

XVIth CONGRESS OF
THE INTERNATIONAL ASSOCIATION OF
DEMOCRATIC LAWYERS

AT

PARIS

JUNE 7 to 11 – 2005

COMMISSION : 2

PAPER : INTERNATIONAL HUMAN RIGHTS & TERRORISM
RE-THINKING THE PRINCIPLES OF GENERAL
INTERNATIONAL LAW

PRESENTER : NIKHIL NARENDRAN

B.A, LL.B. [HONS]
6th Semester Student
National Institute for Advanced
Legal Studies, Cochin, Kerala, India.

**INTERNATIONAL HUMAN RIGHTS AND TERRORISM: RE-THINKING THE PRINCIPLES OF
GENERAL INTERNATIONAL LAW**

BY NIKHIL NARENDRAN¹

Terrorism has always posed a challenge of its own to international lawyers due to its very peculiar characteristics. Unlike a war terrorism has no determinate enemy or a discernable combat field, making it the most feared phenomena among states. The fear that terrorism has been able to instil in a vast majority of states in the past decade has produced a still more powerful counterforce: the massive violations of human rights by states in the name of suppression of terrorism. Arguably, the most important task at present is to clearly delineate the characteristics of both this emerging concepts under international law. It is seen that many a times what is sacrificed at the altar of counter terrorism is nothing but the right to self-determination or the right to resistance, which has been recognized as the most fundamental principle of international law. The paper argues from the standpoint that, if self-determination movements violate principles of international humanitarian law, such acts should be classified as terrorist acts. Further, it is argued that a more powerful response of international law to the mess of terrorism would be to place primary responsibility on the terrorist organization and secondary responsibility on states. It is to vindicate this position that one should classify a terrorist organization as a subject of international law. It is in light of the above propositions that, in the following pages, the author has ventured into rethinking certain aspects of general international law.

Terrorism can be defined as “any act of indiscriminate violence which is directed against an established system of government, which involves, murder, and extortion, destruction of both public and private property, intrusion and disruption of public telecommunication systems (including cyber terrorism).” This is a simple dictionary definition of terrorism, which is inadequate to curb the challenges posed by the global terrorist’s activities.

M. Kalliopi K. Koufa the U.N special rapporteur for U.N commission on Human Rights has differentiated between five different types of terrorism:²

(1) Individual or group terrorism, (2) international state terrorism, (3) state regimes or government terror (4) state sponsored or state supported terrorism and (5) national liberation struggles for self determination. An adequate definition of terrorism is the need

¹ B.A. LL.B (HONS) DEGREE, 6th semester student, National Institute for Advanced Legal Studies, Cochin, India.

² Kalliopi K. Koufa, “ Terrorism and Human Rights”, preliminary report prepared as special rapporteur for Commission on Human Rights, Sub commission on prevention of discrimination and protection of Minorities, E/CN. /SUB.2/1999/27.

of the hour to face international terrorism, which spreads across the world. As we see today, terrorist organizations have an international nexus, which spread across numerous countries and receive financial help from mafias.

A widely accepted definition of terrorism is lacking. The monumental acts of indiscriminate violence may well fall outside any definition. In criminal law, motivation of the actor is generally irrelevant, but when terrorism is concerned, the defendant's domestic criminal liability is converted in to international crime. He may be liable in the domestic law for aggravated offences in domestic law on the basis of a terrorist motive and will usually have less protection of his civil liberties and human rights than if he were not suspected of the terrorist act. It is to be further noted that, a terrorist in one country, may be regarded as a freedom fighter in other country. The perspective from which the act is done may change the nature of act from an act of terrorism to a patriotic one.

This is the main reason why the international community is unable to reach in to conclusion while defining terrorism. There are numerous definitions of terrorism, but none is accepted widely. The definitions of terrorism, suggested by various countries, are generally based on their foreign policy and tend to be politically motivated.³ The true distinction between terrorist activities and struggle for the right of self-determination is to be dealt with while defining terrorism.

It is also not clear in international law whether an act is terrorist only if it is politically motivated.

In 1937 the League of Nations adopted the convention for the creation of an International criminal court ostensibly as an anti terrorism measure.⁴ But the convention never came in to force.

