

The Global Fight Against Terrorism and the Application of International Humanitarian Law

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Introduction

The article attempts a conceptual analysis of acts of terrorism and then progressively analyses how terrorism has been handled over time and lastly ventures into the most interesting part of the discussion: the global fight against terrorism and whether or not International Humanitarian Law (IHL) applies to this 'war'. The article concludes that overall, terrorism as a concept is a function of global politics, which prevail in a given political environment within States

at any given point in time.¹ Global fight against terrorism, therefore, may be handled according to the prevailing political environment in a State—that determines whether or not those labeled terrorist will be handled as common criminals or fighters that fall under the ambit of IHL.

Terrorism as a Concept

Conceptually, terrorism may be understood as a deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.² A person who carries out acts of terrorism is a terrorist. One act of a terrorist is a 'terrorist incident'. According to the United States Federal Investigation Bureau (FBI), a terrorist incident is a violent act or an act dangerous to human life, in violation of criminal laws of the United States or any other State, to intimidate, or coerce a government, the civilian population, or any segment thereof, in furtherance of any political or social objective.³ It is important to note that we may not find a commonly agreed upon definition of terrorism, a terrorist or a terrorist incident.

On its part, the OAU Convention on the Prevention and Combating of Terrorism (*hereinafter* The African Convention) defines 'terrorism' in a manner that excludes struggles for national self-determination from its definition.⁴ Article I(3) of the Convention defines a terrorist act 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 member 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:

1 C. Reus-Smit and D. Snidal (eds.) (2008). *The Oxford Handbook of International Relations*, accessed on 30th April, 2013 at www.princeton.edu/~amravacs; H. J. Morgenthau (1978). *Politics Among Nations: The Struggle for Power and Peace*, Fifth Edition, Revised, New York, pp. 4-15.

2 B. Hoffman, *Inside Terrorism* (New York: Columbia University Press, (1998), p.43.

3 The Federal Bureau of Investigation (FBI) (2005). *Terrorism 2002-2005*, USA accessed on 2 May 2013 at <http://www.fbi.gov/stats-services/publications/terrorism-2002-2005>; see also *Transnational Terrorism, Security and the Rule of Law, Concepts of Terrorism: Analysis of the Rise, Decline, Trends and risk*, accessed on 2 May 2013 at <http://www.transnationalterrorism.eu/tekst/publications/WP3%20Decl%2005.pdf>

4 Adopted by the 35th OAU Summit in Algiers, Algeria, in July 1999.

- i. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - ii. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - iii. create general insurrection in a State.
- b. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing or procuring or any person, with the intent to commit any act referred to in paragraph (a) (i),(ii) and (iii).

It is equally important to note that the African Convention legitimises and excludes certain terrorist incidents from the purview of the definition of terrorism.⁵ For example, Article 3 (1) of the Convention provides:

Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

The import of this provision is that, yes the struggle waged according to this Convention may amount to terrorism or the means and methods employed therein constitute terrorist acts or incidents, but African States waived their right to treat such acts as terrorist acts, because their perpetration serves a particular and accepted political purpose and to the satisfaction of those States. This understanding imports in the interpretation of the provisions of the Convention into the arena of the concept of political and ideological relativism—one man's meat is another's poison: today a terrorist, tomorrow a victor and hero. The definitions given and their philosophical underpinnings converge at one point: a terrorist is a violent person, his or her acts are violent, and it is justifiable in the circumstances of arrest of such a person to treat him or her with caution, while applying reasonable force and not necessarily applying the common standards of human rights associated with any arrest or capture of either common criminals

⁵ The purpose of the Convention was basically to enable the weak and dominated peoples of Africa to liberate themselves from the occupying powers, and as such liberation acts constituted a form of armed conflict recognised under IHL. However, the means and methods used against the occupying powers were not generally those that would be within the ambit of IHL.

or combatants or any other privileged fighters in an armed conflict. This kind of analysis begs the question: Are the standards set in promulgating the means and methods prohibited under IHL which might be employed during armed conflict the same as those that apply while 'waging a war against an aggressor or any other category of persons or organisations falling within the general description of an aggressor, within the context of the African Convention'?

