



# TERRORISM AND INTERNATIONAL HUMANITARIAN LAW: A CRITICAL APPRAISAL

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## ABSTRACT

*Always the definitional problem is attached with the concept of terrorism. One man's terrorist is another man's freedom fighter leads to the difficulty to all while defining the terrorism. Therefore, sometimes it becomes quite difficult to distinguish between terrorism and fight for the independence or freedom. Particularly, problem arise when the government or the establishment assume all those activities as terrorism which are against the interest of group capturing the power in the state or government. The same act becomes for another group a liberation movement. Terrorism always resulted in violence. The purpose of violence distinguishes any act whether such an act is terrorism or not. If the violence directed against the protected group of people and objects such a violence is terrorism under international humanitarian law. But, act of violence is directed against the combatant and military installations such an act may be considered military operation rather than the terrorism. Whether particular act is terrorism or not, depends upon the objective, nature and target of an act. 1991 UN General Assembly Resolution could be taken as an example. The Resolution denounced act of terrorism but, in virtually the same breath reaffirmed inalienable right to self-determination and independence of the people under colonial and racist and other forms of the alien domination and foreign occupation. This normative contradiction resulted in the criminalization of only specific acts such as aircraft hijacking, or attack*

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*against internationally protected persons under the various international treaties. Even because of definitional challenges, crime of terrorism was excluded from the ICC Statute.*

**Key Words:** Terrorism, International, Humanitarian Law, Asymmetrical, Exclusion.

## **INTRODUCTION**

Terrorism either in one or in another form, has continuously been existing in the society. It has been inflicting significant damage to society and individuals by using various means, methods, and weapons. Terrorism has been one of the most heinous crimes, striking innocent people and it is particularly associated with “asymmetrical conflict” where one party is militarily much weaker than other. The fundamental strategy of the person or group involved in the terrorist activities, is to draw attention of the people, or government, and the entire world to their cause by committing certain acts of violence. Terrorist group may be a small and militarily weak in comparison to the party against which, the act of terrorism has been carried out. Terrorists often target such a place from where they could obtain large publicity. Terrorists usually choose targets that symbolize what they oppose.

Mostly, acts of terrorism often resulted in the violence and death of innocent people. Terrorism usually causes extensive property damage too. Globalization has brought terrorism into forth as a acute problem. As the globalization characterizes the elimination of time and distance barriers and increases access to information, technology and communication the terrorist groups are certainly benefitted with this opportunity. Such opportunity may be exploited by both legitimate and illegitimate elements. Terrorist groups particularly are in a more beneficial position to cross state borders, acquire and move equipment, obtain information, communicate with each other, and transfer funds transnationally, and create networks globally.<sup>1</sup> The attack against the Twin Tower in United States of America on 11 Sep. 2001 is an example of such unwanted use of the benefit produced out of globalization.

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<sup>1</sup> Charlotte Ku and Paul F. Diehl (ed.), *International Law, Classic and Contemporary Readings* 312 (2<sup>nd</sup> Edn., Viva Books, Pvt. Ltd. New Delhi 2004).

## PROBLEMS OF DEFINITION

What is terrorism? It has been the difficult question in present context as it is perceived differently by different thinkers. Terrorism mainly perceived in its goals and objectives. While any person engaged in a terrorist activity, is perceived as criminal by some people in a society and the same person is perceived as a hero. Terrorism is a concept colloquial meaning that lacks a consensus definition under international law. Because of a saying one “man’s terrorist is another man’s freedom fighter” it has been so hard to find a consensus definition of terrorism.<sup>2</sup>

Terrorism as a universal phenomenon, and having no universal definition, each of the country in the world has been trying to deal with it the way they think appropriate. It has remained as an unsolved question till now, and might be remained unsolved even in the future as no uniform perception found about terrorism. Any act for some people, may be regarded as the fight for the freedom and for some it may be regarded as the terrorism. A person engaged in terrorist activities may be regarded as a freedom fighter for one section of people and the same person may be regarded as the terrorist for another. In this context definitional problem becomes more complex when terrorism has been used even to obtain the legitimate political goal. Many international instruments condemn terrorism and carved out national liberation movement and group struggling for the self-determination in the context of history of colonialism and operation as an exception. UN General Assembly Resolution of 1991 denounced terrorism but in the same time reaffirmed the inalienable right to self-determination and independence of people under colonial and racist and foreign occupation.<sup>3</sup> As a result, this normative contradiction codification efforts have generated number of treaties requiring state to criminalize only terrorist acts such as; aircraft hijacking, or attack against internationally protected persons. Even the architect of Statute of International Criminal Court excluded act of terrorism from the ICC Statute.

