

COUNTER TERRORISM AND ITS IMPACT ON HUMAN RIGHTS

75185



DATA ENTERED

**Dissertation submitted for the
Degree of LL.M (International law)**



Submitted By:

Saira Mehmood

31-FSL/LLMIL/F04

Supervised By:

Assistant Professor Mushtaq Ahmed

Faculty of Shariah and Law.



**FACULTY OF SHARIAH AND LAW
INTERNATIONAL ISLAMIC UNIVERSITY,
ISLAMABAD.**

MS
363.32
SAC

DATA ENTERED

CS
2/4/2012

7: 052-85
Q2/1
M/D

Accession No TH 5185

Terrorism
Prevention - Terrorism
Disaster Relief
Internal Security

D.E.
JP
7-12-2012

FACULTY OF SHARIAH AND LAW

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD


It is certified that we have read the thesis submitted by Saira Mehmood Registration No.31FSL/LLM/04 entitled "*Counter Terrorism and its Impact on Human Rights*" as a partial fulfillment for the award of Degree of LL.M(International Law). We have evaluated the thesis and found it to the requirement in its scope and quality for the award of the Degree.

Supervisor:



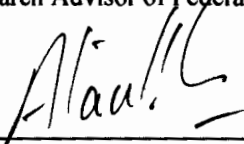
(Asstt. Prof. Mushtaq Ahmad)

External Examiner:



(Matti-ur-Rehman)
(Research Advisor of Federal Shariat Court)

Internal Examiner:



(Asstt. Prof. Atta Ullah)

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

TABLE OF CONTENTS

S.NO.	Contents	Page
1.	Table of Contents	i
2.	List of Abbreviations	iv
3.	List of Cases	v
4.	Dedication	vi
5.	Acknowledgement	vii
6.	Abstract	viii
7.	Introduction	1
8.	Chapter 1. Defining Terrorism	4
	1.1 Introduction	4
	1.2 Early History of Terrorism	5
	1.3 Terrorism in 21 st Century	11
	1.4 Conceptualizing terrorism	12
	1.5 Definitions of Terrorism	14
	1.6 Definition of Terrorism in International Law	15
	1.7 Terrorism and Human Rights	16
9.	Chapter 2. The Legal Position of Counter Terrorism Initiatives	19
	2.1 United Nation and Use of Force	19
	2.2 Prohibition on Use of Force	22
	2.3 Self Defence	22

2.4	Security Council	28
2.5	Terrorism and States Responsibility in International Law	32
2.6	Responding to 9/11.	34
2.7	The United Nations Approach to 9/11	35
10.	Chapter 3. Ensuring Human Rights When Faced with Serious Acts of Terrorism	39
3.1	History of Human Rights (A Short Look)	40
3.2	States Responsibility of Respecting and Promoting Human Rights	42
3.3	Human Rights and Terrorism According to the Legal Framework	44
3.4	International Humanitarian Law	47
3.5	Relationship of Human Rights with International Humanitarian Law	48
3.6	War on International Terrorism and Violation of Human Rights (Potential Dilemmas)	51
3.7	Counter Terrorism Initiatives and its Conflict with International Humanitarian Law and Human Rights Law.	57
11.	Chapter 4. Analysis of Counter Terrorism Initiatives in View of its Implications on Human Rights.	64
4.1	United States Strategy for “War on Terror”	64
4.2	International Due Process Standards.	67
4.3	Violation of International Human Rights by United States.	70
4.4	International Human Rights Law in Wartime and Other	73

“States of Exception”

4.5 The Human Rights Impact of Counter Terrorism Measures: Current

Issues: 78

12. Conclusion 81

13 Bibliography 87

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights.
CIA	Central Intelligence Agency.
CTC	Counter Terrorism Committee.
CTED	Counter Terrorism Executive Directorate.
ECHR	European Convention on Human Rights.
ICCPR	International Covenant on Civil and Political Rights.
ICJ	International Court of Justice.
IHR	International Human Rights.
IHL	International Humanitarian Law.
PWG	Policy Working Group.
SC	Security Council.
UDHR	Universal Declaration of Human Rights.
U.S.A	United States of America.
U.N	United Nations.

LIST OF CASES

S.No.	Cases	Page No.
1.	Nicaragua Case.	25
2.	Caroline Case.	25
3.	Corfu Channel Case	33
4.	Jose Padilla Case.	60,72,73
5.	Esam Hamadi Case	73

DEDICATION

Dedicated to my parents

**“O’ my Lord! Do mercy on both of them
as they did on me when I was a child!”**

(Amin)

ACKNOWLEDGEMENT

I am deeply indebted to my supervisor, Professor Mushtaq Ahmed for heartedly providing all possible supervision. His experience in research had been a precious asset.

