Combating Terrorism under Human Rights and Humanitarian Law Regime

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* Our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension.¹

Introduction

Terrorism being indefensible, the need to combat it can hardly be overemphasized for terrorists seek to destroy peace, freedom and above all rule of law and thus represent a considerable challenge to the international community. Similarly, the measures to counter terrorism, if devoid of the norms of human rights and humanitarian law, might be fatal for very principles and values that terrorism threatens. Nevertheless, in recent years, many states have adopted various measures to combat terrorism which have a corrosive effect on the rule of law, sustainable peace, and guarantee to enjoy human rights. It appears that the policy makers of such states are either failing to understand or willfully disregarding, for political or other motives, the need to respect human rights and observe the norms of international humanitarian law while combating terrorism. In this context, the present paper starts with the conviction that effective counter-terrorism measures and the promotion of human rights and humanitarian law are not conflicting goals, but complementary and mutually reinforcing. The paper argues that existing norms of human rights and international humanitarian law should not be compromised on the plea of the fight against terrorism since the best long-term guarantee of security is embedded in these norms. Acting outside the realm of these norms, while responding to terrorism, will ultimately prove counterproductive.

In what follows, the norms regarding application of human rights and humanitarian laws in the responses to terrorism will be summarized, the contemporary pretexts of undermining these norms will be presented and examined, and finally the consequences of marginalizing these norms will be analyzed.

Applicability of Human Rights and Humanitarian Law in the Responses to Terrorism

To what extent human rights and international humanitarian law are relevant in the fight against terrorism depends on the determination of two issues, namely, (a) delimitation of the extent of application of these two sets of law and their interplay, and (b) relevance of such delimitation in the responses to terrorism.

As to the first issue, the answer is quite simple - while international humanitarian law applies only in situation of armed conflict, human rights law protect the individual at all times. This is more because the boundaries between international human rights law and international humanitarian law are not contiguous, but rather overlapping.\(^2\) Though the emergence of an armed conflict is a *sine qua non* for the applicability of international humanitarian law, this context does not suffice to exclude the implementation of the regime of the protection of human rights. Therefore, to claim that, in time of war, human rights obligations of a state are replaced by the norms of IHL is not tenable. However, flexibility embedded in the international human rights instruments allows the states to impose limitations on the enjoyment of certain human rights. However, while imposing such limitations, states must respect a number of conditions.\(^3\) In addition to respecting the principles of equality and non-discrimination, the limitations must be prescribed by law, in pursuance of one or more specific legitimate purposes and “necessary in a democratic society”.\(^4\) Moreover, in times of declared national emergency, international human rights law also permits derogation of certain


obligations to a certain extent. The provisions of derogation from human rights obligations, being restrictive and extra-ordinary in nature, must be interpreted in a strict manner. Article 4 of the International Covenant on Civil and Political Rights (ICCPR)\(^5\) sets out the formal and substantial requirements which a state must fulfill to derogate legitimately from human rights obligations. These substantive requirements demand that the option of derogation be resorted to only when life and existence of the nation is threatened and so long it is required by the exigency of situation. Moreover, there are certain human rights as specified in the said covenant which must not subject to derogation. Moreover, the UN Human Rights Committee, building on states’ other obligations under international law, has developed a list of elements that, in addition to the rights specified in article 4 of the ICCPR, cannot be subjected to lawful derogation.\(^6\) Apart from these permissible limitations and derogations, the obligations under international human rights law and international humanitarian law co-exist even during war time. On the other hand, the rules of international humanitarian law are non-derogable, subject to very limited exceptions.\(^7\) Therefore, international humanitarian law is one, although not the only, baseline below which derogation of rights may not go.\(^8\)

If we move to address the second issue, it appears that counter terrorism measures may differ widely, ranging from action taken by the United Nations Security Council to prosecution of presumed terrorists at the domestic level.\(^9\) However, in most of the cases, the debate is whether response to terrorism should be understood as ‘law enforcement’ or as ‘war’? The choice between these paradigms has profound implications for human rights – namely, whether we have entered the territory of derogation or not.\(^10\) While combating terrorism, if a state officially proclaims public

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6  See, Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001.

