

Use of force in the light of the fight against terrorism

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Abstract:

International humanitarian law (IHL) currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organization an aspiring hegemony's militarization of its foreign and counterterrorism policies.

International humanitarian law recognizes two different categories of armed conflicts (usually known as civil wars).when and where the “war on terror” manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law.

War on terror is new paradigm in armed conflict. The rules of IHL apply equally to all parties to an armed conflict whether it is an aggressor or acting in self-defense or is a state or rebel group. Thus the IHL rules also apply to the armed conflict named as “war on terror”. Humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implication, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. “War on terrorism” has been used to justify unilateral preemptive war, perpetual war, human rights abuses, and violations of international law.

Key words: International humanitarian law, terrorism and international armed conflict.

1.1 Introduction:

International humanitarian law recognizes two different categories of armed conflict. Wars between two or more states are considered to be international armed conflicts, and war, as clashes occurring on the territory of a single state are non-international (or internal) armed conflicts (usually known as civil wars).

When can an armed conflict be said to obtain? The Geneva conventions themselves are of no help to us here, since they contain no definition of the term. We must therefore look at state practice, according to which any use of armed force by one stated against the territory of another triggers the applicability of the Geneva conventions between the two states.¹

Problem sometime arise when one of the parties to the conflict denies that international humanitarian law is applicable, even though there is fighting. It has happened, for example that a state declares a territory occupied by it as its territory, thereby laying the applicability of the law of Geneva open to question².

IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities and the near or total collapse of some state.

¹ Hans-peter gasser, *International Humanitarian Law: an introduction*, (Geneva: ICRC,1993), 22.

² Ibid.

Over the past ten years a number of new IHL norms and institutions (courts) have been created, not in Geneva, but in New York, Ottawa, and Hague. In turn, these new institutions have contributed considerably to the development of customary IHL.³

1.2 War on terror: a new paradigm in armed conflict.

The same is the situation with the new era armed conflict, better to call it the armed conflict of 21st century named as “war on terror”. Is international humanitarian law applicable to the existing war on terror, and if applicable then to what an extent? How to bring the parties to the conflict to agree that international humanitarian law is applicable to the prevailing global armed conflict, known as war on terror.

When and where the war on terror manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. Whether or not an international or non-international armed conflict is part of the global war on terror is not a legal, but a political question. The designation global war on terror does not extend the applicability of humanitarian law to all events included in this notion, but only to those that involve armed conflict.⁴

What is the proper role of international humanitarian law (the law of armed conflict?) humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implication, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. Otherwise, the standard bodies of domestic and international criminal and human rights laws will apply.⁵

The war on terrorism (also known as the war on terror) is an umbrella term coined by the Bush administration to refer to the various military, political, and legal actions taken to ostensibly “curb the spread of terrorism” following the September 11, 2001 attacks on the United States. Both the phrase “war on terrorism” and the policies it denotes have been a source of ongoing controversy, as critics argue it has been used to justify unilateral preemptive war, perpetual war, human rights abuses and other violations of international law.⁶

On September 20, 2001, during an address to a joint session of Congress and the American people, President George W. Bush formally declared war on terror when he said, our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. U.S. President Ronald Reagan also used the phrase frequently in the 1980s. In fact, many leaders from all over the world utilize this term when dealing with terrorist activity.⁷

1.3 WAR ON TERROR: IS IT AN ARMED CONFLICT?

As already mentioned IHL is only applicable in armed conflict. A central element of the notion of armed conflict is the existence of “parties” to the conflict. The parties to an international armed conflict are two or more states (or states and national liberation movements), whereas in non-international armed conflict the parties may be both states and armed groups – for example, rebel forces- or just armed groups.

In either case, a party to an armed conflict has a military – like formation with a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL. The rules of IHL apply

³ Luc Reydams, *A la guerre comme a' la guerre: patterns of armed conflict, humanitarian law responses and new challenges. International Review of the Red Cross*, (Geneva: ICRC, 2006) volume 88, Number 864.

⁴ www.icrc.org official statement, 21-07-2005. Last accessed on 29/03/2021.

⁵ <https://www.icrc.org/en/doc/resources/documents/statement/5xcmnj.htm>. Last accessed on 29/03/2021.

⁶ https://en.wikipedia.org/wiki/War_on_terror

⁷ Ibid.

equally to all parties to an armed conflict. It does not matter whether the party concerned is the aggressor or is acting in self-defense. In addition, it does not matter if the party in question is a state or a rebel group.

Accordingly, each party to an armed conflict may attack military objectives but is prohibited from direct attacks against civilians. Specific aspects of the so-called war on terrorism launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL. The war waged by the US-led coalition in Afghanistan that started in October 2001 is an example.