Terrorism has been such a terminology having its contextual meaning and use. Sometimes it becomes quite difficult to distinguish

<sup>2</sup> Ronald C. Slye and Beth Van Schaack, *International Criminal Law*, Aspen Publishers 185 (2009).

<sup>3</sup> GA Resolution 46/51, 1902.

between resistance movement and the acts of terrorism. Any movements furthered against the suppressive government may be terrorist activity in the eye of the government but at the same time such movements may be regarded as the liberation movement.

There have been various efforts at the global level for the prohibition of the terrorism. Yet there is no universal treaty that defines a crime of terrorism at large. The League of Nations initiated for the first major attempt to prohibit terrorism after the assassination of King Alexander of Yugoslavia by Croatian separatists in 1934.<sup>4</sup> Convention for the Prohibition and Punishment of terrorism 1937 first time defined terrorism as “ All criminal acts directed against a state and intended or calculated to create a state of terror in the minds of the particular persons or a group of persons or the general public.”<sup>5</sup> The treaty was signed by 24 state parties and India was the only state to ratify the treaty. On the onset of the WW II, no further efforts initiated to bring the treaty into effect and after dissolution of the League of Nations, the treaty was never revived. This abortive start, stimulated states to proceed in a piecemeal fashion by criminalizing various forms of terrorism, such as offences committed on board aircraft<sup>6</sup>, unlawful seizure of aircraft,<sup>7</sup> crime against the internationally protected persons<sup>8</sup>, taking of hostage,<sup>9</sup> crime involving maritime navigation,<sup>10</sup> crime involving nuclear material,<sup>11</sup> terrorist bombing,<sup>12</sup> and financing of terrorism.<sup>13</sup>

Regarding the penal provisions, state parties to the relevant treaties are required; to incorporate prohibition and punishment into their domestic criminal legislation, to treat enumerated act of terrorism as extraditable

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<sup>4</sup> Ronald C. Slye and Beth Van Schaack, *International Criminal Law*, Aspen Publishers 186 (2009).

<sup>5</sup> Convention for the Prohibition and Punishment of Terrorism, 1937, Art. 2.

<sup>6</sup> Convention on the Offence and certain other Acts Committed on the Board Aircraft, 1963.

<sup>7</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

<sup>8</sup> Convention on the Prevention and Punishment of the Crime against Internationally Protected Persons including Diplomatic Agents, 1973.

<sup>9</sup> International Convention against Taking of Hostages, 1979.

<sup>10</sup> Convention for the Suppression of unlawful acts against the safety of Maritime Navigation, 1988.

<sup>11</sup> International Convention for the Suppression of the Act of Nuclear Terrorism, 2005.

<sup>12</sup> International Convention for the Suppression of Terrorist Bombing, 1998.

<sup>13</sup> International Convention for the Suppression of Financing of Terrorism, 2000.

offences, to grant mutual legal assistance in the investigation and prosecution of the prohibited acts in accordance with the broad principle of extraterritorial jurisdiction. As provided for in various treaties dealing with act of terrorism states have attempted to define the terrorism at national level. In United States, an act of terrorism means any activity that- a) involves a violent act or an act dangerous to human life that is a violation of criminal laws of the United State or any states, that would be criminal violation if committed within the jurisdiction of United States or any states and, b) appears to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of the Government by intimidation or coercion, (iii) to affect the conduct of the government by assassination or kidnapping.<sup>14</sup> Similarly United States Army Manual on Counter Terrorism defines it as “the calculated use of violence or threat of violence to attain goals that are political, religious, or ideological in nature. This is done through intimidation, coercion or instilling fear”.<sup>15</sup>

With the outbreak of Maoist Insurgency in Nepal, she came up with a new law prohibiting the terrorist activities. The Act provides for the provision to declare some of the activities as terrorist acts such as; inflicting any danger to the sovereignty, integrity and peace and order of the country or any part of the country or disrupting security of any of the Nepalese diplomatic mission in a foreign land or destructing property of such mission, or to kill or hurt people or to cause killing or hurting people by applying ammunitions, bombs or explosives or inflicting damage or vandalizing the property of people or setting fire into the property of people or using poisonous substances in the commodities of public utility or intimidating people applying such means. Similarly coercing or intimidating or kidnapping people or produce, stockpile, distribute, export, and import any ammunition, bombs or explosives to obtain the terrorist objectives or to aid such acts or provide training for such purpose.<sup>16</sup>

Leaving aside the liberation movement and fight for the right to self-determination, other acts committed purely to terrorize the common

<sup>14</sup> Noam Chomsky, *Pirates and Emperor, the Old and New, International Terrorism in the Real World* Delhi 120 (Viva Books Pvt. Ltd. 2007).

