up to five years.

2. Participation in a criminal society (criminal organization) or in an association of organizers, leaders or other representatives of organized groups, shall be punishable by deprivation of liberty for a term of three to ten years with or without a fine in the amount of up to five hundred thousand roubles or in the amount of earnings or other revenue of a convicted person for a term of up to three years.

Id.

104. Despite the current judicial practice, some authors argue that there exists a possibility of charging a person with section 210 alone when no crime has yet been committed. KOMMENTARIJ K UGOLOVNOMU KODEKSU ROSSIJSKOI FEDERATSII 422 (V.M. Lebedev ed.) (2001).

105. In other words, § 210 criminalizes “association” rather than any concrete action. R.T. Naylor, *Predators, Parasites, or Free-Market Pioneers: Reflections on the Nature and Analysis of Profit-Driven Crime*, in CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION 41 (Margaret E. Beare ed., 2003) [hereinafter Naylor, *Predators*].

106. Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191, 196 (2000); Arnaud de Borchgrave, *Ignoring Russia’s Crisis of Crime*, WASH. TIMES, July 25, 1997, at A19.

fixed income.

- Capability of acting over prolonged period of time.
- Clear-cut division of labor.
- Possession of information on group activity and well developed means of internal communications.
- Access to group resources.
- Available system of secrecy and security.¹⁰⁷

It is immediately apparent that the MVD's definition of organized crime is more extensive than the definitions contained in the Russian Criminal Code. This in itself poses a problem as the definition utilized by the law enforcement authorities is not consistent with the definitions utilized by the courts. Such inconsistencies may potentially lead to the escape from responsibility, the arbitrary sentencing and the prosecution of petty criminals, members of certain ethnic or religious groups, and political opponents as members of organized crime.

Apart from the problems discussed above, the lack of a single government-wide definition of the concept of "organized crime" makes it an easily manipulated one. In other words, what is meant by "organized crime" may be molded to respond to a particular institutional vision of this phenomenon. Thus, once a certain perception of "organized crime" or "mafia" is developed, a whole institutional culture emerges around this concept and often ample data is supplied to justify the particular institutional vision of "organized crime," while anything contradicting the official vision is discarded.¹⁰⁸ Hence, when the MVD states that "40% of private businesses, 60% of state-owned enterprises, and between 50% and 85% of the banks are controlled by organized crime ... [a]ll told, roughly two-thirds of Russia's economy is under the sway of the crime syndicates,"¹⁰⁹ one cannot help but wonder what these statistics mean. Perhaps

107. W. WEBSTER & A. DE BORCHGRAVE, *RUSSIAN ORGANIZED CRIME: GLOBAL ORGANIZED CRIME PROJECT 24* (1997); see also [http://www.mvdinform.ru_\(Russ.\)](http://www.mvdinform.ru_(Russ.)) (last visited Jan. 24, 2005).

108. WEBSTER & DE BORCHGRAVE, *supra* note 107, at 1-18; see also Naylor, *Predators*, *supra* note 105, at 48 (stating that the genuine desire by an entity that is designated to fight organized crime often "begins to take second place to the wish to promote hidden agendas," such as increased funding and expanded scope of powers).

109. WEBSTER & DE BORCHGRAVE, *supra* note 107, at 2.

in order to justify the seriousness of its role and to obtain significant governmental funding, the MVD characterizes many types of activities as organized crime that would not necessarily be characterized as such by other agencies with different agendas.¹¹⁰

What is additionally troubling is that the MVD becomes unreceptive to different visions of organized crime and, hence, to different strategies aimed at combating it that do not correspond to the pre-existing MVD strategies. It is noteworthy that, up to 1996, around eighty percent of all crimes that were included in the MVD statistics under the rubric of crimes committed by organized groups were crimes of a predatory nature such as robberies, murders, and assaults.¹¹¹ Thus, crimes that involved supply and demand aspects, such as economic crimes, and that are often associated with organized crime were for the most part not investigated and not reflected in crime statistics.¹¹²

Taken together with the analysis in Part I, the above discussion shows that the definition of organized crime found in the Palermo Convention is different from that contained in the Russian Criminal Code and that both of these definitions are different from the MVD's definition of what constitutes an organized criminal group. To add to the confusion, the terms "mafia" and "organized crime" are frequently used in Russian public discourse to account for the current situation and, hence, have a very expansive meaning.¹¹³ To some extent all of these