7  Under very specific circumstances, certain rules of international humanitarian law can be the subject of derogation or restriction based upon reasons of national security, military necessity or imperative military reasons. See, ICRC, *Commentary on the Additional Protocols of 8 July 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, p.392.


emergency or declares war (since war implies the state of public emergency), it can lawfully derogate from its human rights obligations to the extent permitted by international standard. If the fight against terrorism is not fought in the form of armed conflict between organized armed groups, humanitarian law has no manner of application.\textsuperscript{11} If a state, however, uses the term ‘war’ to describe its law enforcement operation against terrorism, the existence of war cannot be assumed in the true sense of terms and as such international humanitarian law would not be applicable. In fact, the notion of ‘war’ against terrorism is a political slogan – comparable to the ‘war’ against poverty or the ‘war’ against AIDS. However, the attack on a third country may transform such a campaign into an armed conflict in the sense of international humanitarian law.\textsuperscript{12}

**Recent Techniques of the Responses to Terrorism for Undermining Human Rights and Humanitarian Law and their Justifications**

During the last one decade, particularly after the atrocious events of 9/11, new interpretations are being offered and new techniques are being employed to deviate from the state obligations under human rights and IHL regime. These include, \textit{inter alia}, characterization of crimes as ‘armed conflict’, resorting to war by avoiding law enforcement measures, declaration of unjust war through wrong interpretation of self-defence right, and unjust attack on the efficacy of IHL. These interpretations and techniques are posing potential threats to the very essence and existence of the basic norms of human rights and IHL. A critical examination of these innovative techniques in the light of human rights and humanitarian law jurisprudence, as presented in the following paragraphs, will expose that the interpretations offered to justify these techniques have hardly any legal basis.

‘War on terror’ related ‘hostilities’ outside Afghanistan (and Iraq) are, mostly, not armed conflicts at all.\textsuperscript{13} Nevertheless, these hostilities are frequently being characterized as ‘armed conflict’ and thus the fact that terrorist attacks constitute crime is being suppressed. There is no denying the fact that international standards do not offer a quick-fix answer to the question - whether a terrorist


attack fall within the definition of ‘armed conflict’ or not. This is due to absence of any legal standard that defines ‘terrorist attack’. However, according to the existing humanitarian law standards, the determination as to the existence and nature of an armed conflict is an objective one, based upon the nature and degree of hostilities, irrespective of the purpose or motivation underlying the conflict.\textsuperscript{14} Traditionally, acts of international terrorism are not viewed as crossing the threshold of intensity required to trigger application of the laws of armed conflict.\textsuperscript{15} Similarly, terrorist acts by private groups are not viewed customarily as creating armed conflicts.\textsuperscript{16} In this context, how to characterize the attacks of 9/11 allegedly initiated by Al Qaeda, a private group?

The U.S. President George W. Bush, while addressing the Congress on 20 September 2001, said: “On September 11\textsuperscript{th}, enemies of freedom committed an act of war against our country”.\textsuperscript{17} Herein, 9/11 attacks are rhetorically characterized as ‘war’, i.e., international armed conflict, although according to international law the least that is required for war is two states.\textsuperscript{18} In fact, as a non-state, Al Qaeda could not be considered legally competent to declare war on a state and accordingly the attacks of September 11 could not have initiated an international armed conflict.\textsuperscript{19} Can these attacks, then, be characterized as ‘non-international armed conflict’? The answer is an emphatic ‘no’. This is because, according to the Additional Protocol II of the Geneva Conventions,\textsuperscript{20} non-international armed conflict requires control of the High Contracting Party’s territory by an armed group.\textsuperscript{21} Since the United States is not a party to the said Protocol and its territory was not

\textsuperscript{14} One narrow exception to this rule is prescribed in article 1(4) of Additional Protocol I, which incorporates within the classes of conflicts governed by the Protocol “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”. See, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978, article 1(4).


\textsuperscript{16} Leslie C. Green, \textit{The Contemporary Law of Armed Conflict}, Manchester University Press, Manchester, 2000, p.56.

\textsuperscript{17} Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347 (September 20, 2001).

\textsuperscript{18} See, Common article 2 of the 1949 Geneva Conventions.

\textsuperscript{19} Avril McDonald, “Defining the War on Terror and the Status of Deatinees: Comments on the Presentation of Judge George Aldrich”, \textit{4 Humanitäres Volkerrecht}, 2002, p.207.

\textsuperscript{20} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609.

