

NOTES AND COMMENTS

Terrorism and the International Criminal Justice System

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Abstract

Terrorism has always haunted mankind. In recent years, terrorism has become a global issue. States are frequently becoming victims of terrorist activities. The consequence of terrorism is that it violates human rights. The attack on World Trade Centre tower, New York in September 11, 2001 has made the world consider terrorism as a matter of serious concern. At present, international terrorism is a matter of grave concern. There have been adoptions of many Conventions to deal with terrorism. However, there is a hurdle to it. This hurdle is because there is no uniform definition of terrorism.

Keywords: *international terrorism, terrorism, human rights*

I. Introduction

“Terrorism has been a dark feature of human behavior since the dawn of recorded history. Great leaders have been assassinated, groups and individuals have committed acts of incredible violence, and entire cities and nations have been put to the sword- all in the name of defending a greater good. Terrorism, however defined, has always challenged the stability of societies and the peace of mankind of everyday people. In the modern era, the impact of terrorism- that is, its ability to terrorize- is not limited to the specific locales or regions where the terrorists strike.”² Terrorism as a concept is not of new origin. Incidents like assassinations, conquest can be found in Bible. State terrorism can be traced to the Roman Empire. Mention of “cases exist of movements in the ancient and medieval Middle East that used what modern analysts would consider to be

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² G. Martin, “*Understanding Terrorism Challenges, Perspectives, and Issues*”, Sage Publications, p.2

terrorist tactics.”³ The term ‘terrorism’ was coined by Edmund Burke during French Revolution.

In 1934, the issue of international terrorism was raised after the King of Yugoslavia was killed by certain terrorists and “Yugoslavia formally raised a finger against Hungary in the league of Nations for connivance in the assassination of the King.”⁴ After this, the League of Nations (LON) adopted the Convention on the Prevention and Punishment of Terrorism. However, this convention never saw the light of the day. The matter of international terrorism came up before the United Nations (UN) when private individuals carried out activities which jeopardized civil aviation during the international flights. This resulted in adoption of many conventions like Tokyo Convention, 1963; The Hague Convention, 1970 and the Montreal Convention, 1971. In 1972, the General Assembly (GA) of the UN set up an Ad Hoc Committee on Terrorism comprising of 35 members. This Ad Hoc Committee in 1985 condemned “all acts, methods, and practices of terrorism”⁵ as criminal act. The GA also adopted Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; International Convention for the Suppression of Terrorist Bombing, 1997 and the International Convention for the Suppression of the Financing of terrorism, 1999.

Consideration of terrorism as an “instrument of State control persisted until the end of the Second World War.”⁶ After the Second World War “terrorism became mired in the ideological cleavages and proxy violence of the Cold War. Whereas developed States focused on non-State terrorism, developing and socialist States emphasized ‘State terrorism’ by imperial powers, and regarded anti-colonial violence either as an exception to terrorism, or as justified by colonialism.”⁷ In later part of 20th century emerged the idea of “fundamentalist

³G. Martin., “*Understanding Terrorism Challenges, Perspectives, and Issues*”, Sage Publications, p.5

⁴K.C. Joshi, “*International Law & Human Rights*”, Eastern Book Company, Lucknow, p. 277

⁵J.G. Starke, “*Introduction to International Law*”, Butterworths, p. 103.

⁶B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.1.

⁷B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.2.

religious terrorism”⁸. After the September, 11 (2001) attack, there developed a trend to conflate “disparate terrorist threats into a homogeneous global pandemic, erasing the specificity of the concrete conditions giving rise to different situations of violence.”⁹

There is no denial to the fact that terrorism is a threat to the society, human rights, peace and security. The international community condemns terrorism. However, there is failure on the part of the international community in defining terrorism.

II. Hurdles in Defining Terrorism

After the Second World War, there have been debates at the UN regarding the definition of terrorism. But there was no conclusion reached as to the definition of terrorism. This was because the newly formed third world countries had their reservations in arriving at a conclusion for the definition of terrorism. They wanted that the violent activities of the freedom fighters should not come under the definition of terrorism and opined that “the notion that no treaty could be adopted to ban terrorism unless at the same time the historical, economic, social, and political causes underlying resort to terrorism were studied in depth and thrashed out”¹⁰.