The 1949 Geneva conventions and the rules of customary international law were fully applicable to that international armed conflict, which involved the US led coalition, on the one side, and Afghanistan, on the other hand. However, much of the ongoing violence taking place in other parts of the world that is usually described as terrorism is perpetrated by loosely organized groups (networks) or individuals that at best share a common ideology.

On the basis of currently available factual evidence it is doubtful whether these groups and network can be characterized as a party to a conflict within the meaning of IHL. Terrorism is a phenomenon. Both practically and legally. War cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted fight against terrorism rather than a war on terrorism.⁸

1.4 Can it be categorized as international armed conflict?

In order to determine the legal status of the detainees, it is first necessary to determine whether an armed conflict exists, and if so, whether that conflict is international or not international. The type of armed conflict depends upon the status of the parties to the conflict and the nature of the hostilities. The status and rights of individuals depend, in turn, on the relationship of those individuals to the parties to the conflict.

It may also become important to determine the temporal and geographical boundaries of the armed conflict- for the most part, the Geneva conventions would not apply to conduct that occurred prior to the onset or after the end of the armed conflict, nor would it apply to conduct occurring on the territory of a non party to the conflict. Whether the territory on which the punishable conduct occurred is considered occupied or partially occupied may also be relevant to determining the status of detainees and the law applicable to them.

The Geneva conventions apply in full to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them or in any cases of partial or total occupation of the territory of a high contracting party. Common article 3 of the Geneva conventions applies to internal hostilities serious enough to amount to an armed conflict, although the parties are encouraged to adopt voluntarily the remaining provisions with respect to each other.

In the case of sporadic violence involving unorganized groups and uprisings, the law of war is not implicated, although the law of basic human rights continues to apply. The classification of an armed conflict presents few difficulties in the case of a declared war between two states. Such a conflict would clearly qualify as an international armed conflict to which the Geneva conventions would apply in their entirety.

Such conflicts have also become rare. The term internal armed conflict generally describes a civil war taking place within the borders of a state, featuring an organized rebel force capable of controlling at least some territory. Internal conflicts may be more difficult to classify as such because states frequently deny that a series of violent acts amounts to an armed conflict. Classifying a conflict in which a foreign state intervenes in an internal armed conflict creates an even more complex puzzle. Some theorists consider an armed conflict to

⁸ International humanitarian law and terrorism, questions and answers, 5/05/2004. Section: Reaffirmation and development of humanitarian law. Key document. <http://www.icrc.org> . site last accessed on 25/03/2021.

remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency, whereas foreign intervention on behalf of a rebel movement would internationalize the armed conflict. Under this view, the war in Afghanistan was an internal conflict between the Taliban and northern alliance troops until US forces intervened, at which point the conflict became international.

When the Taliban cede control of the government, the conflict may have reverted to an internal conflict, because US forces then become aligned with the government of the state. Others view virtually any hostilities causing international repercussions to be international for the purposes of the Geneva conventions. According to the official commentary of the international committee of the Red Cross (ICRC), the conditions for an international war are satisfied whenever any difference arises leading to the use of armed force between the militaries of the states.

Both the United States and Afghanistan are signatories to the four Geneva conventions of 1949. If the Taliban was, at the onset of the conflict, the government of Afghanistan and its soldiers were the regular armed forces, it would appear that the present conflict meets the Geneva conventions definition of an international armed conflict. However, only three states ever recognized the Taliban as the legitimate government of Afghanistan. While it is not necessary for the government of states engaging in hostilities to recognize each other, the rules are less clear were virtually no country recognized a government.

The use of force by private persons rather than organs of a state has not traditionally constituted an act of war, it is arguable that refusing to recognize the Taliban as a de facto government of a state would preclude the United States from prosecuting the September 11 terrorist attacks as war crimes. After all, it has been suggested that international terrorism might be considered to amount to armed conflict for the purpose of the law of war only if a foreign government is involved.

The level of state support of terrorism required to incur state responsibility under international law is a matter of debate. Denying that any state is involved in the terrorist acts that precipitated the armed conflict could call into question the United States treatment of those attacks as violations of the law of war. Some observation cites additional policy ground for treating the armed conflict as international.

To treat it as an internal conflict could have implications for US allied troops. No one would be entitled to POW status or protected person status under the third and fourth Geneva conventions, although common article 3 would remain in force for all the parties US and coalition soldiers may be placed. At risk of capture in Afghanistan or elsewhere depending on how the conflict proceeds. The president Bush recent decision to apply the Geneva conventions to the Taliban but deny their application to al Qaeda as a not party may be an implicit recognition that the armed conflict is an international one.⁹

It is nonetheless indisputable that within the wider context of the war on terror two international armed conflicts strict since have taken place, namely the conflicts in Afghanistan and Iraq. to the minds of those who invoke that nation, however, the war on terror extend far beyond the conflicts in Afghanistan and Iraq to encompass all the anti-terror operations that have taken place since September 2001. When examining the rules of humanitarian law applicable to either situation i.e. International armed conflict or non-international armed conflict, one is immediately struck by the immense difference in their number.