110. V.V. LUNEEV, *PRESTUPNOST' XX VEKA. MIROVYE, REGIONAL'NUE I ROSSIISKIE TENDENTSI* 305 (1999).

111. *Id.*

112. *Id.* The flaws in the MVD's recording of statistics relating to organized crime were acknowledged by the MVD itself when it stopped compiling the statistics relating to the number and the types of organized criminal entities in 1996, citing the unreliability of such information. *Id.* at 303. Apart from being unreliable, some authors have noted that Russian crime statistics are frequently artificially manipulated in order to achieve certain aims (such as demonstrating the importance of an institution's work) or to satisfy a particular governmental demand (such as the demand to combat crime generally and organized crime in particular). Inaccurate or, worse, manipulated crime statistics are then routinely utilized to justify powerful legal and political initiatives and "to frighten the public into acquiescence." R.T. NAYLOR, *WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY* 8 (2002) [hereinafter NAYLOR, WAGES].

113. In Russia today, the terms "organized crime" or "mafia" are used by many to refer to a variety of individuals and occurrences. For many Russians, anyone who

definitions are rather arbitrary, some achieved as a result of political compromises and some shaped by institutional as well as political, economic and social realities. While the concept of the mafia utilized by the public is more a function of assigning blame, the definitions used by the MVD and those found in the Palermo Convention and the Russian Criminal Code all concentrate on various attributes of criminal enterprises. While the Russian Criminal Code contains only vague references to the stability and cohesiveness of criminal organizations, the Palermo Convention and the MVD definitions discuss various attributes of criminal entities, such as structure and period of operations, in greater detail. Furthermore, both the Palermo Convention as well as the MVD definitions refer to the overarching motive of profit in criminal enterprises.

IV. POST 9/11 MERGER OF TERRORISM AND ORGANIZED CRIME

To this point, we have discussed the failure of the international community to craft satisfactory definitions of international terrorism and transnational organized crime, and the inability of many states, in particular the United States and Russia, to agree domestically upon common national legal definitions of the terms. The challenge of adequately defining these terms has become even more complicated after 9/11 with the growing tendency to merge to some extent the concepts of terrorism and organized crime.

It is noteworthy that prior to 9/11, the concept of terrorism was not generally included in instruments dealing with organized crime. For example, the above-discussed Palermo Convention did not include terrorist acts in its definition of

engages in commercial activity, is involved in politics, possesses certain economic standing, or is from the Caucasus region is labeled a member of the "mafia." Scott P. Boylan, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 *FORDHAM INT'L L.J.* 1999, 2011–12 (1996); Duncan DeVille, *Combatting Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 *GEO. WASH. J. INT'L L. & ECON.*, 87 (2001). This public perception of organized crime is aggravated by the often sensationalist reporting techniques of the Russian media that primarily concentrate on the number and the graphic details of various murders and the lifestyles of so-called "mafia bosses."

organized crime, despite the deep concern over the “growing links between transnational organized crime and terrorist crimes” expressed in UNGA Res.55/25 preceding the Convention.¹¹⁴ Similarly, U.N. anti-terrorism resolutions recognized the link but kept the two concepts operationally separate. The UNGA *Declaration on Measures to Eliminate Terrorism* (1994) noted with concern the “growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs” and remained convinced of “the desirability for closer coordination and cooperation among States in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials.”¹¹⁵ However, the measures subsequently outlined in the *Declaration* focused exclusively on the fight against terrorism. No measures were included to combat the organized criminal activities listed in the Preamble.

Some of the reasons for separating these concepts relate to the fundamental distinction between terrorism and organized crime. While terrorism involves ideological or political motives, the primary motive for organized criminal activity is profit. Furthermore, as discussed above, there is still no international consensus regarding a single all-inclusive definition of terrorism. Although similar statements may be made regarding a satisfactory definition of organized crime, the inclusion of the concept of terrorism (at least prior to 9/11) into international instruments dealing with organized crime risked making these instruments unworkable, due to the division of opinion among the signatories. Finally, even if organized criminal activities were used to finance terrorist operations, such activities constituted distinct and lesser crimes than the ultimate act of terrorism itself,¹¹⁶ and hence, should be kept separate.