<sup>15</sup> *Supra* Note no. 1, p. 121.

<sup>16</sup> Section 3 of *Terrorist and Disruptive (control and Punishment) Act, 2058*.

people need to be strictly prohibited and must be defined as universal crime under the national criminal jurisdiction. So, some efforts have been made to obtain the uniform definition of terrorism at international level. In this context terrorism is defined as a “strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purpose. That strategy is restored to by state actors either against their own populations or against the population of another country. It is also used by non-state actors such as insurgents or revolutionary groups acting within their own country or in another country. Lastly it is used by ideologically motivated group or individuals or acting inside or outside their country of nationality, whose methods may vary according to their beliefs, goals, and means”<sup>17</sup> But the issue being extensively debatable there is no uniform opinion among the writes on the subject.

### **TERRORISM AND INTERNATIONAL LAW**

Despite various efforts to codify a global prohibition against terrorism under international law, there is no single universal treaty or international instruments defining the crime of terrorism comprehensively. Convention for the Prevention and Punishment of Terrorism 1937 was the first major step taken by the League of Nation for the prohibition of terrorism. This work was ignited with the assassination of King Alexander by Croatian Separatist in 1934. But, causing outbreak of WW II, this treaty could not be brought into effect and the treaty never revived causing the dissolution of League of Nations. This Convention can't be underestimated, as it was the first comprehensive and multilateral antiterrorist convention. Furthermore, it was accompanied by another international treaty providing for the establishment of the first international criminal court for the punishment of terrorists, a precursor of postwar international criminal tribunals such as; Nuremberg and Tokyo.

This convention although aborted, first time gave a definition of terrorism as ‘all criminal acts directed against and intended and calculated to create a state of terror in the mind of particular persons or a group of

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<sup>17</sup> *Supra* Note no. 1.

the persons or general public'. From this abortive start international community induced to incorporate acts of terrorism in a piecemeal fashion in many instruments over last few decades. Such an instruments are;<sup>18</sup>

- Convention on Offence and certain other acts committed on Board Aircraft 1963
- Convention for the Suppression of Unlawful Seizure of Aircraft 1970
- Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation 1971
- Convention on the Prevention and Punishment of Crimes against internationally protected person including Diplomatic Agents 1973
- Convention against the Taking of Hostage 1979
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988
- International Convention for the Suppression of Terrorist Bombing 1997
- International Convention for the Suppression of Financing of terrorism 1999

These instruments provide no comprehensive or universally accepted definition of terrorism. Instead, provide separate and specific definition to the issue in accordance with their nature. Additionally, these instruments set obligation to incorporate the relevant prohibition into their domestic criminal codes, treat enumerated act of terrorism as extraditable offence, grant mutual legal assistance in the investigation and prosecution of the prescribed acts, either to extradite or prosecute offenders pursuant to broad principle of extraterritorial jurisdiction for the state parties.

This definitional proliferation however leads to the conclusion that there is less possibility to achieve universally established definition. However, the multiple definitions of terrorism share certain structural elements;<sup>19</sup>

1. the preparation of violence by enumerated or unremunerated means;
2. targeting of innocent civilians or elements of the civilian infrastructures;

<sup>18</sup> Larry Maybee and Benarji Chakka (ed.) International Humanitarian Law 289 (A Reader for South Asia, 2008, ICRC, Delhi).

<sup>19</sup> Ronald C. Slye and Beth Van Schaack, International Criminal Law, Aspen Publishers 186 (2009).

3. conduct that is undertaken;
  - a. With the intent to cause violence or wanton disregard for the act's consequences
  - b. for the purpose of causing fear of terror, coercing a government or intimidating an enemy
  - c. to achieve some political, military, ideological or religious goal.