\textsuperscript{21} Article 1.
controlled by the alleged perpetrators of 9/11 attacks, there is no reason to characterize the attacks as ‘non-international armed conflict’. 22

Such a characterization is not consistent with the need to combat terrorism. In fact, regarding the terrorist attacks dated September 11, 2001 as ‘international armed conflict’ amounts to acknowledging the legitimacy of attack on the Pentagon as it was a military object. Moreover, by characterizing terrorist attacks on U.S. targets as armed attacks . . ., the U.S. is recognizing in Al Qaeda and other terrorist organizations a higher status than they actually possess under international law, and serving to give them legitimacy. 23

Characterization of terrorist acts as ‘armed conflict’ not only presents a misapplication of international humanitarian law but also operates as a tool in the hands of powerful states to claim, in a political rather than legal manner, unlawful derogation of human rights obligations. Because of such characterization, a state may resort to war as a response to terrorism by avoiding law enforcement measures. But, according to international standards, acts of terrorism which are committed outside of armed conflict generally constitute crimes under domestic and, depending on the circumstances, international criminal law and thus should be regulated through the enforcement of domestic and international criminal law. 24 There is another area of concern which is sometimes claimed to justify the avoidance of law enforcement measures. Can a violent terror like a suicide bomber who is prepared to die be deterred by the threat of prison? The answer is: “Yes”, with time. Punishment of a suicide bomber, if inflicted after due process of law, can act as a deterrent for other potential future suicide bomber. Contrarily, dealing with a suicide bomber in a manner devoid of due process of law can exert popular sympathy and can motivate many a people to resort to terrorism.

Declaration of war against terrorism also lacks sound legal foundation. Following the attacks of 9/11, the U.S. administration started the war. The National Security Strategy of the United States of

America 2002 states: “The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism— premeditated, politically motivated violence perpetrated against innocents.”

Herein, the use of the term ‘war against terrorism’ seems very strategic and significant. By speaking of ‘war’, the Bush administration is trying to limit the relevance of human rights law. On the other hand, by speaking of ‘terrorism’, they are also denying the relevance of international humanitarian law. This point is a bit of a misnomer. In fact, ‘terror’ or ‘terrorism’ cannot be a party to an armed conflict and one cannot be at war with terrorism per se, for terrorism is a tactic, a method. In fact, by combing the two into dubious notion of ‘war on terror’, the administration is seeking to create a gray zone outside the ambit of law.

To impose war on sovereign states, the war on terror is relying on the right of self-defence acknowledged by article 51 of the UN Charter. Such reliance is also misconceived. The International Court of Justice in the Nicaragua judgment and the Nuclear Weapons advisory opinion made it clear that exercise of self-defense right must meet the tests of ‘necessity’, ‘proportionality’, and ‘immediacy’. In the advisory opinion on the Wall case, the International Court of Justice seemingly required that an armed attack should be committed by a state or be imputable to a foreign state to come within the purview of article 51 of the UN Charter. It may often be rather difficult to legally attribute terrorist acts to the state hosting the terrorist organization.

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25 Available at: www.whitehouse.gov/nsc/nss3.html (last visited on July 11, 2008).
30 Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion, 1986, ICJ Reports, para. 41.
31 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 139.
Nicaragua, the International Court of Justice set a high standard for attribution of private acts to states. In another recent case, the Court has affirmed this proposition.

With sheer disregard to these norms, the U.S. and its allies attacked Afghanistan in response to 9/11 attacks and claimed their move as an exercise of their right of self-defense. As a matter of fact, by attacking Afghanistan, the option of law enforcement against the alleged perpetrators of 9/11 attacks was ignored, especially when such attacks constitute crimes rather than armed conflict. As such, the war against Afghanistan does not meet the criteria of ‘necessity’. Furthermore, responding to attacks dated 11 September 2001 through air strikes against Afghanistan on 7 October 2001 does not demonstrate any linkage of ‘immediacy’. The obvious conclusion, then, is that armed attack against Afghanistan cannot be defended as an exercise of self-defence right as permitted by article 51 of the UN Charter. Rather, this attack constitutes a violation of territorial integrity of a sovereign state and accordingly a clear violation of article 2(4) of the Charter. According to one commentator:

> Armed attacks by al-Qaeda, which is neither a state, nation, belligerent, nor insurgent group (as those terms are understood in international law), can trigger a right of selective and proportionate self-defense under the UN Charter against those directly involved in such armed attacks. However, neither these attacks nor the use of military force by a state against such attackers can create a state of war under international law.

However, some analysts attempt to justify this attack on the reasoning that the Taliban government also violated its international responsibilities by allowing the Al-Qaeda to use the territory of Afghanistan as a base of terrorist operations. This argument, however, fails to conceive that the countermeasures available to respond to breaches of state responsibility do not generally include use of force.