The Geneva conventions and their additional protocols contain 20 provisions on internal armed conflict against almost 500 on international wars. Yet, it can safely be said that the problems from the humanitarian point of view are the same whether shots were fired over or within the border.¹⁰

⁹ Jennifer Elsea, *Treatment of "Battlefield detainees" in the war on terrorism*, January 23 2007, Legislative Attorney American Law Division, CRS Report for Congress. Order code RL 31367. <http://www.fas.org/crs/terror/RL31367.pdf>. Last accessed on 29/03/2021.

¹⁰ Hans-peter Gasser, *International Humanitarian law: an introduction*, (Geneva: Henry Dunant Institute Haupt, 1993)

1.5 Armed conflict or law enforcement operation

A large number of operations have been carried out within the territory of the states involved and by agents of those states; several have had transnational character and have seen the involvement of law enforcement agencies and military forces of numerous states. From the perspective of international law, the latter operations are not part of any war or of any armed conflict, and are to be considered as law enforcement operations on an international scale against a transnational criminal organization.¹¹

A necessary distinction has therefore to be drawn between captures and detentions which took place in the context of an armed conflict stricto sensu, i.e., during the conflicts in Afghanistan and Iraq and the subsequent military occupation, and arrest and detention carried out in the context of law enforcement operations.¹²

One could attempt to refuse this problem by categorizing Al-Qaeda attacks as purely criminal and the response as law enforcement activities that should be closely disciplined by domestic civil liberties law and international human rights law. This categorization would, however, defy the way all parties to the struggle conduct and define it. It would also take one of the key armed conflicts of our time, conducted by military means, out of the jurisdiction of the laws of war.

No matter which body of law one chooses to place this conflict within its sole jurisdiction seems to expand its conceptual framework beyond reasonable bounds. It is the discontinuous quality of the war on terror that makes it akin to the confrontation with Iraq that has persisted for over fourteen years and that has continually shifted back and forth between exceptional, war-like activities and normalized, ongoing regulation.¹³

1.6 Applicability of Geneva conventions to war on terror

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 conventions best serve the interests of armed forces and of their members, 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”.¹⁴

A denial of POW status to captured enemy combatants does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the fourth Geneva Convention on the protection, in wartime, of civilian persons. If they are not nationals of the adverse party to the conflict but citizens of third states, they keep the status of the foreign national.

Civilian detainees have to be treated according to the rules set out in the fourth Geneva conventions. Civilian detainees suspected of having committed a serious crime can and must be put on trial. The fourth Geneva Convention does not grant them any immunity from prosecution for acts of terrorism, but it does establish the obligation to grant them a fair trial.¹⁵

¹¹ Silvia Borelli, Casting light on the legal black hole: International law and detention abroad in the “war on terror” *International review of the Red Cross*, (Geneva: ICRC, March 2005). Volume 87 number 857.

¹² Ibid.

¹³ Nathaniel Berman, Privileging Combat? Contemporary Conflict and the legal Construction of war. *Columbia Journal of Transnational Law*, (2004), 32.

¹⁴ Huns-Peter Gasser, Acts of terror, “terrorism” and international humanitarian law, *International Review of the Red Cross*, (September 2002), vol. 84 N 847.

¹⁵ Article 5 of the fourth Geneva Convention of 1949.

The ICRC has said in this connection that it remains firmly convinced that compliance with international law in no manner constitutes an obstacle to the struggle against terror and crime. International humanitarian law grants the detaining power the right to legally prosecute prisoners of war suspected of having committed war crimes or any other criminal offence prior to or during the hostilities.¹⁶

It has been suggested that the four criteria in GPW art. 4A(2) apply to regular armed forces as a matter of customary international law; however, others point out that state practice does not appear to support the conclusion that the armed forces of states have been categorically denied eligibility for POW status on the basis that the army did not comply completely with the law of war. The Bush administration has also asserted that the Geneva conventions are obsolete when it comes to dealing with terrorists, but will continue to follow the treaties principles.

Humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implication, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. Otherwise, the standard bodies of domestic and international criminal and human rights laws will apply. There is good reason for this division of legal labor between humanitarian law and other legal regimes.

While the purposes of humanitarian law are humanitarian, it is also true that killing, detention without judicial review and trials with reduced menus of rights are permitted, albeit within defined limits, in times and situations of armed conflict, thus, the determination that a particular situation is subject to the law of armed conflict can have decidedly un-humanitarian consequences. This is especially the case when parties assert the rights of belligerency, but decline to accept the humanitarian obligations imposed by the laws of armed conflict.