All convention instead of defining terrorism comprehensively, list out the various acts as terrorism. International Convention for the Suppression of Financing of terrorism 1999, reinforced by UN SC Resolution No 1373 (2001) in the week following the attack of 9/11 (September 11, 2001) requires all states *inter alia*, suppress financing of the acts of terrorism and freeze financial assets of persons or entities involved in the terrorism. The Convention states<sup>20</sup> that, "Any person commits an offence within the meaning of this Convention; if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:<sup>21</sup>

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Following the UNGA Resolution 51/210 of 17 Dec 1996, Ad hoc committee and its working group on Comprehensive Convention on International Terrorism has proposed the following definition of terrorism; Any person commits an offence within the meaning of this convention if that person, by any means, unlawfully and intentionally causes:

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<sup>20</sup> International Convention for the Suppression of Financing of Terrorism, 1999 Art. 2.

<sup>21</sup> International Convention for the Suppression of Financing of Terrorism, 1999 Art. 2(1).

1. Death or seriously bodily injury to any person; or
2. 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 and the environment, or
3. Damage to property, places, facilities, or systems referred to in paragraph (b) of this Article, resulting or likely to result in major economic loss, a population, or to compel a government or an international organization to do or abstain from doing any act<sup>22</sup>

However, the question of defining the terrorism in comprehensive way may not be solved causing the changing face of the terrorism. Cyber terrorism, cross boarder illegal financial transactions are some of the recent phenomena emerging in this sector. Even in the absence of universally accepted definition some common features of the terrorism can be traced out as follows,<sup>23</sup>

- Terrorism is the violence or threat of violence against ordinary civilians, their life, property, and well-being. No distinction is made between intended target and the bystanders by the terrorist and terrorist attack indiscriminately
- Terrorism is sometimes used to attain a political goal which allegedly could not be achieved by ordinary lawful means within the existing constitutional order
- Terrorism is not the philosophy but is a part of strategy which is carried out by organized groups over a longer period of time
- Terrorist acts are often perpetrated against persons who have no direct connection with intended result
- The purpose of the terrorist acts is to create fear in order to establish conditions, which in perpetrators opinion, should further their cause
- Terrorism is intended to humiliate fellow human beings. It is perceived as a crime by large majority of people. In certain circumstances some persons may attempt to justify such acts as allegedly helping to achieve a goal which in their view, is more important than the prohibition of indiscriminate violence against civilian

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<sup>22</sup> The UN Ad hoc -Committee's Draft Convention, Art., 2.

<sup>23</sup> Supra Note no. 18, p. 289.

## TERRORISM & INSURGENCY

Insurgency may be found closely related with terrorism. Insurgency particularly aims to overthrow the existing oppressive government and insurgents used to apply all available means. Some of the means and methods applied may come within the ambit of terrorism. Sometimes similar types of the activities may not be regarded as terrorism but same activity if crosses the limit in terms of the result it produces it may be regarded as terrorism. Insurgency and Guerilla warfare may be assumed to be the synonyms. One of the primary causes of resemblances between insurgency and terrorism is to have similar types of goals. However specific differences could be examined between terrorism and the insurgency such as; <sup>24</sup>

Insurgency	Terrorism
<ul style="list-style-type: none"> <li>• Insurgency is a political movement, a political effort with a specific aim</li> <li>• The ultimate goal of an insurgency is to challenge the existing government for control of all or a portion of its territory, or force political concession in sharing political power.</li> <li>• Insurgency requires active or tacit support of some of the portion of population. Sometime insurgents may be supported by external powers and require approval from other countries or political entities but not necessarily required.</li> </ul>	<ul style="list-style-type: none"> <li>• Terrorism has not any specific political goal and often not regarded as a movement</li> <li>• Terrorism has no any defined goal or political objective if so that is hidden or concealed and not supported by the common population</li> <li>• But a terror group does not require and rarely has active support or even the sympathy of a large fraction of the population nor they achieve declared support by external powers</li> <li>• Terrorist rather describe themselves as “freedom fighters” or “soldiers” or “activists”</li> </ul>

<sup>24</sup> Terrorism Research, What is Terrorism? (Aug. 15, 2024, 09:05AM), [http:// www.terrorism-research.com](http://www.terrorism-research.com).