Even though there was failure in defining terrorism, the activity of terrorism was condemned in many treaties. For example, Article 33(1) of the Fourth Geneva Convention, 1949 provided that ‘collective penalties and likewise all measures of intimidation or of terrorism are prohibited’. Similarly, in Article 4(2)(d) of the second Additional Protocol, 1977 on the Internal Armed Conflicts prohibited ‘acts of terrorism’ at any time and in any place whatsoever. Also, Article 4 of the International Criminal Tribunal for Rwanda, 1994 dealt with situations of acts of terrorism. The focus was on “prosecution or extradition of perpetrators of certain designated acts such as the hijacking of

⁸B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.2.

⁹B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.3.

¹⁰as cited in Cassese, A., *“International Criminal Law”*, Oxford University Press, p. 120.

aircraft, acts of violence against aircraft, airports, ships and oil platforms, attacks on diplomats or hostage taking”¹¹

The UN GA set up an Ad-hoc Committee on International Terrorism for the purpose of defining terrorism between the year 1972 and 1979. This Ad- hoc Committee failed to define terrorism as voices were raised by the third world countries not to include in the definition of terrorism the national liberation movement. “It appeared than and later that, quite often according to a commonplace of our times, ‘one person’s terrorist is another person’s freedom fighter.”¹²

The term terrorism in 1990 ‘reappeared under the pressure of politicians, the media and NGOs, first of all in press releases, unilateral declarations or other so-called ‘soft law’ texts, then in international conventions.”¹³ In 1977, the Council of Europe adopted European Convention on the Suppression of Terrorism. However, this Convention did not provide definition of terrorism. After twenty of the adoption of this Convention, UN in 1999 drafted International Convention on the Suppression of Terrorist Bombings. This Convention of 1999 also did not define terrorism. In 1999 in another convention titled International Convention for the Suppression of the Financing of Terrorism¹⁴, there was an attempt to define terrorism.

Even after the deadly September 11 attack on the World Trade Center, New York, the situation remains the same. There is no consensus arrived regarding the definition of terrorism. “The Security Council, in its resolution 1368 of 12 September 2001, called on the international community to ‘redouble their efforts to prevent and suppress terrorist acts. Later on Resolution 1373 of 28 September 2001, the council decided upon a certain number of appropriate measures to be taken by States. However, the Council failed to provide any clarification as to what is meant by ‘terrorism’. Moreover, India presented a

¹¹G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

¹²G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

¹³G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

¹⁴G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

proposal to the UN General Assembly for comprehensive convention against international terrorism, which has been unsuccessful due to the failure to agree on the scope of the Convention, that is to say, once again, on a definition of terrorism.”¹⁵

The concept ‘one man’s terrorist is another man’s freedom fighter’ has obstructed in providing definition of terrorism.

III. Necessity of Dealing Terrorism at the International Level

Terrorism “undermines human rights, jeopardizes the state and peaceful politics, and threatens international peace and security.”¹⁶ Thus, terrorism is a serious crime which is a concern at the international level. Terrorism needs to be dealt at the international level i.e at the International Criminal Court (ICC) established by the Rome Statute (Statute).

The Statute in Article 36(3) mentions “the judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.” Under Article 36(8) (ii) of the Statute it mentions that judges to be selected according to ‘equitable geographical representation’. This unbiased feature of ICC will help in dealing with cases relating to terrorism. This is because the States will not be able to play a role in dealing with crimes of terrorism.

Inclusion of terrorism as a crime in the Statute will be beneficial to States that are small and have weak governments. Small States who do not have sufficient financial resources to carry out proceedings related to terrorism cases will be benefitted. Also States with weak governments who may be unable to carry out proceedings related to terrorism cases because of adverse political consequences will be benefitted by such inclusion of terrorism as a crime in the Statute. Also inclusion of terrorism as a crime in Statute will be beneficial in situations where the governments of States find it difficult to deal with

¹⁵G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

¹⁶B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.7.

terrorists. As in today's time terrorism operates all throughout the globe, there is a need for ICC to deal with terrorism.