Humanitarian law has been accused of being passé, or at least stale and in need of revision- inadequate to deal with the demands of modern day terrorism and the efforts to combat it. This is a red herring. The phrase war on terror is a rhetorical device having no legal significance. There is no more logic to automatic application of the laws of armed conflict to the war on terror than there is to the war on drugs, war on poverty or war on cancer.

Thus blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialized law of corporations for its failure to address all business disputes. Humanitarian law recognizes two categories of armed conflict international and non-international. Generally, when a state resorts to force against another state (For example, when the war on terror involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies.

When the war on terror amounts to the use of armed force within a state, between that state and a rebel group, or between rebel groups within the state, the situation may amount to non-international armed conflict. a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified. Absent these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable.¹⁷

Keeping in view the above mentioned criteria in war on terror the territorial bounds of the conflict can either be defined and identified nor the beginning and end of the conflict can be defined and identified, however the parties to the conflict can be defined and identified i.e., Al Qaeda, the US and its allies in the war on terror are the parties to the conflict. as according to article 4 (2) of the Geneva convention the organized resistance movement has been defined as those being commanded by a person responsible for his subordinates, with a distinctive sign and emblem, carrying arms openly and that of conducting their operations in accordance with the law and customs of war.

¹⁶ ICRC press release of 9 February 2002. <http://www.icrc.org>. Last accessed on 30/03/2021.

¹⁷ <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument> 16/03/2004, official statement by Gabor Rona. Last accessed on 30/03/2021.

1.7 What is terrorism?

1.7.1 Etymology:

The term terrorism” comes from Latin *terrere*, to frighten via the French word *terrorism*, which is often associated with the *regime de la terreur*, the reign of terror of the revolutionary government in French from 1793 to 1794. A leader in the French revolution, Maximilian Robespierre, proclaimed in 1794 that: terror is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy.

The English word terrorism in the meaning systematic use of terror as a policy was first recorded in English dictionaries in 1798 – a meaning which differs from the modern understanding of the term.¹⁸

1.7.2 Reasons for Controversy:

The modern definition of terrorism is inherently controversial. The use of violence for the achievement of political ends is common to state and not-state groups. The difficulty is in agreeing on a basis for determining when the use of violence (directed at whom, by whom, for what ends) is legitimate. The majority of definitions in use have been written by agencies directly associated with a government, and are systematically biased to exclude governments from the definition.

The contemporary label of terrorist is highly pejorative; it is a badge, which denotes a lack of legitimacy and morality. The application terrorist is therefore always deliberately disputed. Attempts at defining the concept invariably arouse debate because rival definitions may be employed with a view to including the actions of certain parties, and excluding others. Thus, each party might still subjectively claim a legitimate basis for employing violence in pursuit of their own political cause or aim.¹⁹

Terrorism expert Walter Liqueur in 1999 also has counted over 100 definitions and concludes that the only general characteristic generally agreed upon is that terrorism involves violence and the threat of violence. For this and for political reasons, many news sources avoid using his term, opting instead for less accusatory words like bombers, militants, etc.²⁰

Terrorism is a social phenomenon with many aspects which vary from case to case. Neither expert in international law nor government representatives has yet agreed on a comprehensive and widely acceptable definition. The only text dates back to the 1937 convention for the prevention and punishment of terrorism, which defined acts of 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”. This definition is not very explicit, as the text refers only to criminal acts and does not specify which acts are illegal in the context of terrorism.²¹

Definitions of terrorism are usually complex and controversial, and, because of the inherent ferocity and violence of terrorism, the term in its popular usage has developed an in terms stigma. It was first coined in the 1790s to refer to the terror used during the French revolution by the revolutionaries against their opponents. The Jacobin party of Maximilian Robespierre carried out a reign of terror involving mass executions by the guillotine.

¹⁸ https://en.wikipedia.org/wiki/Definition_of_terrorism. Last accessed on 25/03/2021.

¹⁹ Ibid.

²⁰ https://en.wikipedia.org/wiki/Definition_of_terrorism. Last accessed on 25/03/2021.

²¹ Huns-Peter Gasser, Acts of terror, “terrorism” and international humanitarian law, *International Review of the Red Cross*, (September 2002), vol. 84 N 847.