Alas, this form of understanding and analysis of events complicates the fight against the global war on terror for there is no clear cut criterion to define in discrete terms what global terrorism is or what constitutes acts of terror. The definitions given seem to lend their hand more to the subjective than the objective arenas of conceptual analysis. Note that Article 35 of Additional Protocol I to the Geneva Conventions outlaws categorized means and methods of warfare, which when used within an armed conflict amount to a violation of the principles of IHL and these would equally be unlawful under the broad criminal law statutes.⁶

It is important to note that acts of terrorism have been a subject of investigation over time, especially in the developed and more politically advanced economies like the United States of America (U.S.A) and Europe—they are now increasingly engulfing the whole globe and may not be restricted any longer to the developed world. The current wave of terrorism seems to have started in the 1980s when Osama Bin Laden declared war and organised the bombing of two U.S.A Embassies in Republic of Kenya and the united Republic of Tanzania.⁷ Acts of terrorism increased thereafter until September 2001 when as a result of one fairly brief, yet highly dramatic and destructive attack on two of the core symbols of the world's most powerful political actor, the (U.S.A), was attacked. The politics of terror, and the overpowering fear that terror produces in its wake, lay at the very foundation of the evolution of current social order and waging a war on global terrorism.⁸

⁶ Article 35 provides: 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

⁷ T.H. Kean (Chair) (2004). National Commission on Terrorist Attacks Upon the United States (archived), accessed on 2 May at <http://govinfo.library.unt.edu/911/report/911Report.htm>.

⁸ M.G. Marshall – Global Terrorism: An Overview and Analysis (Draft 09/11/02), at 2.

The global fight against terrorism largely became a concept of the Global community when the United Nations Security Council expressed its resolve to deal with global terrorism in its several Resolutions.⁹ Recognition by the United Nations Security Council of terrorism as a global threat has since enabled Member States of the United Nations such as the U.S.A., North Atlantic Treaty Organisation (NATO) Members, Uganda, Burundi, Djibouti, Kenya and Sierra Leone and those who support the noble cause to wage direct war against terrorists. The global war against terrorism, just like terrorism itself, may not be confined to a particular geographical territory or space. The State waging war on terrorism or the terrorist group need not be in close proximity with the one to be assaulted. For example, on October 7, 2001, the United States under the auspices of United Nations Security Council Resolutions 1368 of 12 September, 2001 and 1378 of September 2001 launched its armed attack on Afghanistan as a part of its war against global terrorism.¹⁰ Uganda, and later Burundi and now other African governments such as Djibouti, Kenya and Sierra Leone moved to Somalia to fight terrorists led by Al Shabaab a terrorist organisation linked to Al Qaeda that was founded by late Osam Bin Laden in the 1980s. The current spate of terrorism has prompted governments the world over to work towards improving their counter-terrorism mechanism in order to counter the acts of terrorists. It is in this arena of counter terrorism that questions of whether or not principles of IHL apply to terrorism or not come into play.

Terrorist incidents may be anticipated, for example, if the terrorists give advance notice of the attack, or if governments intercept terrorist communication, but the magnitude of terrorist attacks cannot be identified before they occur. Terrorists may also not be immediately identified on sight. This implies that counter-terrorism means must be so accurate and precise. According to the Government of Canada:

- 9 See for instance United Nations Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th Meeting, on 28 September 2001, which *inter alia* reaffirmed Security Council's unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts.
- 10 UNSC RES 1368 of 12 September, 2001 among others calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable while UNSC Res. 1378 *inter alia* Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

Counter-terrorism has a military component, but this cannot solely define international efforts. The multi-pronged fight against terrorism must include diplomacy, intelligence, security and law enforcement, customs and immigration, transportation, justice and finance expertise. All the relevant branches of government must work together to: prevent individuals from engaging in terrorism; detect the activities of individuals and organizations who may pose a terrorist threat; deny terrorists the means and opportunity to carry out their activities; and respond proportionately, rapidly and in an organized manner to terrorist activities and mitigate their effects.¹¹

The foregoing discussion, which is largely based on the experiences of the victim States or those who champion the fight against global terrorism portray terrorism as a common criminal act. Consequently, known cases of how terrorists have been handled such as the Guantanamo Bay Prison scenario, do not call for any apologetic views of the public. However, human rights aspects of persons arrested and detained as terrorists might be violated, and in some cases such as the Guantanamo Bay Prison, have been violated much as their captors strive to justify such violations because of the violence that was nipped-in-the-bud, before the terrorists executed their plans to their logical conclusions. The legal argument advanced in that respect being that globalisation of terrorism and the challenges associated with it and the various traditional assumptions about international law, its relationship to domestic law, the ways in which it is created and the methods of its enforcement are yet to accommodate this new wave of criminal acts.¹² The next part attempts an analysis of the relationship between global war on terrorism and IHL.