International humanitarian law is sometimes criticized as a hindrance to combat terrorism and accordingly suggested to be ignored in so-called ‘new forms of conflict’ initiated as a result of

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34 Jordan J. Paust, “There is No Need to Revise the Laws of War in Light of September 11”, American Society of International Law Task Force on Terrorism (November 2002).
35 Article 50 of International Law Commission’s Articles on States Responsibility makes this point explicit.
terrorism. In the words of a critic: “The crisis of international humanitarian law was an accident waiting to happen. For when law and material reality no longer coincide, it is, of course, law that must give way”. ³⁶

U.S. officials and other analysts have asserted that the global war on terror is an international armed conflict even when it is not a conflict between states, where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end indefinable, and, most importantly, where the non-state parties are unspecified and unidentifiable entities that are not entitled to belligerent status. ³⁷

It is sometimes claimed that humanitarian laws do not apply to an armed conflict initiated to combat terrorism if the terrorist group concerned does not have a territorial base. This claim is misconceived since common article 3 of the Geneva Conventions and the rules of Additional Protocol II, for their application, do not require any territorial base of the parties to an armed conflict.

In the current ‘war on terror,’ the United States claims that members of transnational armed groups are ‘unlawful combatants’ who have the disadvantages but not the benefits of the two statutes. As they (i) do not belong to a state, (ii) do not distinguish themselves from the civilian population, and (iii) do not comply with the laws of war, they are not combatants. At the same time, members of these groups may nevertheless be attacked as combatants and detained without any individual determination like prisoners of war (without having the privileges of that status). ³⁸ Such an interpretation cannot stand, since it would defeat the very purposes for which the status of POW exists in humanitarian law. ³⁹


Consequences of Undermining or Marginalizing Human Rights and Humanitarian Law in the Fight Against Terrorism

The best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law. But, the so-called global war on terror is miserably undermining and marginalizing human rights and international humanitarian law. Consequently, there is apprehension that promotion of human rights and international humanitarian law might be an issue of no relevance or, at least, of stiff challenge, and the development of comprehensive international standards on terrorism might be deferred. The author also predicts vacuum of legal norms and breeding of terrorism.

In the name of combating terrorism, many countries are enacting restrictive and repressive anti-terrorism laws. These laws are, in most of the cases, undermining the norms of human rights. These draconian laws are empowering the government forces and agencies engaged in anti-terrorism operations to infringe human rights of individuals, enabling such forces and agencies to resort to torture and other allied crimes and finally ensuring their impunity. The problem is more acute in case of states with poor human rights records. The governments of such states are getting opportunity to defend and rationalize their repressive activities and operations just by terming them as ‘anti-terrorism measures’.

Prior to 9/11, many states had been facing multidimensional pressure from the powerful western countries to honour human rights. The so-called global war on terror has brought a feeling of relief for these regimes. They have now found the most efficacious way to secure western silence on human rights abuses. It is just saying “yes” for the war on terror, providing support for such war and claiming that they themselves are challenged by terrorists inside their territory and, if possible, linking these alleged terrorists to Al-Qaeda.  

Contemporary war against terrorism is also likely to affect the promotion of international humanitarian law. Its long term consequence would be a matter of tragedy for the people for whose

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interests the rules of IHL developed. The observation of Hans-Peter Gasser regarding the present
trend of undermining the Third Geneva Convention merits citation:

The Third Geneva Convention, with its comprehensive set of rules determining the
treatment and material conditions of detention of members of the armed forces taken
prisoner, is perhaps the best known and strongest pillar of the international legal
system which protects victims of warfare. The POW Convention best serves the
interests of armed forces and of their members, officers and men, and has consequently
never been a subject of controversy. A weakening of it would be a tragedy for
members of armed forces who have to fight in future conflicts. The law which protects
them in captivity should not be undermined by any ‘war against terrorism’. 42

However self-evident the term ‘terrorism’ might be, the efforts at international level for years have
taught us how difficult it is to define the term in a manner generally, if not universally, acceptable to
the states. 43 The absence of agreement on a comprehensive definition of terrorism under
international law suggests that the characterization of an act or situation as one of terrorism cannot
in and of itself serve as a basis for defining the international legal obligations of states. Rather, each
such act or situation must be evaluated on its own facts and in its particular context to determine
whether and in what manner contemporary international law may regulate the responding conduct
of states. 44 Although, as a piecemeal approach, the United Nations has adopted a number of
‘sectoral’ treaties dealing with specific aspects of terrorism, 45 there is at present no universal treaty