Although terrorism in this usage implies an act of violence by a state against its domestic enemies, since the 20th century the term has been applied most frequently to violence aimed, either directly or indirectly, at governments in an effort to influence policy or topple an existing regime.²²

Terrorism is not legally defined in all jurisdictions; the states that do exist, however, generally share some common elements. Terrorism involves the use or threat of violence and seeks to create fear, not just within the direct victims but among a wide audience. The degree to which it relies on fear distinguishes terrorism from both conventional and guerrilla warfare.²³

Terrorism proper is thus the systematic use of violence to generate fear, and thereby to achieve political goals, when direct military victory is not possible. This has led some social scientists to refer to guerrilla warfare as the weapon of the weak and terrorism as the “weapon of the weakest”.²⁴

In order to attract and maintain the publicity necessary to generate widespread fear, terrorists must engage in increasingly dramatic, violent, and high profile attacks. These have included hijackings, hostage takings, kidnappings, car bombings, and, frequently, suicide bombings. Although apparently random, the victims and locations of terrorist attacks often are carefully selected for their shock value. Schools, shopping center. Bus and train stations, and restaurants and nightclubs have been targeted both because they attract large crowds and because they are places with which members of the civilian population are familiar and in which they feel at ease.

The goal of terrorism, generally is to destroy the public's sense of security in the places most familiar to them. Major targets sometimes also include buildings or other locations that are important economic or political symbols, such as embassies or military installations. The hope of the terrorist is that the sense of terror these acts engender will induce the population to pressure political leaders toward a specific political end.

Some definitions treat all acts of terrorism, regardless of their political motivations, as simple criminal activity. For example, in the United States the standard definition used by the Federal Bureau of Investigation (FBI) describes terrorism as the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

The element of criminality, however, is problematic, because it does not distinguish among different political and legal systems and thus cannot account for cases in which violent attacks against a government may be legitimate. A frequently mentioned example is the African National Congress (ANC) of South Africa, which committed violent actions against that country's apartheid government but commanded broad sympathy throughout the world. Another example is the resistance movement against the Nazi occupation of France during World War 2.

Since the 20th century, ideology and political opportunism have led a number of countries to engage in transnational terrorism, often under the guise of supporting movements of national liberation. (hence, it became a common saying that “one man's terrorist is another man's freedom fighter.”) The distinction between terrorism and other forms of political violence became blurred- particularly as many guerrilla groups often employed terrorist tactics and issues of jurisdiction and legality were similarly obscured.

The problems have led some social scientists to adopt a definition of terrorism based not on criminality but on the fact that the victims of terrorist violence are most often innocent civilians. For example, the U.S. government eventually accepted the view that terrorism was premeditated, politically motivated violence perpetrated against noncombatant targets. Even this definition is flexible, however, and on occasion it has been expanded to include

²² <http://www.britannica.com/eb/article-9071797/terrorism>. Last accessed on 25/03/2021.

²³ Ibid.

²⁴ <http://www.britannica.com/eb/article-9071797/terrorism>. Last accessed on 25/03/2021.

various other factor, such as that terrorist acts are clandestine or surreptitious, that terrorists choose their victims randomly. In addition, that terrorist acts are intended to create an overwhelming sense of fear.²⁵

Terrorism is a term used to describe violence or other harmful acts committed (or threatened) against civilians by groups or persons for political or other ideological goals. Most definitions of terrorism include only those acts which are intended to create fear or terror, are perpetrated for an ideological goal (as opposed to a lone attack), and deliberately target or utterly disregard the safety of non-combatants. Many definitions also include only acts of unlawful violence.

As a form of unconventional warfare, terrorism is sometimes used when attempting to force political change by convincing a government or population to agree to demands to avoid future harm or fear of harm, destabilization of an existing government, motivating a disgruntled population to join an uprising escalating a conflict in the hopes of disrupting the status quo, expressing a grievance, or drawing attention to a cause.

Terrorism has been used by a broad array of political organizations in furthering their objectives; both right-wing and left-wing political parties, nationalistic, and religious groups, revolutionaries and ruling governments. The presence of non-state actors in widespread armed conflict has created controversy regarding the application of the laws of war.²⁶

1.8 Terrorism and guerrilla warfare

In practice, terrorism and guerrilla may merge into each other. It is, however, advisable to keep these two techniques of the application of force distinct. From the point of view of established authority, both methods of fighting are irregular. On the internal level, both are likely to constitute criminal activities and, in an international conflict, both may amount to war crimes.