Art 1 (2) of the convention defined terrorism thus

“Criminal acts directed against a state and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public”

³ Victoria Schofield, “Defining Terrorism”, in *Terrorism, The Global Perspective*, Ed by A.S Narang and Pramila Srtivastava, International Institute of Non-Aligned studies, Kanishka Publishers New-Delhi

⁴ Claire de Than & Edwin Shorts, “International Criminal law and Human Rights”, Sweet & Maxwell London p. 233

Cherif Bassiouni defined terrorism in 'legal responses to international terrorism: United States procedural aspects (1988)' as an

"Ideologically-motivated strategy of internationally prescribed violence designed to inspire terror with in a particular segment of a given society in order to achieve a power outcome or to propagandise a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state"⁵

Problems with such general and all-inclusive definitions are that it will criminalize legitimate acts of the people who are genuinely fighting against state oppression

As mentioned earlier, the acts of state does indeed forms terrorism, when it is denying the right of self-determination of indigenous people.

The international law commission has defined the term terrorism to include:⁶

- 1) Any act causing death or grievous bodily harm or loss of liberty to head of state, persons exercising the prerogative of the Head of state, their hereditary or designated successors, the spouse of such persons, or person charged with public functions or holding public opinions when the act is directed against them in their public capacity;
- 2) Acts calculated to destroy or damage public property or property devoted to public purpose;
- 3) Any act likely to imperil human lives through the creation of a public danger, in particular, the seizure of Aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;
- 4) The manufacture, obtaining possession or supplying of arms, ammunitions, explosives or harmful substances with a view to the commission of terrorist act.

The definition is a broad one; however it fails to go into the minute aspects like harbouring, aiding and financing terrorist organisations. It also shares the lacuna in the previous definitions and does not recognise the right of resistance.

⁵ BASSIOUNI, M. Cherif, [ed.]. *Legal responses to international terrorism: U.S. procedural aspects*. Dordrecht, Netherlands: Martinus Nijhoff, (*International Studies on Terrorism*; 4), ©1988

⁶ As cited at Claire de Than & Edwin Shorts, "International Criminal law and Human Rights", Sweet & Maxwell, London p. 233

The Indian draft 1996 on terrorism revised in 2000 defines terrorist "as any person who commits an offence with in the meaning of this convention if that person by any means unlawfully or intentionally does the act intended to cause

- 1) Death or serious bodily injury to any person or serious damage to a state or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system or such destruction results or is likely to result in major economic loss.
- 2) When the purpose of such act by its nature or context is to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act."

It also makes an attempt to classify offences such as aiding or abetting it or any other act contributing to such offences under the convention. Many countries accepted this definition, as it dealt with the minute aspects like harbouring. But the lacuna exists, as it doesn't necessarily deal with the right of resistance.

The Convention of Organisation of Islamic Conference on Combating International Terrorism 1st July 1999⁷ adopted an elaborate definition.

Article 1 paragraph 2 of the Convention of Organisation of Islamic Conference on Combating International Terrorism on 1st July 1999 defines terrorism as: -

" Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorising people or threatening to harm them or impelling their lives, honour, freedom, security or rights exposing the environment or any facility or public or private property to hazards or occupying or seizing them or endangering a

⁷ <http://www.ciaonet.org>, at http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_25.html as on 27th May 2005

national resource or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent states”

But article 2 (a) of the convention provides that “ people’s 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”⁸.

This clause excludes the legitimate acts of struggle against oppression from the ambit of terrorism. But the main flaw of this definition is that, any act, which kills thousands of innocent people, will be justified, if it is for a genuine cause. This view cannot be accepted as it will grant a ‘licence to kill’ to the terrorist organisations.

A perfect yardstick should be there to differentiate between groups fighting for self-determination and terrorist groups.

Terrorism and Right to Self-determination: Determining an Objective Standard of Distinction

The right to self-determination has come to be generally accepted as a right recognized under international law, and is enshrined under numerous multilateral treaties,⁹ United Nations General Assembly Resolutions¹⁰ and Declarations.¹¹ The International Court of Justice [ICJ] has also characterized the right of self-determination as one recognized under international law, both customary and conventional, and has further elevated it to the status of obligation *erga omnes*.¹² The Court observed as follows:

“It suffices for the present purposes to draw attention to this multiplicity of sources and to the fact that they concur in recognizing those rights [to self-determination] as existing erga omnes.”