I would like to acknowledge the honorable Dean and Professors of the Shariah and Law, International Islamic University, Islamabad for providing all necessary facilities, which made my studies possible here.

Special thanks to my friends for providing all possible support and guidance.

Saira Mehmood

ABSTRACT

Terrorism is one of the hot issues of the contemporary world. The terrorist events of 9/11 proved that terrorism is a big challenge faced by the whole world and need was felt to draft an effective counter terrorism strategy.

Though the use of force is prohibited by the UN Charter, this is not an absolute rule, as there are certain exceptions like use of force in self-defense, under certain circumstances. In the wake of September 11 Security Council passed two resolutions and a counter terrorism committee was established in 2001.

Every counter terrorism strategy aims to protect the human rights. International Humanitarian Law is applicable to situations of armed conflict. Hence, it must be taken into account while devising counter terrorism initiatives. Currently the drafting of a counter terrorism policy is a challenge to the strategists, as its vague and undefined concept can even evade the basic human rights in the near future.

This thesis aims at evaluating the current laws relating to terrorism and evaluating the counter terrorism initiatives adopted by U.S in response to 9/11 so as to check their impact on human rights.

Currently throughout the world, counter terrorism measures are promulgated to prevent violations of human rights, but it is a sad reality that on this pretext, the world witnessed the worst violations of human rights, which led to the curtailment of the rights of freedom of expression and attacks on human right defenders.

The purpose of this thesis is to raise awareness among the authorities entrusted with envisaging counter terrorism strategies, that this on terror and its counter initiatives have further undermined the essence of human rights and International humanitarian law and even led to the erosion of democratic institutions, which instead of stopping this course led to its further promotion.

Hence in nutshell it can be concluded that the need of hour is to draft an effective counter terrorism strategy on International level in order to prevent the future generations from this scourge.

Introduction

INTRODUCTION

Many People around the world are advocating for new laws to fight terror. These anti-terrorist laws as a result have had profound effects on human rights and civil liberties. The troubling reality is that, multiculturalism freedom and civil liberties are at a stake. If the terrorist's target was to undermine democracy, freedom and human rights, then they are winning the battle. Each time a new anti- terrorist law is enacted, it puts a full stop to civil rights and freedom. After the incident of 9/11 the "war on terrorism" has created a dangerous situation. This situation is dangerous for freedom, democracy and justice all over the world, and it caused the human rights activists to reflect upon the fundamental values, such as freedom of speech, respect for human dignity, freedom of religion, justice for all and tolerance. A negative linkage is considered to be there between "war on terror" and human rights.

"War on terror" is considered to be a defining conflict of "21st century" .Many questions are raised about "war on terror" such as, who is winning the "war on terror"? Where the "war on terror is going?" Is it a "war on terror" or the "war of terror"? Is the "war on terror" going out of control?

At present, there is a need to protect the legal boundaries in order to overcome the

strain resulting from 9/11 and the “war on terror”. As a result of response to 9/11, the implications for human rights are potentially grave, not only in the present scenario, but also for the future.

This thesis attempts to set out in brief the law that governs the responses to 9/11. It also highlights the areas where the law is unsettled. It does not mention the facts, nor advocates anything beyond the application of international law. The purpose of the thesis is to provide a resource for those who are struggling with many legal questions raised by the present situation. These questions include: whether and in what circumstances the use of force is allowed in response to abominable events? What does terrorism mean and how it can be defined? When a state is held liable for the terrorist activities of individuals?

The scope of the thesis is limited to the laws that ought to govern the responses to terrorist acts and protection given under international law to the people’s liberty in such conflicts.

The methodology adopted for the research will be a qualitative. There would be a detailed survey and research in order to obtain timely information on the issue of counter terrorism and human rights from a variety of specialized perspective.

In concluding the information gathered during the research ,I would adopt a right-based methodology ,which would provide the most effective analysis.Under this approach,I will examine the implications of counter terrorism initiatives in the light of established conventions on human rights.

The rationale of this thesis is that, to highlight the pressing problems of counter terrorism in the context to protect the world population against violation of basic human rights. There is a need to have a further research on it, so that the general public can have better understanding of counter terrorism and its implications for human rights, in order to set out criteria of their own. The negative impact of counter terrorism initiatives should be analyzed in an objective and impartial way. Within the UN system first of all, the existing legal framework should be reaffirmed and interpreted by competent legal authorities.