In three respects, terrorism and guerrilla warfare differ:

1. Terrorists tend to use force indiscriminately and on an excessive scale. The reason is that whenever their aim is not merely revenge or retaliation, they seek to attain their objective, whatever it may be, by the creation of fear. As it is difficult to anticipate how much fear is likely to produce the desired results, terrorists are likely to overact. Guerrillas think primarily in military terms. Thus they tend to concentrate on the military and police forces of the political system against which they are fighting. In the typical case, they are short of weapons and ammunition and, therefore, likely to use force economically. Their irregularity is of a different order. It lies in the revolutionary character of their organization and the specific techniques of guerrilla warfare.
2. Terrorist may find it convenient to act as one-man armies and compensate for their numerical weakness by the caliber of their destructive power. In contrast, guerrilla forces, however small, tend to operate in groups.
3. The existence of individual terrorist does not create an armed conflict, internal or international. This requires the involvement of more than negligible groups. While terrorism is compatible with situation of armed conflict, it may also occur in situation of peace and tranquility, domestic or international. In contrast, the existence of substantial guerrilla forces presupposes or creates a situation of internal or international armed conflict. Thus a terrorist is probably best defined by reference to his immediate objective. It is to use force for creating fear and, in this way, to attain whatever further aim he may have in mind. As this essential aspect of the matter is brought out in the very word terrorist, any definition of the term has an unavoidably circular element.²⁷

²⁵ <http://www.britannica.com/eb/article-9071797/terrorism>. Last accessed on 25/03/2021.

²⁶ https://en.wikipedia.org/wiki/Definition_of_terrorism. Last accessed on 25/03/2021.

²⁷ George Schwarzenberger, *International Law and Order*. Terrorists, Guerrilleros, Mercenaries, (London: Stevens and Sons, 1971).

1.9: UN and other definitions

The question of a definition of terrorism has haunted the debate among states for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the convention drafter in 1937 never came into existence. The UN member states still have no agreed-upon definition.

Terminology consensus would, however, be necessary for a single comprehensive convention on terrorism, which some countries favor in place of the present 12 piecemeal conventions and protocols. The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures.

Cynics have often commented that one state's terrorist is another state's freedom fighter. If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A. Schmid suggested in 1992 in a report for the then UN crime branch that it might be a good idea to take the existing consensus on what constitutes a war crime as a point of departure.

If the core of war crimes deliberate attacks on civilians, hostage taking and the killing of prisoners is extended to peacetime, we could simply define acts of terrorism as peacetime equivalents of war crimes.²⁸

1.9.1. proposed definitions of terrorism

A. League of Nations convention or the draft convention on terrorism. (1937):

In 1937, an attempt was made to codify the subject in a convention for the prevention and punishment of terrorism (CPPT). This effort received its impetus from French proposal, made after the assassination of King Alexander I of Yugoslavia in 1934 at Marseilles. The conventions were directed against terrorism of an international character. The convention on terrorism still deserves attention for two reasons:

1. The convention contains a definition of terrorism. This is defined as A2 criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.
2. The aims of the convention were to create mandatory rules of municipal criminal law against terrorism and to make terrorism an extraditable crime. Yet, in spite of an anti-terrorist climate prevailing in the League of Nations era, the government of India was the only one country which ratified the conventions.²⁹

B. UN Resolution language (1999)

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whosoever committed;

2. reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. (GA Res. 51/210 Measures to eliminate international terrorism)

C. Short legal definition proposed by A.P. Schmid to United Nations Crime Branch (1992):

Act of terrorism = peacetime equivalent of War Crime.

²⁸ Singh v. Bihar, 2004 SOL Case No. 264, April 2, 2004, Para. 16, available at <http://supremecourtonline.com> (upholding conviction under the Indian Terrorist and Disruptive Activities Act of 1987 of a number of heavily armed individuals who attacked a group of police officers).

²⁹ George Schwarzenberger, *International Law and Order. Terrorists, Guerrillas, Mercenaries*, (London: Stevens and Sons, 1971).

D. Academic Consensus Definition:

The UN'S academic consensus definition, written by terrorism expert Alex P. Schmid and widely used by social scientists, runs:

Terrorism is an anxiety- inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence- based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror. A target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.³⁰

One man`s terrorist is another man`s freedom fighter was a common refrain prior to 11 September 2001. There was little consensus on how to define terrorism. The attacks in New York and Washington, D.C. are forcing a new worldview on terrorism. A precise definition is one of the priorities in the current discussions on a comprehensive convention against terrorism.

However, other vexing questions remain, such as; should acts of the armed forces of member states also fall under the conventions, e.g. the one against nuclear terrorism? The United Nations has wrestled with the definition question since the 1972 attack at the Munich Olympic Games. Two camps emerged: those who thought that the United Nations should primarily concentrate on dealing with the causes of terrorism and those who wanted to outlaw specific acts like hostage taking or the theft of nuclear material, no matter what caused them.

Thirty years later there are 12 international conventions relating to terrorism but an explicit definitions is still missing, as is a strong supervisory board to monitor the implementation of treaty obligations. An additional protocol could fill this void. Security council resolution 1373 gives more teeth to the convention for the suppression of the financing of international terrorism because it fall under chapter VII of the united nations charter, making many of its provisions mandatory for all united nation member states. The Security Council has also established a counter terrorism committee to monitor the implementation of the resolution.³¹

Terrorism has been on the agenda of the United Nations for decades. Thirteen international conventions have been elaborated within the framework of the United Nations system relating to specific terrorist activities. Member states through the general assembly have been increasingly coordinating their counter- terrorism efforts and continuing their legal norm setting work.