Despite these fundamental differences, the events of 9/11 increasingly led to the linking of the concepts of “terrorism” and

114. See Palermo Convention, *supra* note 7, at 2.

115. *Declaration on Measures to Eliminate International Terrorism*, U.N. GAOR, 49th Sess., 84th mtg., Annex, at 3, U.N. Doc. A/RES/49/60 (1994).

116. I. Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 318 (2003).

“organized crime.” In some instances, particularly in the field of narcotics, the activities of organized crime are now frequently discussed under the rubric of terrorism. At a symposium on the legal implications of the response to 9/11, Donnie Marshall, former Director of the U.S. Drug Enforcement Administration (2000–01), cited the example of Mexican drug trafficking groups:

In Mexico, drug trafficking groups have long been involved in kidnapping, torture and murder, along with the assassination and intimidation of public officials and citizens alike. These groups, who even killed a Catholic cardinal, have no political agenda. However, their terrorist acts have the same effect as politically motivated terrorists: they render political, judicial, economic and commercial institutions ineffective, and destabilize the government and the economy.¹¹⁷

In other instances, because of the existing legal regime, the fight against terrorism has been grafted onto measures initially designed to combat organized crime. Such efforts are particularly apparent in the revised *Forty Recommendations of the Financial Action Task Force (FATF)*¹¹⁸ issued in June 2003.¹¹⁹

117. D. Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 CORNELL INT'L L. J. 599, 602 (2002).

118. The Financial Action Task Force (FATF) was established at the G-7 Economic Summit in Paris in 1989 under the auspices of the Organization for Economic Cooperation and Development (OECD). See *Overview of the OECD: What is It? History? Who Does What? Structure of the Organization?*, at http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (last visited Jan. 24, 2005); see also FATF, *More About the FATF and Its Work*, at http://www1.oecd.org/fatf/AboutFATF_en.htm#History [hereinafter *More About the FATF*] (last visited Jan. 24, 2005); Mike Levi, *Money-Laundering and Its Regulation*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 181 (2002). The FATF is an inter-governmental body, which currently consists of thirty-one countries and territories and two regional organizations. *More About the FATF*, *supra*. One of the first tasks of the FATF was to develop recommendations, forty in all, setting out the measures national governments should take in order to develop and implement effective anti-money laundering programs. FATF, *Welcome to the FATF*, at <http://www1.oecd.org/fatf/index.htm> (last visited Jan. 29, 2005).

119. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS, at http://www.fatf-gafi.org/40Recs_en.htm (last visited Jan. 24, 2005) [hereinafter FORTY RECOMMENDATIONS]; MIKE LEVI, CONTROLLING THE INTERNATIONAL MONEY TRAIL: A MULTI-LEVEL CROSS-NATIONAL PUBLIC POLICY REVIEW, FUTURE GOVERNANCE RESEARCH INITIATIVE 2 (2003) [hereinafter LEVI, MONEY TRAIL].

Initially, the *Forty Recommendations* dealt solely with money laundering.¹²⁰ However, subsequent to 9/11 and the expansion of the FATF's mandate in 2001 to include anti-terrorist financing measures, the 2003 revised *Forty Recommendations* purported to set up a regime that deals with both money laundering as well as terrorist financing. A regime attempting to deal with both of these distinct concepts, apart from the advantage of saved costs, is problematic. Although in many cases terrorist financing relies on illicit funds, much of terrorist financing originates from legitimate sources, such as cultural and social events, door-to-door solicitation within the community, and sale of publications. Money laundering, on the other hand, generally involves disguising the illicit origins of the funds in order to enable their open usage.