It is the duty of all the states to protect their citizens from terrorism, which is considered to be one of the greatest threats against international community. But in doing so, the States must take the greatest care to insure that terrorism do not become an embracing concept. It means that these measures should not be used to block or justify violations of human rights and recognized humanitarian standards.

After 9/11, thousands of human beings, innocent civilians, were brutally deprived of the most fundamental rights. For example, right to life which is to be taken as a crime against humanity. Although it is very difficult to understand the reasons for the committal of this kind of crime, but in order to achieve security, we cannot sacrifice human rights. A greater respect for human rights, social justice and democracy can be achieved through the well established international instruments such as UN Charter, International Covenants on Human Rights and the Geneva conventions for the protection of war victims. These instruments will give only effective cure against terrorism.

Therefore, we must continue our struggle to value the rights of our own and to respect the rights of others. At the same time, we must confirm and assure the primacy of the rule of law while keeping in mind that certain acts are so evil that no cause whatsoever can justify their use.

So the fight for social justice must be dealt in accordance with the law .For that the security measures for the people must be firmly founded in law and in defending rule of law, everyone is bound by law to respect it.

Chapter 1

DEFINING TERRORISM

1.1 Introduction:

The word terrorism proves its existence and practice throughout history in wide variety of political ideologies. Terrorism means different things to different people depending on the religion, race, ethnicity and the geographic location they belong, which makes it difficult to have an authentic definition of terrorism.¹

However its definitions are mostly based on three conditions

- The methods (violence)
- The target (civilians or the government)
- The purpose (to impart fear and force political or social change)

The style adopted by the rebellion people of the developing countries is depicted as a method of radicals for the struggle of independence or anti-conical struggle. Therefore the word terrorism holds different meanings and understanding for different people as this *clinché* rightly expresses:-

“One man’s terrorist is another man’s freedom fighter”.

It is mostly taken as the product used by non governmental groups but

¹ John Richard Thackrah, *Dictionary of Terrorism*, (Routledge: London and New York, 2004), p.30.

government also utilize it for variety of purpose like

- To upkeep its power
- To end liberation campaigns
- To maintain harmony among people joining some particular groups. The example could be of United States, which according to some is indulged in terrorism itself against selected targets, while attacking other countries for promoting terrorist activities.

To draw a line between *violence* and *terrorism* is difficult as mostly the governments themselves are involved in some degree of violence e.g. war which is a deadly way of resolving dispute.

In order to understand the concept of terrorism, we first have to go through the history of terrorism and its different stages of development. Following discussion of terrorism in historical prospective leads us to a more traditional understanding of the term violence against civilians in order to instill fear and thus bring a political or social change.²

1.2 Early History of Terrorism:

Difference in opinions, beliefs and violent emotions has always produced terrorism as a result. Its exact emergence as a concept is not known but it's estimated to have roots at least 2000 years ago. Moreover today's terrorism has in some respect come full circle, with many of its contemporary practitioners motivated by religious

² Harvey W. Kushner, *Encyclopedia of terrorism*, (Sage Publications, Inc, 2003), p.xxiii

convictions, something which was done by many of their earlier predecessors. The word also holds a political aspect, which covers the discourse amounting terrorism, a phenomenon which is explained by Paul R Pillar as “A challenge to be managed not solved”³

1.2.1 Religious roots of terrorism:

During the first century of Roman invasion, the Jewish groups were known as sicari and the Zealots. This period is thought to be the evolution of terrorism. During this period the most used weapon was sica (it’s a short dagger with literal meanings of “dagger men”) against people who were thought apostate.⁴ Scari were part of Zealot group. The term zealot is derived from this movement.⁵

The movement of Zealots was initiated around 70 AD/CE in Palestine. During 11th century Ismailis(Assassins) appeared whom Mongols defeated in the 13th century. Later on 17th century the barbaric act of sacrificing people at the goddess “Kali” was practiced by members of the thugee cult. The basic aim of this group was to terrorise the individuals and not the governments or populations.

During 16th to 18th century (the age of absolutism) religious conflicts lost their acuteness and were replaced by political assassination of prominent statesman. However, monarchs never had the intention of killing individuals despite of their differences. Systematic terrorism started in late 19th century with wide number of

³ Paul R. Pillar, *Terrorism and U.S Foreign Policy*, (Brookings Institute Press: Washington DC, 2001), p.vii.

⁴ Webster’s Third New International Dictionary (Merriam- Webster 1984) p.2657.

⁵ Kushner, *Encyclopedia of Terrorism* , p.360

categories.