The Security Council has also been active in countering terrorism through resolutions and by establishing several subsidiary bodies. At the same time a number of programmers, offices and agencies of the United Nations system have been engaged in specific operational actions against terrorism further assisting member states in their efforts. To consolidate and enhance these activates member states opened a new phase in their counter terrorism efforts by agreeing on a global strategy to counter terrorism.

The strategy, adopted on 8 September 2006 marks the first time that countries around the world agree to a common strategic approach to fight terrorism. The strategy forms a basis for concrete plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the united nations in combating terrorism; and to ensure

³⁰ Alex Schmid, Albert Jongman et al., Political Terrorism (New Brunswick, NJ: Transaction Books, 1988) p.28. Schmid is in the process of updating this work, see, "The Problem of Defining Terrorism" (a paper presented at a conference on Terrorism and Security Studies, George Marshall Defense Center, Garmisch Germany, June 28 2004) pp.1–30.

³¹ http://www.unodc.org/unodc/newsletter_2001-12-01_page006.html

the respect of human rights while countering terrorism. The strategy builds on the unique consensus achieved by world leaders at their 2005 September summit to condemn terrorism in all its forms and manifestations.³²

E. United Nations

While the United Nations has not yet accepted a definition of terrorism. Terrorism expert Alex P Schmid has propounded a short legal definition which runs as:

- An act of terrorism is the peacetime equivalent of a war crime.
- On March 17, 2005, a UN panel described terrorism as any act intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.
- The general assembly resolution 49/60, adopted on December 9, 1994, contains a provision describing terrorism: criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.³³

F. European Union

The European Union (EU) employs a definition of terrorism for legal/official purposes, which is set out in Art. One of the *frameworks Decision on combating terrorism* (2002). This provides that terrorist offences are certain criminal offences set out in list comprised largely of serious offences against persons and property which. Given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population; or unduly compelling a government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.³⁴

G. United States

The United States has defined terrorism under the federal criminal code. Chapter 113B of part 1 of title 18 of the United States code defines terrorism and lists the crimes associated with terrorism. In Section. 2331 of Chapter 113^b, terrorism is defined as:

Activities that involve violent... or life-threatening acts... that are a violation of the criminal laws of the United States or of any state and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and ... © occur primarily within the territorial jurisdiction of the United States... (Or) ...© Occur primarily outside the territorial jurisdiction of the United States.³⁵

H. United Kingdom

The United Kingdom defined acts of terrorism in the terrorism act 2000 as the use of threat of action where:

- a) The action falls within subsection(2),
- b) The use or threat is designed to influence the government or to intimidate the public or a section of the public and
- c) The use of threat is made for the purpose of advancing a political, religious or ideological cause.

³² <http://www.un.org/terrorism>.

³³ <https://legal.un.org/avl/ha/dot/dot.html>. Last accessed on 26/03/2021

³⁴ <https://www.seforall.org/system/files?file=2020-11/Anti-Terrorism-Policy-SEforALL.pdf>.

³⁵ <https://www.law.cornell.edu/uscode/text/18/2331>. Last accessed on 26/03/2021

(2) Action falls within this subsection if it

- a) involves serious violence against a person,
- b) involves serious damage to property,
- c) endangers a person's life, other than that of the person committing the action,
- d) creates a serious risk to the health or safety of the public or a section of the public or
- e) is designed seriously to interfere with or seriously to disrupt an electronic system.³⁶

I. Individuals

- **L. Ali Khan:**

Terrorism sprouts from the existence of aggrieved groups.

- **David Rodin (Oxford Philosopher)**

Terrorism is the deliberate, negligent, or reckless use of force against noncombatants, by state or no state actors for ideological ends and in the absence of a substantively just legal process.

- **Walter Liqueur:**

Terrorism constitutes the illegitimate use of force to achieve a political objective which innocent people are targeted.³⁷

- **James M. Poland:**

Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence and audience.³⁸

J. Organization of African unity (OAU)

Convention on the prevention and combating of terrorism has defined terrorism in Article 1(3) as

- 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 number of 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:
 - 3 (i) intimidate, put in fear, force, coerce or induce any government, body, institutions, 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 instruction in a state.
- (b) any promotion, sponsoring, contribution to, command, aid incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) to (iii).³⁹

³⁶ <https://www.legislation.gov.uk/ukpga/2000/11/section/1>. Last accessed on 26/03/2021

³⁷ <https://www.jewishvirtuallibrary.org/defining-quot-terrorism-quot> Last accessed on 26/03/2021

³⁸ Ibid.