One of the immediate effects of combining the “apples and oranges” of anti-money laundering and anti-terrorist financing efforts was the “refocusing or distorting [of] the concept of money laundering to include proceeds from legitimate activities that might support terrorism, including aid to the families of terrorists.”¹²¹ Hence, in many cases the focus of examinations shifted to looking at financial transactions with legitimately acquired funds (instead of criminal funds) and trying to anticipate when such funds may be directed to finance terrorism, a task that is, even by the FATF's own admission, generally futile. For example, in its own “Guidance for Financial Institutions in Detecting Terrorist Financing,” issued on April 24, 2002, the FATF stated that:

[i]t should be acknowledged as well that financial institutions will probably be unable to detect terrorist financing as such. Indeed, the only time that financial institutions might clearly identify terrorist financing as distinct from other criminal misuse of the financial system is when a known terrorist or terrorist organization has opened an account.¹²²

120. See THE FORTY RECOMMENDATIONS (1996), at http://www.fatf-gafi.org/40Recs-1996_en.htm (last visited Jan. 24, 2005).

121. LEVI, MONEY TRAIL, *supra* note 119, at 22.

122. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, GUIDANCE FOR FINANCIAL INSTITUTIONS IN DETECTING TERRORIST FINANCING ¶ 9 (2002).

This difficulty in detecting terrorist financing is further exacerbated when, as discussed above, the absence of an internationally-agreed upon definition of terrorism makes it problematic to identify a “known terrorist or terrorist organization” in the first instance.

The merger of the concepts of money laundering and terrorist financing—given the generally amorphous nature of the concept of terrorism, the difficulties with determining which transactions are indicative of terrorist financing, and the fact that terrorist financing frequently involves legitimate funds—leads to the unfortunate consequence of so-called non-financial profiling. “Non-financial profiling” is generally based on categories, such as religion, ethnicity, and the ability to speak the local language. This often leads to the identification of the “usual suspects” (that is, people of Arab descent or Islamic faith, or various Islamic charitable organizations) as engaging in suspicious transactions.¹²³ Such non-financial profiling, arguably based on discriminatory criteria, is in part aided by the FATF’s Recommendation 13. Recommendation 13 calls upon financial institutions to make a suspicious transaction report to the financial intelligence unit if it “suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing.”¹²⁴ From the wording of this Recommendation, it becomes apparent that suspicions of money laundering or terrorist financing do not have to rely on reasonable objective criteria and instead may be based on simple stereotyping of certain groups and institutions as prone to criminality.

Although strong arguments may be made regarding the violation of civil liberties as a result of non-financial profiling, it seems that after 9/11, the whole concept of civil liberties is

123. See Levi, *Money-Laundering and Its Regulation*, *supra* note 119, at 9; P.C. Van Duyne & H. De Miranda, *The Emperor’s Clothes of Disclosure: Hot Money and Suspect Disclosures*, 31 CRIME L. & SOC. CHANGE 245 (1999); see also Bantekas, *supra* note 116, at 321–22 (arguing for the benefits of non-financial profiling, “nonfinancial [profiling] makes a seminal contribution to detecting terrorist funds . . . even socio-cultural Muslim groups that are not connected to, nor advocate, political violence or terrorism, create and preserve the ‘Islamic atmosphere’ that is used by more extremist and violent groups.”) *Id.* at 322.

124. THE FORTY RECOMMENDATIONS, *supra* note 120, at 5.

becoming increasingly outmoded.¹²⁵ In fact, there remains only very limited criticism of the FATF's evangelical approach¹²⁶ of combating money laundering and terrorist financing.¹²⁷ Instead, the FATF's approach is reinforced by the proliferation of an "industry of experts"¹²⁸ that advise countries about their anti-money laundering and anti-terrorist financing regimes, as well as by the Non-Cooperative Countries and Territories (NCCT) initiative.¹²⁹ However, despite the increasing synchronization of various domestic anti-money laundering and anti-terrorist financing regimes, the question that is seldom asked is whether all these efforts, spearheaded by the FATF with strong US backing and undertaken at tremendous expense, make a difference in reducing the presence of organized crime or terrorist activities. Some authors suggest that there is little evidence¹³⁰ of the actual usefulness of the FATF's measures. More importantly, from the standpoint of this article, the question is whether the operationally blurring of international terrorism and transnational organized crime helps or hinders efforts to understand and to devise precise legal definitions of

125. Levi, *Money-Laundering and Its Regulation*, *supra* note 119, at 1.

126. One only has to look at the section entitled "Spreading the Anti-Money Laundering Message Throughout the World" in the 2002–2003 FATF annual report to understand the reference. See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 2002–2003 (2003), available at http://www.fatf-gafi.org/pdf/AR2003_en.pdf (last visited Jan. 24, 2005).