⁸ *ibid.*

⁹ Art.1 of International Covenant on Social Economic and Cultural Rights, 1966

¹⁰ The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 Oct. 1970, Declaration on the Granting of Independence to Colonial Countries and Peoples (14 Dec. 1960)

¹¹ Universal Declaration of Human Rights, 1948

¹² East Timor Case (Portugal v. Australia), ICJ Rep. 1995

Further, the struggle for self-determination can take many forms: organization of the people into liberation movements, armed struggle even to the extent of resorting to violence and attack on government institutions. Invariably State authorities seek to brand these struggles for self-determination as acts of terrorism, thereby masquerading violation of an *erga omnes* obligation through the cover of lawful response to terrorism. This also demonstrates an unpleasant relationship between two of the most antithetical concepts that developed in international law: the loyalty to one is determined by the disloyalty to the other. Many of the definitions of terrorism place cardinal emphasis on the motive behind terrorist acts. The difficulty of this strand of thinking is that too much political exigencies affect the characterisation of the motive, there by tending to be more subjective than objective. In the present global scenario, even the acts of the violence, which are grotesque, are justified by several nations by branding them as liberation struggle, while other armed conflicts are labelled as terrorism however genuine the cause. Since liberation struggles for right of self-determination (against colonial masters or against oppression of a non-representative state) is lawful under the international law, unlike terrorism, the above proposition must be subject to careful scrutiny.

Article 1(2) of the International Covenant on Civil and Political Rights 1966, reads thus
“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

There is a need to draw the perfect distinction between ‘struggle for right to self-determination’ and ‘terrorism’. The friendly relations declaration and ICCPR can be used as a tool to differentiate these two. As mentioned earlier Art 1(2) of International Covenant on Civil and Political Rights 1966, respects the right of self-determination.

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 Oct.

1970) lays down that every state should promote self-determination rights and to end colonialism.¹³

The safe guard in the declaration goes thus

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

This can be a tool, a restricting one. The safe guard provides that, any claim for self-determination by a group in a nation, which governs by following the principles of equal rights, and self-determination of people, and which is of a representative nature, shall be deemed invalid¹⁴.

So far terrorist attacks have usually been defined as, serious offences, punishable under national legislations by national courts. The numerous international treaties on the matter oblige the contracting states to engage in judicial co-operation for the repression of those offences. This leads as to the question of whether terrorism is being recognized as an international crime under customary international law. An answer to this question should take into consideration any relevant material that reflects the *opinio juris* of States. In the

¹³ “Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order: (a) To promote friendly relations and co-operation among States; and (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;” and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter. Every State has the duty to refrain from any forcible action, which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

¹⁴ Caroline E Foster, Articulating self determination in the rights of indigenous people, EJIL (2001) Vol 12 NO 1 141

first place, we take into account various multilateral treaties, which have declared terrorism [including its aiding and sponsoring] as an offence under law. The preamble of International Convention for the Suppression of Financing of Terrorism¹⁵ and International Convention for the Suppression of Terrorist Bombing¹⁶ have unequivocally characterized terrorism as an offence which should be taken cognisance of by the international community as a whole. Numerous General Assembly Resolutions¹⁷ have also characterized terrorism as an aggravated offence demanding the immediate attention of international community. The Statute of the International Criminal Tribunal for Rwanda, brought into fore by the Security Council, has elevated it to the status of an international crime, placing it at par with genocide, torture and crimes against humanity. It is well accepted that unanimous consensus is not a requirement for customary law to evolve; an overwhelming consensus among States is sufficient. Therefore, there is much force in the contention that terrorism has in fact achieved the status of international crime under customary international law, notwithstanding its unfortunate exclusion as an international crime under the Rome Statute.¹⁸ Further, as a logical extension, it may be safely argued that at least trans-national, state-sponsored or state-condoned terrorism amounts to an international crime,¹⁹ and which is already contemplated and prohibited by international customary law as a distinct category of such crime.²⁰

To cope up with the rapid evolution of terrorism as an evil phenomenon presenting nightmares to the adherents and students of international law, one needs to correspondingly increase the pace of the progressive development of international law. It has become imperative that terrorist organisations should be given the status of

¹⁵ International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

¹⁶ International Convention for the Suppression of Terrorist Bombing, G.A. Res. 164, on May 23rd 2001.