- 11 Government of Canada (2011) *Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy*, Her Majesty the Queen in Right of Canada, Cat. No.: PS4-104/2011E-PDF, ISBN: 978-1-100-17291-0; G. Fernandes (2001). *The Global Fight Against Terrorism: Where to Begin and How to End*, South Asia Terrorism Portal, Institute for Conflict Management, India.
- 12 O. Cross et al (2006). *Law in Times of Crisis, Emergency Powers in Theory and Practice*, Cambridge Studies in International and Corporate Law, Cambridge University Press, Washington, USA.

Interface Between Global War on Terrorism and International Humanitarian Law

International humanitarian law (IHL) (*jus in bello*) is a body of law that applies only in cases of armed conflict.¹³ It was developed at a time when the use of force (*jus ad bellum*) was a lawful form of international relations, when States were not prohibited to wage war, when they had a right to wage war.¹⁴ IHL was born in the battlefield (during armed conflicts) and that is why it is sometimes referred to as the law of war or law of armed conflict.¹⁵ Developments in global politics have since necessitated that IHL is applied even in cases of non-international character—where one of the parties to the conflict is not a State. An authoritative definition of the scope of application of IHL is discerned from the provisions of Common Article 2 to the Geneva Conventions, which essentially provides:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply 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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The essence of common Article 2 is to ensure that clear circumstances of an armed conflict are delineated from other situations, which though generally amount to conflicts, are nonetheless not armed conflicts. Provisions of common Article 2 are supplemented by Article 1 of the Additional Protocol I which *inter alia* provides:

- 13 ICRC (2008). How Is the Term "Armed Conflict Defined in international Humanitarian Law?" Opinion Paper, Geneva accessed on 2 May 2013 at <http://www.icrc.org/cng/resources/documents/article/other/armed-conflict-article-170308.htm>.
- 14 M. Sassoli and A. A. Bouvier in co-operation with S. Carr, L. Cameron and Thomas de Saint Maurice, *How Does the Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, vol. 1, 2nd ed., ICRC, Geneva, (2006), p. 102.
- 15 See G.D.Solis (2010). *The Law of International Armed Conflict: International Humanitarian Law*, United States Military Academy, Cambridge University Press accessed on 2 May 2013 at www.cambridge.org; A. A. Bouvier *et al* (2012). *Peace Operations Training Institute*, Williamsburg, USA; Note also that Henry Dunant who is believed to be the father of modern IHL started his work at the Battle of Solferino, from whence treaties including the current Geneva Conventions were created.

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Clearly, there is need for a situation of conflict to qualify as an armed conflict before IHL can be invoked. Armed conflicts between States are clearly defined as international armed conflicts and are easily identified. However, non-international armed conflicts might be confused or deliberately denied the appropriate stature and merely labeled as ordinary insurrections within States. In respect to non-international armed conflicts, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic Decision* (International Tribunal for the former Yugoslavia) observed that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.¹⁶ IHL applies in such situations. However, IHL does not apply in the following circumstances: situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.¹⁷ In order for IHL to operate, there must exist a legally cognisable armed conflict—either internal (non-international) or international armed conflict.¹⁸

The above criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganised and short-lived insurrections. It equally distinguishes armed conflicts from the means and methods employed during the armed conflict. The term, armed conflict in itself suggests the existence of hostilities between armed forces organised to a greater or lesser extent.¹⁹ The decisions of the International Criminal Court for Rwanda (ICTR) in the *Akayesu*

- 16 See generally *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Second Amended Indictment, 14 December 1995.
- 17 Article 1 (2) of the Additional Protocol II to the Geneva Conventions, 1949.
- 18 *Op.cit.* note 10, Para 8.
- 19 *Jean Paul Akayesu ICTR-96-4-T* (Judgement and Sentence, 1998).

Case and the ICTY in the *Tadic Case* rendered the discrepancy of treatment of victims during armed conflict untenable—it is no longer important to assert that criminal acts were perpetrated during international or non-international armed conflict.

There is no room for exceptions in any case which is legally declared an armed conflict under IHL. Indeed, Article 3 of the Additional Protocol I to the Geneva Conventions provides:

Without prejudice to the provisions which are applicable at all times: a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol; b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

The question which arises then is: Does terrorism qualify as a category of an armed conflict so that principles of IHL can be applied in situations categorized as terrorism? Conceptually, terrorism is the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons.²⁰ In particular, the FBI definition of a terrorist act categorically eliminates the possibility of one labeled a terrorist to be considered a fighter or combatant that is a protected person under IHL. If an act of terrorism is committed during a situation of armed conflict then automatically, IHL will apply. In any other case, the law applicable would be international criminal law or national criminal law of the State where terrorist acts have been committed or of any other State whose national criminal legislation mandates it to arrest, investigate and prosecute such acts.