Insurgency	Terrorism
<ul style="list-style-type: none"> <li>• Insurgents frequently describe them as “Insurgents” or “Guerrillas”.</li> <li>• Insurgents or Guerilla force sometime may clash directly with the government forces to prove that they can effectively challenge the military effectiveness of the government.</li> <li>• Use of terror is not inherent in insurgency and the Guerrilla warfare. While some of the more successful emergency employed terrorism and terror tactics to destroy government efficiency and mobilizing support to inspire further resistance.</li> <li>• Insurgents need not requiring targeting of non-combatants. They have primary responsibility to distinguish between combatants and non-combatants and require targeting only military objectives.</li> <li>• Insurgency movements and Guerilla forces can adhere to international norms regarding the law of war in achieving g their goals,</li> </ul>	<ul style="list-style-type: none"> <li>• But a terrorist group has nothing to gain from such clash. They do not attempt to challenge government forces directly but act to change perception as to the effectiveness or legitimacy of government itself.</li> <li>• Terrorists use methods that neutralize the strength of conventional forces. Attacking by bombs and mortars on civilian targets or ambushing undefended convoys and assassination of protected individuals are common tactics.</li> <li>• Terrorist do not discriminate between combatant and non-combatants, or if they do, they broaden the category of “combatants” so much as to render it meaningless. e.g. defining all members of nation or a ethnic group or any citizen supporting the nation as combatants</li> <li>• Terrorists often expand their groups of acceptable targets, and conduct operation against new targets without any warning or notice of hostilities</li> </ul>

**REGIONAL ARRANGEMENTS FOR COMBATING TERRORISM**

Despite the various unsuccessful attempts to fight terrorism globally, regional organizations have adopted numbers of binding

instruments in relation to the terrorism. Various regional conventions have defined the terrorism in their regional context basically provide responsibility to punish the perpetrators to domestic courts. Majority of the treaties seek to protect civilians and civilian property. All the treaties establish obligation to criminalize the action defined, and include an obligation to extradite or prosecute. Even without the global consensus on a comprehensive definition, terrorism has not gone unregulated.<sup>25</sup> The regional Conventions have set the definition and the mechanism for the prosecution and punishment of the perpetrators of the terrorist acts.

### **OAU Convention on the Prevention and Combating of Terrorism, 1999**

Organization of African Unity has adopted the Convention on the Prevention and combating of Terrorism in 1999. The convention has given the definition for terrorist acts. The Convention states that;<sup>26</sup>

The “Terrorist act” means:

- (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any member or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
  - (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
  - (ii) Disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
  - (iii) Create general insurrection in a State;
- (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or

<sup>25</sup> International Council on Human Right Policy, Talking about terrorism, Risk and Choice for Human Rights Organizations, Geneva 21 (2008).

<sup>26</sup> OAU Convention on the Prevention and Combating of Terrorism, 1999 Art. 3.

procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

### **Shanghai Convention on Combating Terrorism, Separatism and Extremism 2001**

The convention was adopted in 2001 and six states participated in the convention.<sup>27</sup> Unlike other conventions, the convention instead of listing terrorist acts, defines terrorism.<sup>28</sup> The convention referring to the terrorist acts provided for in the other convention defines terrorism. The convention states that; For the purposes of this Convention:

1) “terrorism” means:

- a) any act recognized as an offence in one of the treaties listed in the Annex to this Convention (hereinafter referred to as “the Annex”) and as defined in this Treaty;
- b) other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict or to cause major damage to any material facility, as well as to organize, plan, aid and abet such act, when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act, and prosecuted in accordance with the national laws of the Parties;

### **European Convention for the Suppression of the Terrorism 1977**

The European Convention similar to other convention gives no specific definition but lists out some acts as terrorism. The convention focuses on the extradition of the offenders in its Article 1. For the purpose of the extradition between contracting states, none of the following offences shall be regarded as political offences, or as an offence connected with the political offences, or offence inspired by the political motives;

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<sup>27</sup> The state parties were Republic of Kazakhstan, the People’s Republic of China, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan, and the Republic of Uzbekistan.

<sup>28</sup> Shanghai Convention on Combating Terrorism, Separatism and Extremism, 2001 Art. 1.