A. Definition of Terrorism- The Need

Terrorism at today's time is a global concern that needs to be dealt with effectively. The concern that arises before the world at large is to arrive at a definition for terrorism. Arriving at a definition for terrorism will help in preventing the effects of terrorism.

There can be no denying of the fact that terrorism has become a constant element of our time. Also the nature of the acts of terrorism has undergone a sea change from what it was in olden times. Technology has helped a lot in bringing about the change in the activities of terrorists.

“Defining terrorism as a discrete crime normatively recognizes and protects vital international community values and interests, symbolically expresses community condemnation, and stigmatizes offenders.”¹⁷

Terrorism results in gross violation of human rights. “If terrorism is thought to threaten international peace or security, an international definition must be limited to acts capable of that result- for instance, because of its cross-border or multinational preparation or effects, the involvement of State authorities, or injury to other vital international community values or interests.”¹⁸

In the book *Defining Terrorism in International Law*, the author Ben Saul has given a definition of terrorism. He defines terrorism as:

- a) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
- b) Where committed outside an armed conflict;
- c) For a political, ideological, religious, or ethnic purpose; and
- d) Where intended to create extreme fear in a person, group, or the general public, and:
 - (a) seriously intimidate a population or part of a population, or
 - (b) unduly compel a government or an international organization to do or to abstain from doing any act.

¹⁷B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.7

¹⁸B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.61.

- e) Advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act.¹⁹

According to Paul Wilkinson terrorism consists of the following major characteristics:

- i. Terrorism is premeditated and aims to create a climate of extreme fear or terror;
- ii. Terrorism is directed at a wider audience or target than the immediate victims of violence;
- iii. Terrorism inherently involves attacks on random and symbolic targets, including civilians;
- iv. The acts of violence committed are seen by the society in which they occur as extra-normal, in literal sense that they breach the social norms, thus causing a sense of outrage; and
- v. Terrorism is used to influence political behavior in some way- for example, to force opponents into conceding some or all the perpetrators' demands to provoke an overreaction, to serve as a catalyst for more general conflict, or to publicize a political cause.²⁰

It is said that terrorism has a “chameleon- like character.”²¹ Depending upon the circumstances in which terrorism is committed²², it can be included in varied categories of crime like war crime or crime against humanity under ICC. The question that arises is whether it is right to include terrorism under the many categories of crime or should terrorism be considered as a separate crime altogether under ICC? Let us analyze what happens if we include terrorism in the varied categories.

Let us now analyze these issues and then try to come to a conclusion.

¹⁹Ben Saul, *“Defining Terrorism In International Law”*, Oxford University Press, pp.65-66.

²⁰as cited in Joshi, K.C., *“International law & Human Rights”*, Eastern Book Company, p. 278.

²¹as cited in Cassese, A., *“International Criminal Law”*, Oxford University Press, p. 125.

²²See Cassese, A., *“International Criminal Law”*, Oxford University Press, p. 125.

Terrorism as 'war crime'

International Humanitarian Law says that act of terrorism is “prohibited and criminalized so long as it is directed against civilians.”²³ The Fourth Geneva Convention under Article 33(1) prohibits acts of terrorism committed against civilians who are eligible for the status of protected persons, whether they are perpetrated by the armed forces of a belligerent’s territory as internees, or in an occupied territory. The Second Additional Protocol of 1977 in Article 4 (2) (d) prohibits acts of terrorism against persons or civilians who ceased to be a part of the internal armed conflicts. “In addition, under both the First and Second Additional Protocol ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’ (Articles 51(2) and 13(2) respectively.)”²⁴

Terrorism as 'crime against humanity'