127. See Bantekas, *supra* note 116, at 326 (stating that in the aftermath of 9/11, the United States and the FATF capitalized on the prevailing circumstances and international sentiment to pursue policies that would not have received international approval just a short while prior to the terrorist attacks).

128. LEVI, MONEY TRAIL, *supra* note 119, at 3.

129. The Non-Cooperative Countries and Territories (NCCT) initiative creates so-called "blacklists" of countries that fail to regulate money laundering on par with FATF standards. See *id.* at 6. The "blacklisting" of a country often means the withdrawal of foreign economic aid, capital flight and a general slowdown of all financial transactions, as other banks treat transactions from a "blacklisted" country as suspicious. See *id.* (giving a description of the economic effect of being placed on the NCCT list); see also NAYLOR, WAGES, *supra* note 112, at 133 (noting that being placed on the NCCT list frequently results in the destabilization of the country's financial system).

130. The lack of evidence is in part due to the difficulties in researching the true amount of money laundering that takes place as well as the fluctuations in crime rates. See P.C. Van Duyne, *Money-Laundering: Estimates in Fog*, 2 J. ASSET PROTECTION & FIN. CRIME 58 (1994).

these terms.

V. CONCLUSION

There is as yet no single agreed-upon, all-inclusive definition of terrorism in international law. The negotiations on the *Draft Convention* have stalled, largely due to fundamental differences over the definitional question. As for transnational organized crime, the consensus suggested by the presence of the Article 2 definition in the Palermo Convention is more apparent than real, and has resulted in a conceptually-weak compromise definition that is, at once, overly broad and under inclusive. The lack of international consensus on satisfactory definitions for these two phenomena is hardly surprising given that domestic agencies and institutions within the same state often cannot agree on common national definitions of the terms. The definitional task has become even more complicated with the blurring of the operational concepts of terrorism and organized crime with the combining of anti-money laundering and anti-terrorist financing efforts in the aftermath of 9/11.

Apart from the specific reasons discussed above, the failure of states to arrive upon satisfactory all-inclusive definitions of these terms can be traced to the changing nature and diversity of terrorism and organized crime themselves. Due to their constantly evolving nature and their ability to take many forms, it is doubtful that any checklist definitions will completely capture their essential attributes for all time. As well, this failure can also be traced to the restrictive view of these phenomena as exclusively external threats, that is, as something separate and distinct from legitimate society and, hence, poised to destroy it. This ignores that organized crime constitutes an integral part of legitimate society, often intermingling with legitimate business in its search for profit and opportunity.¹³¹ And like organized crime, terrorism also touches many legitimate niches in society, such as charitable fund-raisers and financial institutions.

Although the international community has thus far been unable to produce satisfactory, all-inclusive definitions of

131. See WOODIWISS, *supra* note 58, at 388.

terrorism and organized crime, the requirement for precise legal definitions of these terms remains. Legal definitions set out the scope of a prohibited offense—the activities that fall within the prohibition as well as those that fall outside. For example, if the definition of terrorism restricts this to acts of political violence committed *by non-state actors only*, this filters out a great deal of state-authored terrorism.¹³² Furthermore, legal definitions delimit the actions that can lawfully be taken in response to the crime. If, for instance, terrorism is defined not only as a criminal act but as the equivalent of an “armed attack” activating a state’s right to self-defense under Article 51 of the U.N. Charter, this opens up for the victim state a whole range of possible responses up to and including the use of force.

As well, any gaps or ambiguities in the definition of terrorist or organized criminal acts create legal “gray areas” that both the criminal and the victim state can exploit. Terrorists and organized crime members can take advantage of gaps in the law to shield their activities and themselves from legal countermeasures. For example, the enforcement mechanism in counterterrorism treaties—that is, the duty of states to try or extradite international terrorists (*aut dedere aut judicare*)—was not thought to be a norm of customary international law. Thus, “to the extent a terrorist remained on the territory of a ‘friendly’ or incompetent state, that is, a state which was either powerless or not inclined to investigate and punish the criminal in question, that terrorist could largely avoid the application of international law.”¹³³

132. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 9–10 (1999).

133. Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUDIES L. REV. 135, 147 (2004). Sadat notes that the international community has improved on these shortcomings in recent years. *Id.* For example, terrorist acts are no longer considered political offenses for the purposes of extradition. *Id.* Article 11 of the Convention for the Suppression of Terrorist Bombings (1997), for instance, stipulates that:

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or

Equally disturbing, states may exploit any definitional gaps in order to harness the “war on terrorism” or the “war on crime” for other unrelated and often less creditable ends. As the U.N. Working Group on Terrorism pointed out, “[t]he rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/or suppression of resistance to military occupation.”¹³⁴ Similarly, without a precise definition of the term, organized crime “can be whatever the speaker wants it to be—a massive threat, a theatrical legacy, or petty criminals.”¹³⁵ Frequently, proponents of various “tough” measures supposedly aimed at organized crime do not even define what they mean by the term but claim that everyone knows what it means.¹³⁶ Thus, as with “terrorism,” the term “organized crime” has the potential of becoming a convenient ruse to satisfy various agendas going beyond crime control without (at least initially) raising suspicions about the inconsistency of the goals of these various programs and initiatives.

Related to this is the use of the “terrorist” and “organized crime” labels, in the absence of precise legal definitions, to delegitimize opponents, rivals, and competitors, among others. To state the obvious, “terrorism” is a value-laden term that carries with it extremely negative connotations.¹³⁷ To successfully label an opponent—whether a member of, say, an insurgent organization or opposition political grouping—a “terrorist” is to undercut the legitimacy of both the actor and the cause for which the actor is struggling. Conversely, it legitimizes

an offence inspired by political motives.

UNITED NATIONS OFFICE ON DRUGS AND CRIME, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS, at http://www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html (last visited Jan. 24, 2005).

134. *Report of the Policy Working Group on the United Nations and Terrorism*, U.N. Doc. A/57/273/Annex (2002).

135. Beare & Naylor, *supra* note 58, at 1.

136. James Sheptycki, *Against Transnational Organized Crime*, in *CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION* 125 (Margaret E. Beare ed. 2003).

137. *See* THE TERRORISM READER 10–13 (David J. Whittaker ed., 2nd ed. 2003).

many state actions taken in the name of counterterrorism¹³⁸ that might have provoked domestic or international protest under other circumstances or both.

The same holds true for the “organized crime” label. This term, as astutely noted by Professor James Sheptycki, carries with it powerful “associative baggage.”¹³⁹ Sheptycki notes that organized crime is frequently compared to a disease, an epidemic, an alien threat to the well being of legitimate citizens, or an entity alien to normal society.¹⁴⁰ The solutions presented to eradicate this threat are often couched in martial metaphors, such as the “war on drugs” or the “war on crime.”¹⁴¹ War on crime proponents generally tend to favor highly-punitive, opaque policies that frequently allow for blatant violations of basic human rights and civil liberties under the guise of solving the problem of crime.¹⁴² Such policies, however, do not account for either the complexities in form and substance of various organized criminal entities, nor for the social causes that prompt the emergence of such a variety of criminal enterprises.

Thus, while the lack of precise, all-inclusive legal definitions of terrorism and organized crime may reflect the international community’s inability to resolve genuine differences over the nature of these phenomena, it could also be that some states are not particularly interested in pushing for precise definitions. They may prefer the current state of definitional ambiguity in so far as it gives them considerable “room for maneuver” in the war on terrorism and the war on crime as well as in the pursuit of other unrelated goals.

To recap, the international community has yet to elaborate satisfactory, all-inclusive legal definitions of international terrorism and transnational organized crime. Yet, the need for precise legal definition remains. How, then, should the international community proceed?

The alternative to the umbrella approach examined in this

138. Tighter restrictions on domestic civil liberties and human rights are examples.

139. Sheptycki, *supra* note 136, at 121, 124, 126.

140. *Id.* at 126.

141. *Id.* at 122, 127.

142. *Id.* at 126–28, 133.

article is the building block approach, that is, one in which narrow operational legal definitions of specific terrorist and organized criminal conduct are embedded in sectoral rather than comprehensive international conventions. These sectoral conventions taken together form the basis—or the building blocks—for comprehensive legal *frameworks* or *regimes* to deal with terrorism and organized crime.