1.2.2 Terrorism in Nationalists and Anarchists Time Period:

During the French revolution, terrorism was firstly used as a word (*regime de la terror, 1793-1794*) as a synonym for a reign of terror and then later changed to systematic use of terror.⁶

To protect the regime from submissive elements, it was designed such as to authorize power of newly established radical governments. According to French Revolutionary Leader Maximilien Robespierre, in order for the survival of French Republic during its infancy terrorism was considered to be important, in 1794 he said 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 of democracy applied to our country’s most urgent needs”.⁷

The above statement depicts that earlier terrorism was used for positive purposes, as to punish submissive and others whom the regime thought to be a threat to people. After the execution of revolutionary leader Maximilien Rospierre along with 40,000 others during the regime de la terror, an English critic of terrorism Edmund Burke describe people involved in Revolution as terrorist.⁸

⁶ Thackrah, *Dictionary of Terrorism*, p. 114

⁷ Quoted in “*Modern History Source Book*”: Maximilien Robes Pierre: Justification of the use of terror online at <http://www.fordham.edu/halsal/mod/robespierre.terror.html>..(last visited on Jan 2006).

⁸ Kushner, *Encyclopedia of terrorism*, p.360

The notions, of nationalism and citizenship, which both caused and were a result of the French Revolution, also saw the birth of secular terrorism. Marxism, as a political ideology also used the unrest of terrorism as a means for change. The Italian Revolution Carlo Pisane's theory of the "propaganda of the deed" which recognized the utility of terrorism is to deliver a message to an audience other than the target and draw attention and support to a cause- typified this new form of terrorism. ⁹

Narodnaya Volya a Russian populist group Practice Pisane's thesis first in 1878 against the Tsarist Regime. The group's most famous act was assassination of Alexander II but Narodnaya Volya avoided killing innocent.

Nationalist of Ireland and Balkans also used terrorism as a method to have their desired result. During 20th century terrorist attacks reached India, Japan and the Ottoman Empire while two US presidents and one successor was killed during this period.

Like Europe, America faced terrorism before 20th century, not only Anarchists were active during 1880s but the country's Civil War had seen acts of terrorism. ¹⁰

1.2.3 State and Terrorism:

A Serbian nationalist was the cause of ignition of World War I who murdered an Austrian chancellor. Few activities pertaining to terrorism took place after the war due to death of million of individuals. These political assassinations went into a back drop after the war. Germany, Italy Eastern Europe, the Balkans and Palestine

⁹ Bruce Hoffman, *Inside Terrorism*, (Columbia University press: New York, 1998), p.17.

¹⁰ Jessica Stern, *The Ultimate Terrorists* (Cambridge: Harvard University Press, 2001), pp.16-17.

witnessed individual terrorism along with the state terrorism. Fascistic and communistic viewpoints were the result of “individual” terrorism while totalitarian ideologies are the result of state terrorism.¹¹

A new wave of terrorism by political assassinations came during 1930s. The proposals were presented at League of Nations to pass conventions to stop terrorism and for the establishment of an International Criminal Court.¹²

Despite these measures terrorism increased and was used to oppress the weak by various totalitarian regimes like, Nazi Germany fascist Italy and Stalinist Russia. Then in recent years some military dictatorships like that of South American countries or regime in Zimbabwe used terrorism as a measure to cause oppression. But many as Bruce Hoffman do not accept these charges.

“Such usage are generally termed terror in order to distinguish this phenomenon from terrorism”, which is understood to violence committed by non-state entities”.¹³

However not all are of the opinion that terrorism can be considered as non-governmental undertaking.

For example Jessica stern states “in deliberately bombarding civilians as a mean of attack enemy morale, states have indeed resorted to terrorism”. According to her these actions include both Allied strategic bombing campaigns of World War II

¹¹ Kushner, *Encyclopedia of terrorism*, p.360.

¹² Adrian Guelke, *The Age of Terrorism and the International Political System*,(New York: I.B Tours:, 1998), p.3.

¹³ Hoffman, *Inside Terrorism*,pp. 20-23

and also American droppings of Hiroshima and Nagasaki.¹⁴

During Post World War II nationalist groups in Middle East, North Africa and Asia used terrorism as choice strategy for their independence struggle .In predominantly agrarian societies this terrorism took form of guerrilla warfare with China and Indonesia .In urban areas also terrorism was committed, e.g. Palestine, Cyprus.

A large number of national political movements adopted a strategy that would use violence for success. These newly created third world countries and brethren from the communist blocs states advanced the argument that their fight was a hard work of dedicated freedom fighters rather than war against colonial oppression.