‘Crimes against humanity’ comprises of acts like extermination, murder, deportation, torture, imprisonment, sexual slavery, rape, enforced prostitution. Such acts will be considered as ‘crime against humanity’ when done “as part of widespread or systematic attack”²⁵ and “the perpetrators are aware or cognizant of the fact that their criminal acts are part of a general or systematic pattern of conduct.”²⁶

Murder, extermination, deportation, imprisonment, torture, rape sexual slavery, enforced prostitution etc. amounts to crimes against humanity. These acts when committed against the civilian population will amount to crime against humanity only when committed ‘as part of widespread or systematic attack’²⁷ and ‘the perpetrators are aware or cognizant of the fact that their criminal acts are part of a general or systematic pattern of conduct.’²⁸ But what about acts done by the terrorists which are aimed at others than civilians? How can such acts be brought under the category of ‘crime against humanity’? The Statute under Article 7 does not mention about it. Thus within the framework of

²³See Article 7 of the Rome Statute of the International Criminal Court 1998.

²⁴Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

²⁵See Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

²⁶Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 127.

²⁷Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 127.

²⁸See Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

international criminal law, it is not possible to consider terrorism under the category of ‘crime against humanity’.²⁹

Terrorism as ‘separate category of crime’

Given the consequence that terrorism has, it is time that terrorism be considered as a ‘separate category of crime’. In order to curb down the menace of terrorism, there is need of international support. In the book *International Criminal Law*, the author Antonio Cassese mentions that ‘all acts of terrorism are not international in nature.’ When the crime of terrorism is carried out within a state then the act of terrorism is punishable and dealt by the state itself.³⁰ “Terrorism acts amount to international crimes when, first, they are not limited in their effects to one State solely, but transcend national boundaries as far as the persons implicated, the means employed, and the violence involved are concerned; and secondly, they are carried out with the support, toleration or the acquiescence of the State where the terrorist organization is located or of a foreign State. The element of State promotion or State toleration, or even State acquiescence due to inability to extradite the terrorist organization, seems crucial for elevating the offence to the rank of international crime. This is because it is at this stage that terrorism stops being a criminal activity against which States can fight by bilateral or multilateral cooperation, to become (and this is the third element) a phenomenon of concern for the whole international community and a threat to peace.”³¹

During drafting of the Statute, there was interest for including in it provision of terrorism. However, it could not be achieved. In September 2001, with the terror attack on World Trade Centre “the world has awakened to a new danger; terrorism after the September attacks is a totally different phenomenon from that which existed before the attacks in the United States. This is not merely due to the scale of the atrocities, but also because these actions took place on

²⁹Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 129.

³⁰B. Ganor, *The Changing Threat of International terrorism*, <https://www.ict.org.il/Article.aspx?ID=849#gsc.tab=0> (Dec 10, 2019).

³¹Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 129.

American soil. The message conveyed was that no place is safe; not even a superpower is immune.”³²

The threat that terrorism poses to international peace and security demands that terrorism be categorized and recognized as ‘a separate category of crime’ and not as ‘war crime’ or ‘crime against humanity’.

IV. Conclusion

There is no denial to the fact that terrorism poses great threat to humanity. With the ever expansion in terrorist activities it has demeaned human rights. The international community has put a brave fight against terrorism. However, there being no definition of terrorism at the international level is creating hindrances in putting up an effective fight against it. The international community should come up with a definition of terrorism by doing away with the concept of ‘one person’s terrorist is another person’s freedom fighter’. As already discussed in the paper, absence of definition of terrorism should not act as a limitation for incorporating terrorism in the Statute. Terrorism needs to be included under the jurisdiction of ICC as a separate category of crime. Such inclusion will help in effectively combating against terrorism. But this does not mean that there is no need for defining terrorism. Coming up with a definition of terrorism will help in a uniform understanding of terrorism. Including terrorism in the Statute will send a strong message that the international community condemns terrorism and they are together in the fight against terrorist activities.

³²B. Ganor, *The Changing Threat of International terrorism*, <https://www.ict.org.il/Article.aspx?ID=849#gsc.tab=0> (Dec 10, 2019).