- a) An offence within the scope of the Convention for the Suppression of Unlawful Seizure Aircrafts, signed at The Hague on 16 December 1970
- b) An offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23 September 1971
- c) A serious offence involving an attack against the life, physical integrity, or liberty of internationally protected persons, including diplomatic agents,
- d) An offence involving kidnapping, the taking of hostages, or serious unlawful detention,
- e) An offence involving the use of bombs, grenades, rockets, automatic firearms , or letter or parcel bombs if this use endangers persons,
- f) An attempt to commit any of the foregoing offence or participation as an accomplice of a person who commits or attempts to commits such an offence.<sup>29</sup>

### **SAARC Regional Convention on Suppression of Terrorism 1987**

Terrorism has been taken as a threat against stability and security in the SAARC Region. Particularly The 1986 Bangalore Declaration called for state cooperation to prevent and eliminate terrorism from the region. SAARC Convention aimed at Preventing and eliminating terrorism from the region, refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state, and ensure that perpetrators of terrorist acts do not escape prosecution and punishment by providing for their extradition or prosecution.

SAARC Conventoin recognizes the acts as terrorist acts forbidden by other conventions and lists terrorist acts such as: murder, manslaughter, assault causing serious bodily harm, kidnapping, hostage taking, offence relating to the fire-arms, weapons, explosive and dangerous substances used as means to perpetrate indiscriminate violence involving death or serious bodily injury to person or serious damage to property.<sup>30</sup>

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<sup>29</sup> European Convention for the Suppression of the Terrorism, 1977 Art. 1.

<sup>30</sup> SAARC Regional Convention on Suppression of Terrorism, 1987 Art. 1(e).

## INTERPLAY BETWEEN TERRORISM & INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (IHL) do not concern with the justification of war but refers to legality of means (use of weapons) and method (conduct of hostility) the law comes into play in situation of armed conflict. Beside Four Geneva Conventions<sup>31</sup> and Two Additional Protocols of 1977,<sup>32</sup> IHL encompasses a range of other legally binding instruments and customary law as well. IHL only confined to armed conflict, whether international or non-international in character. While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime. As the principle of distinction is a cornerstone of IHL, persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives.<sup>33</sup> In this context two basic principles are relevant.<sup>34</sup> First, IHL does not prohibit certain use of force, including the taking of lives of enemy combatants in the context of armed conflict. Under the principle of distinction, force may be used against the military objective in the way that affords maximum protection to the civilian and civilian objectives. In other words, civilians are fully protected from the attack. For this some of the rules as follows should be taken into consideration;

- the prohibition of deliberate or direct attacks against civilians and civilian objects,
- the prohibition of indiscriminate attacks and of the use of “human shields,” and
- other rules governing the conduct of hostilities that are aimed at sparing civilians and civilian objects from the effects of hostilities.<sup>35</sup>

Second, the principle of Proportionality seeks attack to be proportionate. Even when force may legitimately be used against enemy

<sup>31</sup> 1949 Geneva Convention I, Geneva Convention II, Geneva Convention III, Geneva Convention IV

<sup>32</sup> Additional Protocol I & II of 1977 to Geneva Conventions.

<sup>33</sup> 89(867) International Review of Red Cross (September 2007).

<sup>34</sup> Talking about Terrorism, Risk and Choices for Human Right Organizations, International Council on Human Rights Policy Geneva (2008).

<sup>35</sup> *Ibid.*

combatants or other military objectives. IHL requires combatants to avoid disproportionate or excessive force. Even the civilian may not be targeted they may not be effected. Therefore, it seeks to minimize the impact of “collateral damage”.

IHL prohibits the taking of hostage of civilians or of persons taking no part in hostilities. At the time of armed conflict violence against civilians or civilian objects could be marked as “terrorist” act because such acts already constitute war crimes under IHL. Individuals suspected of having committed war crimes may be criminally prosecuted by the states under existing bases of jurisdiction in international law; and, in the case of grave breaches Art 50, 51, 130 and 147 of the Geneva Convention I, II, III & IV respectively, and violation of Additional Protocol I, they must be criminally prosecuted. The criminal responsibility is individual, and that neither individuals nor the civilian population as a whole may be subjected to collective punishment, which is, obviously, a measure likely to induce terror.