¹⁷ RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [on the report of the Sixth Committee (A/49/743)] 49/60. Measures to eliminate international terrorism, RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [on the report of the Third Committee (A/54/605/Add.2)] 54/164. Human rights and Terrorism, Resolution adopted by the General Assembly [on the report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (A/59/766)] 59/290. International Convention for the Suppression of Acts of Nuclear Terrorism

¹⁸ Rome statute of the international criminal court 1998

¹⁹ India, Srilanka and Turkey has proposed that terrorism should be treated as an international crime, falling under the jurisdiction of I.C.J. A/CONF.183/C.1/L 27

²⁰ Antonio Cassese, Terrorism is also disrupting some crucial legal categories of international Law, EJIL (2001), Vol 12, NOS, 993-1001

international persons or subjects capable of shouldering international responsibility and meeting the liability for its action. It enables one to place primary responsibility for unlawful acts on terrorist organisations. To prevent the harbouring of terrorism, secondary liability can be imposed on states sponsoring or harbouring terrorism. An international tribunal, possibly constituted by a resolution of the U.N General Assembly, can try terrorist organisations for their acts of terror.

Meanwhile one should not be oblivious of the fact that condemnation of, and abhorrence to, terrorists acts is derived not so much from the motive as compared to the nature of the acts. This leads us to re-think certain aspects of the movement, which involves genuine self-determination liberation struggles. It may be rightly argued that the blurring line of distinction between violent acts bordering on terrorism and armed struggle of liberation movements is not so indivisible. International Law and its lawyers should be able to accept the fact that when the armed struggle of liberation movement violates established principles of international humanitarian law, they should be classified as terrorist activities.²¹

We have already demonstrated the *erga omnes* nature of the obligation incumbent upon all States to suppress terrorism. As a natural corollary, any State which indulges in aiding, sponsoring or harbouring terrorist organisations is in breach of its international obligations. However more important is the fact that once the obligation to repress terrorism is conceived as *erga omnes*, the nature of this obligation or norm is elevated to the status of *jus cogens*.²² Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defence of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in

²¹ The author stresses on the point, that for each and every armed conflict, the Humanitarian Law should be applicable. This should be binding on the groups, which struggle for their right of Self Determination.

²² International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes*, which are inderogable.... *Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*. See, M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: *JUS COGENS* AND *OBLIGATIO ERGA OMNES*, 59 *Law & Contemp. Probs.* 63.

time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes.²³

Terrorism And Obligation to Suppress It: Concluding Remarks

Once we have described terrorism as an international crime, and the duty to suppress it as an obligation *erga omnes*, then numerous questions can be raised as to the nature and character of this obligation upon States to suppress terrorism. An inescapable question is: whether a State can intervene in another State on the ground that such other State has failed to suppress international terrorism?

This question is to be answered in the negative, because the right of a State to non-intervention is as much a peremptory norm as the duty and obligation upon States to suppress terrorism. Use of force against a State is lawful only as an act of self-defence in response to a direct armed attack and as per the requirements prescribed by Art.51 of the U. N. Charter. Instead we may suggest that the setting up of an international court for trying the international crime of terrorism is a good alternative. The granting of an *erga omnes* obligation doesn't mean that any state can intervene in to another state for the suppression of terrorism, but it indeed gives the nations a right²⁴ to raise their claim in an international tribunal.

Finally, one needs to re-emphasise the fact that a multilateral legal framework, which should be nothing less than a convention with overwhelming State ratification, is a prerequisite to connect the disjointed corners of the self determination – terrorism conundrum. Unless such a progressive development of international law in the realm of rights, liabilities and international organisations is not effected we will continue to be subjugated by the notion that we live on one Earth but in many worlds.

²³ Ibid.

²⁴ This is an evolving aspect of international law, discussed by J Weeramantry in East Timor Case (*Portugal v. Australia*), ICJ Rep. 1995