42 Hans-Peter Gasser, “Act of terror, ‘terrorism’ and international humanitarian law”, International Review of
43 The only text dates back to the 1937 Convention for the Prevention and Punishment of Terrorism which
defines terrorism as “criminal acts directed against a State or intended to create a state of terror in the minds
of particular persons, or a group of persons or the general public”. However, the convention was ratified only
by the then British India and it never came into force. For a comment on the convention, see, British Yearbook
44 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights,
(last visited on July 15, 2008).
45 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including
Diplomatic Agents (adopted by the General Assembly of the United Nations on 14 December 1973),
International Convention against the Taking of Hostages (adopted by the General Assembly of the United
Nations on 17 December 1979), International Convention against the Taking of Hostages (adopted by the
General Assembly of the United Nations on 17 December 1979), International Convention for the
Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on 15 December
1997), International Convention for the Suppression of the Financing of Terrorism (adopted by the General
of Nuclear Terrorism (New York, 13 April 2005), Convention on Offences and Certain Other Acts
Committed on Board Aircraft (signed at Tokyo on 14 September 1963), Convention for the Suppression of
Unlawful Seizure of Aircraft (signed at the Hague on 16 December 1970), Convention for the Suppression of
Unlawful Acts against the Safety of Civil Aviation (signed at Montreal on 23 September 1971), Convention
which comprehensively prohibits terrorism and applies in all circumstances.\textsuperscript{46} The present war against terrorism has unsettled the already settled norms of norms of international law, human rights law and international humanitarian law so much so that agreement of the world community to reach on an agreement on comprehensive legal standards on terrorism might be deferred. If it happens so, the long term victim would be our dream to combat terrorism.

The so-called global war on terror is also posing a constant threat for the application of established legal norms. Guantanamo detention camp is an example of how the prisoners can successfully be put away from the operation of international as well as domestic laws. The English Court of Appeal rightly described it as a “legal black hole”.\textsuperscript{47} “If you want a definition of this place, you don’t have the right to have rights” – wrote Nizar Sassi, a French detainee, on a postcard addressed to his family. In fact, application of domestic laws is being ignored on the pretext that law enforcement measures are inadequate to deal with terrorism. Human rights norms are being sacrificed by inappropriate use of the term ‘war’ and, most rhetorically, laws of the war are being accused of being outdated having no application in so-called ‘new forms of conflict’ initiated as a result of terrorism.

The so-called global war on terror seems and very often claimed by its promoters as a never-ending war. Is it because of the difficulty or impossibility of combating terrorism or simply because of the inherent nature of this war? Many a people suspect that this war is designed to create a vicious circle that will ultimately promote terrorism requiring more efforts in the anti-terrorism warfare making the whole world a battlefield in the real sense of term. If the counter-terrorism warfare deny human rights and humanitarian law protections to so-called terrorists, the victims of warfare would consider themselves deprived of their legitimate rights and feel motivated to revolt against the


\textsuperscript{47} See, Court of Appeal (Civil Division), \textit{The Queen on the application of R. (Abbasi & another) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department}, 6 November 2002, [2002] EWCA Civ. 1598, para. 64.
perpetrators of such war through terrorism. Moreover, systematic state violation of human rights in the name of fight against terrorism brings the issue of ‘state repression’ in the forefront of public debate enabling the terrorists to justify their actions and gaining public acceptability. As Peter Hostettler rightly observes:

When States violate human rights for short-sighted advantages, e.g., by allowing torture during the interrogation of suspects, they surrender the moral high ground, as well as the State’s underlying constitutional legal foundation. The winner will always be the terrorists, not the security organs, because human rights violation can be used by the media to demonstrate the ruthlessness of a government, which in turn increases the number of direct or indirect supporters of terrorist organizations.48

In 2004, the UN Secretary General’s High-Level Panel on Threats, Challenges and Change reported that grievances nurtured by, *inter alia*, absence of human rights is one of the factors that aid and facilitate recruitment by international terrorist groups.49

**Conclusion**

It is a matter of concern that the ongoing global war on terror has divided the world and people in a way not seen since the end of cold war.50 This is alarming since the real solidarity of the world people cannot be achieved unless and until the responses to terrorism are designed within the framework of human rights and humanitarian law standards. In fact, the impact of any given terrorist act is usually limited in time, but restrictive state responses may have long duration, and affect many more than the attacks that prompted the response.51 This is why, to stress the need of adherence to human rights and humanitarian law norms in the fight against terrorism cannot be given up. However, applying pressure on a government or army to change its approach to anti-terrorism, to bring it more into line with the laws of war and human rights law can be a difficult


There is also the risk of misunderstanding such stress as sympathy for terrorism. But, the risk should not discourage the defenders of human rights and humanitarian law from taking the righteous and just position.

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