IHL also specifically prohibits “measures of terrorism” and “acts of terrorism” against persons in the power of a party to the conflict. Thus, the Fourth Geneva Convention<sup>36</sup> provides that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited,” while Additional Protocol II<sup>37</sup> prohibits “acts of terrorism” against persons not or no longer taking part in hostilities. Both of the Protocols additional to the Geneva Conventions also prohibit acts aiming at spreading terror among the civilian population. Additional protocol I<sup>38</sup> and additional Protocol II<sup>39</sup> stipulate that: The civilian population as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. The main purpose of these provisions is to reiterate the prohibition of acts committed in international or non-international armed

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<sup>36</sup> Geneva Convention Relative to the Protection of Civilian Person in Time of War, 1949 Art. 33.

<sup>37</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949 Relating to the Protection of Victim of Non- International Armed Conflict, 1977 Art. 4.2.d.

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949 Relating to the Protection of Victim of International Armed Conflict, 1977 Art. 51(2).

<sup>39</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949 Relating to the Protection of Victim of Non- International Armed Conflict, 1977 Art. 13(2).

conflict that do not provide a definite military advantage. While even a lawful attack against a military objective is likely to spread fear among civilians, these rules prohibit attacks specifically designed to terrorize civilians.<sup>40</sup> Beside Geneva Conventions and their Additional Protocols, few other international Conventions are applicable to the conduct of state actors and the insurgents or revolutionary groups. These conventions are; Genocide Convention of 1948, Statute of International Criminal Court of 1998, and Convention against Torture 1984 and customary rules of international law. The Convention against Torture and the Genocide Convention are applicable in the time of war and peace both. But the Convention consist no effective enforcement mechanisms to Punish international crimes. Consequently, there are ample chances for the criminals not to be punished.

The weak enforcement of international law has also been the long-term problem in absence of effective mechanism. But certain international attempts have been made to provide effective enforcement. Particularly International Criminal Tribunal for the Former Yugoslavia (ICTY) In 1993, International Criminal Tribunal for Rwanda (ICTR) in 1994 were established by UN Security Council to prosecute genocide, crime against humanity and the war crimes taking place within the territory of respective country. For the purpose of punishing the perpetrators of the crime of genocide, crime against humanity and war crimes at international level, the Rome Statute of International Criminal Court has been adopted. Under which the International Criminal Court has already been established at The Hague, Netherlands and initiated some cases too.

Combating terrorism under municipal law is far from satisfaction as there is no any effecting mechanism to combat terrorism. In such a situation some of the states (Algeria, America, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey) were in favour of the inclusion of terrorism in Rome Statute and some others (the League of Arab States) were against the inclusion of the terrorism in the Rome Statutes as international community has not been able to find the acceptable definition of terrorism. Each of the state

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<sup>40</sup> *Supra* Note no. 33, p.723.

presented their own logic for the inclusion of the terrorism in the Rome Statute. But with the fear of politicization, terrorism could not be included within the jurisdiction of the ICC.<sup>41</sup> Therefore, a dream of international community of establishing an effective and strong mechanism to punish international terrorism could not be turned into reality.

## CONCLUSION

The most problematic thing is that there is no any uniform and universal definition about the terrorism. Due to an adage “one man’s terrorist is another man’s freedom fighter” it is quite difficult to make a uniform opinion against terrorism. Terrorism to some is heroism and crime to others. In this context, terrorism means different thing to different people. No matters what it means but it has been used painstakingly to terrorize people. Both State and non-state actors are found involving in terrorizing the common people to achieve the political goals. Individual states do not keep any uniform perception about terrorism. Due to the variation in perception, combating terrorism has been more complex act. Therefore, a comprehensive convention which is value neutral, encompassing all actors and covering all modalities and techniques is needed. Moreover, all states should have the uniform opinion on terrorism. Having provision in national legal system on terrorism is not sufficient to fight against terrorism and not yet found effective. There is a significant legal gap and a coordinate effort to control international criminal conduct. The Chemical Weapon Convention of 1993 and Bacteriological Convention of 1972 do not have any enforcement mechanism applicable to unlawful terrorist use. In this context first, there should be universal legal mechanism adopted, second, uniform definition should be made of certain terrorist acts, third, inter state penal mechanism with universal jurisdiction should be adopted to brought the criminal to the justice, fourth, there should be a correlation between the international legal measures prepared against terrorism or any other organized crimes and transnational organized crimes, fifth, repetition of the provision against terrorism in any other international instruments may further strengthen the international law as an old academic proverb *Repetitio est mater studiorum* (repetition is the mother of learning) states. □

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<sup>41</sup> Kriangsak Kittichaisaree, *International Criminal law* 227 (Oxford University Press, 2001).