³⁹ <https://au.int/sites/default/files/treaties/37289-treaty-0020> -

[oau convention on the prevention and combating of terrorism e.pdf](#). Last accessed on 27/03/2021

K. UN resolutions against terrorism

Just after 9/11 the United Nations Security Council (UNSC) gave a quick response by passing resolution 1368 (2001) of 12 September 2001. Another resolution 1373 was passed on 28 September 2001 stating as follows.

Reaffirming its unequivocal condemnation of the terrorist acts that took place in New York, Washington DC and Pennsylvania on 11 September, the Security Council this evening unanimously adopted a wide-ranging comprehensive resolution with steps and strategies to combat international terrorism.

By resolution 1373 (2001) the Council also established a committee of the Council to monitor the resolution's implementation and called on all states to report on actions they had taken to that end no later than 90 days from today. Under terms of the text, the Council decided that all states should prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts.

The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay. The Council also decided that states should prohibit their national or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts.

States should also refrain from providing any form of support to entities or persons involved in terrorist acts, take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well.

By other terms, the Council decided that all states should prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other countries and their citizens, by further terms, the Council decided that states should afford one another the greatest measure of assistance for criminal investigations or criminal proceedings relating to the financing or support of terrorist acts. States should prevent the movement of terrorist or their groups by effective border controls as well.⁴⁰

1.10 The impact of terrorism and counter terrorism on human rights

Every act of terrorism is incompatible with international humanitarian law applicable in armed conflict. Like any other violation of the 1949 Geneva Conventions, of another humanitarian law treaty or of international customary law, such acts call for action by states party to those treaties to redress the situation. They not only have a legitimate interest in stopping criminal behavior and thereby protecting their two citizens, they are also legally obliged to monitor compliance with the law, to prosecute and punish offenders and to prevent any further act contrary to humanitarian law.

Acts of terrorism are grave breaches of international law. Moreover, the Geneva Convention does not exclude action by third states with a view to responding to grave breaches or preventing further violations, especially if the state concerned does not take appropriate action itself. Whether such third-party involvement includes the right to use force is not a question for international humanitarian law but for the law of the UN Charter.

A few states claim very wide rights of self-defense to protect, anticipate attacks, and to respond to terrorist and other past attacks. As long as they pay lip-service to the need to act in self-defense, and as long as they report to the Security Council invoking the magical reference to article 51, somewhere their action requires a veneer of legality and their argument will be treated any US action as a precedent creating new legal justification for the

⁴⁰ <https://www.un.org/press/en/2001/sc7158.doc.htm> Last accessed on 27/03/2021

use of force. Thus, they use the US actions in Tripoli, Panama, the Iran/Iraq, Afghanistan, and Sudan as shifting the charter paradigm and extending the right of self-defense (to counter terrorism).

Under the shock of the events of 11 September 2001, a number of states have taken steps to prevent terrorist acts from being committed on their territory. These steps include inter alia.

- Tightening police surveillance, particularly of foreign residents;
- Adopting more vigorous interrogation procedures, which may amount to inhumane treatment or even to torture;
- Curtailing the right of alleged terrorists to a fair trial by e.g. establishing limits to access to witnesses and to the exercise of other rights of the defendant, measures which may sometimes be equivalent to abolishing the presumption of the defendant's innocence;
- Toughening attitudes vis-à-vis asylum-seekers, refugees and migrants e.g. by ignoring the prohibition on returning such persons against their will to a country where they have to fear for their lives (principles of non-refoulement).

While not necessarily illegal as such, these measures may amount to clear violations of a government's commitment to respect international human rights and humanitarian law obligations. Adam Roberts has the following to say about the difficulties international humanitarian law has to face in counter-terrorist operations.

In military operations with the purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subject to mistreatment or torture. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it.

External states supporting the government have sometimes contributed to such excuses. 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 task.

1.11 Conclusion

Terrorism is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted fight against terrorism rather than a war on terrorism. It is however indisputable that within the wider context of the war on terror two international armed conflicts *stricto sensu* have taken place, namely the conflict in Afghanistan and Iraq.

The type of armed conflict depends upon the status of the parties to the conflict and the nature of the hostilities. The status and rights of individuals depend, in turn, on the relationship of those individuals to the parties to the conflict.

The Geneva conventions apply in full to all cases of declared war or of any other armed conflict, which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them, or in any cases of partial or total occupation of the territory of a high contracting party.

War on terror is a new paradigm in armed conflict. The rules of International humanitarian law apply equally to all parties to an armed conflict whether it is an aggressor or acting in self-defense or is a state or rebel group. Thus, the International humanitarian law rules also apply to the armed conflict named as war on terror.

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