This approach has several advantages. First, this method is “tried and true.” It has been used over the past thirty years in the evolution of the international anti-terrorism and anti-organized crime regimes. Twelve sectoral anti-terrorism conventions have been concluded incorporating narrow operational definitions of prohibited offenses ranging from the taking of hostages to terrorist bombings.¹⁴³ Similarly, there have been three conventions (and one protocol) related to narcotic drugs and psychotropic substances¹⁴⁴ as well as the three separate Protocols to the Palermo Convention dealing specifically with human trafficking, migrant smuggling, and the illicit manufacturing and trafficking of firearms.¹⁴⁵

Second, the building block approach provides a possible means to circumvent the political controversies that have bedevilled efforts to fashion all-inclusive definitions. As noted above, discussions on the *Draft Convention* stalled over disagreements on a comprehensive definition of terrorism. Meanwhile, negotiators of the Palermo Convention dealt with the offenses of human trafficking, migrant smuggling and illicit firearms in three separate Protocols so that, if disagreements arose over one issue, it would kill only that particular Protocol and not the Convention itself.

Finally, this is a dynamic approach to the construction of

143. See *United Nations Treaty Collection: Conventions on Terrorism*, at <http://untreaty.un.org/English/Terrorism.asp> (last visited Jan. 24, 2005) (giving a list of these conventions).

144. See *UN Treaties and Resolutions: UN Drug Control Conventions*, at http://www.unodc.org/unodc/en/un_treaties_and_resolutions.html (last visited Jan. 24, 2005) (giving a list of these conventions).

145. See UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, *After Palermo: An Overview of what the Convention and Protocols Hope to Accomplish*, at <http://www.unodc.org/palermo/sum1.html> (last visited Jan. 24, 2005).

comprehensive legal frameworks for combating terrorism and organized crime. It is flexible in that narrow operational definitions tailored specifically to emerging threats can be incorporated into new sectoral conventions, a process potentially less contentious than revisiting and trying to amend more general definitions enshrined in older conventions. Moreover, it is nuanced in that various offenses can be treated differently. It makes little sense to lump *all* terrorist or organized criminal acts—for example, credit card fraud and contract killing, or tree-spiking and dirty-bomb attacks—together under excessively broad definitions.

The principal disadvantage to the building block approach is that there will always be gaps in the anti-terrorist and anti-organized crime regimes. States will always be playing “catch-up,” forced to define and criminalize new forms of terrorist and organized criminal activity in additional sectoral conventions and protocols as these new threats present themselves. But then, the same would hold true under the umbrella approach. Any comprehensive anti-terrorism or anti-organized crime convention would have to be revisited to ensure that these new forms of terrorist and criminal activity are adequately captured under the existing comprehensive definitions of offenses contained therein.

We do not mean to suggest from the foregoing discussion that efforts to fashion all-inclusive definitions of terrorism and organized crime should be abandoned. Such broad definitions are certainly useful for understanding these phenomena *from a sociological and political standpoint*. They provide the conceptual underpinnings needed to avoid disjointedness in legal regimes and the “tunnel vision” associated with a focus on specific criminal conduct. However, from the standpoint of the *legal regulation* of these phenomena, such general definitions are of limited utility. It is much better to proceed along the path of building up comprehensive legal frameworks to combat terrorism and organized crime one convention, and one operational definition, at a time.

Table 1. Comparative Analysis of U.S. Domestic Definitions of Terrorism

Definition	Perpetrators	Method of Combat	Victim <i>Target of Violence</i>	Target <i>Target of Terror</i>	Purpose	Motive
DOD		Calculated use of unlawful violence or the threat of unlawful violence		Governments or societies		Political, religious, or ideological
FBI		Unlawful use of force or violence	Persons or property	Government, civilian population or any segment thereof		Political or social
State	Sub-national groups or clandestine agents	Premeditated violence	Noncombatant targets	Audience		Political
PATRIOT Act (2001)		Violent acts or acts dangerous to human life that violate U.S. criminal laws: Mass destruction, assassination, kidnapping		Civilian population Government	Intimidate or coerce; Influence policy by intimidation or coercion; Affect conduct	
Subcommittee on Terrorism and Homeland Security (2002)	Sub-national group	Illegitimate, premeditated use of violence or threat of violence	Persons or property	Government Populace	Coerce Instill fear	Political

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