My argument is that a blanket perception that a terrorist then is not entitled to rights provided for under IHL is fallacious, much as there are other avenues such as national legislation which essentially guarantee rights of detained persons. It is immaterial to consider that because the violence such a person inflicted either

20 Definition of terrorism accessed on 10th July, 2013 at <http://www.thefreedictionary.com/terrorism>

on the government or the population or would have inflicted on such if his or her plans were not thwarted by his or her captors would be disastrous. Once captured, during an armed conflict situation, such a captive would automatically be entitled to the benefits under IHL as long as he or she complied with the requirements of the law during his or her encounters with the captors—namely acting in a manner that is consistent with that of combatants. Violence cannot be used as a criterion for denying any party to the conflict benefits under IHL. In any case, parties to the conflict meet out violence against their opponents. However, the nature of violence exerted on the opposing fighting forces is anticipated, regulated and must conform to the general principles of IHL—proportionality, military necessity, limitation and not to cause unnecessary harm to persons and the environment.²¹

By definition, and in relation to application of IHL, 'attacks' during armed conflict mean acts of violence against the adversary, whether in offence or in defence.²² This clearly shows that during armed conflict, the parties to a conflict are identifiable—one goes on the offensive while the other takes up the defensive position. Article 49 of the Additional Protocol I further provides: The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party. The key words in this respect are 'a Party to the conflict' and 'adverse Party'. This then makes the discussion clearer: acts of terrorism are common criminal acts of violence committed in situations either not falling within the ambit of the armed conflict, where IHL does not apply or within situations qualifying as armed conflicts, in which case IHL would apply.

It would therefore, appear, and it would legally be argued that if acts of terrorism have a link to an armed conflict, then IHL would apply—they need not be committed within the actual vicinity of the armed conflict, but must be inextricably connected to such an armed conflict.

Terrorism inspires States to re-orient their counter-terrorism mechanisms in ways that affect a wide range of policy processes—in fields of banking and immigration, to surveillance and legal procedures. When a group of persons is declared a terrorist organisation, governments allow highly coercive interrogative techniques, which contravene the absolute prohibition on all forms of torture and cruel, inhuman or degrading treatment. These might include incarceration without access to family members, or legal counsel. In some cases, terrorists are

21 See for example Article 35 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

22 API, Article 49 (1).

sent to other countries for custody where they may face torture or persecution.²³ It might also include trying persons otherwise not subject to military law by military tribunals.

In the case of *Hamdan v. Rumsfeld*, Hamdan who was at one time a driver and bodyguard of Osama bin Laden was captured by militia forces in Afghanistan and handed over to the U.S.A. forces.²⁴ The USA forces transferred him to Guantanamo Bay prison in Cuba for detention. Hamdan was charged with the offence of conspiracy to commit offences triable by military Commissions set up by the President in the US. He appealed to the US Supreme Court. The US Supreme Court held that the Military Commissions as set up by the President violate common Article 3 of the four Geneva Conventions of 1949 to which the United States is a party and whose requirements are incorporated into US statutes, since these commissions do not provide to those accused before them the minimal judicial guarantees recognised as indispensable by civilised peoples. This case demonstrates how States might be inspired to violate human rights of persons belonging to groups declared as terrorist groups. It also demonstrates that States might violate IHL principles by treating such persons as common criminals whereas in actual fact they are participating in an armed conflict. My argument is that the acts of States, as was the case with Hamdan, violate rules of IHL to which they are a party and must be condemned at any rate. The rationale for this condemnation lies in the fact that there is an international legal framework to try persons who commit the most heinous crimes during armed conflict and any attempt to undermine this process is an attempt to re-write IHL in a distorted form.

²³ Refer generally to the example, the Guantanamo Bay Prison in Cuba, while the detaining authority is the United States Government.

²⁴ US Supreme Court, 548 U.S (2006).

Conclusion

I have made a strong case that terror acts or incidents are criminal acts and amenable to trial by States as such. The current spate of global fight against terrorism has been inspired by the high handedness of the terrorists who employ unconventional means of attacks, and which cannot be justified under IHL. Terrorists, unlike combatants or fighters who identify themselves to their opponents, act in concealment. Their actions do not specifically come within the purview of IHL and as such, the global fight against terrorism need not, at all times be classified as an armed conflict. However, rights of persons arrested, identified and categorized as terrorists should be respected, without necessarily attaching such respect to IHL. Persons or fighters who are arrested during an identifiable armed conflict should benefit from the protection accorded to such persons under the IHL regime.