During 1960's terrorism spread throughout the World .In Latin America Military dictatorship was replaced by Tupamaro's form of terrorism. In Argentina left wing terror organizations waged against Argentinean authorities. In 1960's and 1970's a wave of left wing also emerged in Japan, Germany and Italy.¹⁵

1.2.4 Origins of the Terrorist Groups:

A violent group can emerge out of peaceful Protestants of some social problem, groups,such as demanding independence, attracted to religious or ethnic minority. The urban guerilla group when appear are challenged by left wing or right wing groups. Then there are traditional groups like anti colonial and rural guerrilla. Colonial groups include (the national organization of Cypriot Struggle) formed in

¹⁴ Jessica Stern, *The Ultimate Terrorists*, p14.

¹⁵ Kushner, *Encyclopedia of Terrorism*, p. 361.

1955 to drive British occupying forces from Cyprus, or the IRA in its early years ethnic cultural minorities such as ETA and the Black Panthers, double minorities such as the Red Brigade, urban guerillas such as Montoreros and Tupamaros and Japanese Red Army. ¹⁶

Today many of these organizations have ceased to exist altogether, but few organizations such as the Palestinian, Northern Irish and Spanish Basque groups are still there, motivated by more enduring causes. Most of these organizations have made moves toward political rather than the terrorist methods.

1.3 Terrorism in the 21st Century:

Terrorist motives two decades ago were associated with nationalism, seperatism and leaned towards revolutionary and cold war ideological zeal. Now there is greater complexity, diversity and unpredictability. State sponsored terrorism is more secretive and economical with truth. Nowadays Suicide bombers can commit terrible attacks. Religion, extremism and hatred are the motives behind such attacks. At present times four types of terrorism have emerged. First, mass causality terrorism such as the destruction of World Trade Center in 2001. Second, state sponsored chemical or biological weapons, where a state might help a terrorist group. Third, small scale chemical or biological attacks and lastly super terrorism i.e, the use of biological or chemical agents to cause deaths of thousands. ¹⁷

Currently the threat of terrorism is faced by the whole contemporary world. A

¹⁶ Thackrah, *Dictionary of Terrorism*, p .118.

¹⁷ Thackrah, *Dictionary of Terrorism*, p. 118.

lot of questions are being raised in this regard especially as, in any war against terrorism who is considered to be the enemy? What is the new terrorism? Nations view these questions from different perspectives. The democratic nations of the world are well aware of the need to maintain and improve international law in order to protect the human rights and protocol of war.

1.4 Conceptualizing Terrorism:

Conceptualizing terrorism is not merely a theoretical issue but an operative concern of today. Its no longer considered being a local problem of some countries but an issue, which involves a number of international aspects. As terrorism is taken, as an international phenomenon there is a need that responses to it, should also be taken on international scale. In order to develop an effective international strategy to eradicate terrorism, it requires agreement on what it is? And that what should be its proper definition. Without a proper definition of terrorism, it would be impossible to enforce or formulate international agreement against terrorism. The definition of terrorism will be taken as the basic and operative tool for expanding the international community's ability to combat terrorism.

Definition of terrorism is originally controversial. Use of force in order to achieve particular ends is common to state and non-state groups. The actual difficulty comes when the use of violence is to be determined as legitimate. Therefore it is very important to have a definition under which the countries can response to the problem of state sponsored terrorism and terrorist freedom fighters. This would result in the reduction of tension between the nations in solving international crises.

Different scholars have defined the term but no one is all-sure that what terrorism is. More over media has played a great role regarding the coverage of terrorist incidents over the years, which has further increased the difficulty of defining terrorism. As David Rapport cautioned of this phenomena three decades ago “in attempting to correct the abuse of language for political purpose our journalists may succeed in making language altogether useless.”¹⁸

Experts on terrorism are also skeptical of the opinion that whether the attempts to define terrorism are fruitful or not. As said by Walter Lacquer;

“Even if there were an objective, value- free definition of terrorism, covering all its important aspects and features it would still be rejected by some for ideological reasons (...)”¹⁹

Researcher believed that an internationally accepted definition of terrorism could never be agreed upon; after all they say

“One man’s terrorist is another man’s freedom fighter”.

Schmidt and Joungman, in their book “political terrorism” cited 109 different definitions of terrorism obtained in a survey of leading academics in the field. For example Jenkins defined terrorism as;

“The use or threatened use of force to achieve political ends”.

Walter Liqueur added to Jenkins definition by including the requirement of

¹⁸ David Rapport “*The Politics of Atrocity*” in *Yonah Alexander and Seymour Maxend Finger (Eds) Terrorism; Interdisciplinary Prospective*, (New York; John. Jay press 1977), p.46

¹⁹ Walter Liqueur, *The Age of Terrorism* (Boston; little brown and company, 1987), pp.149-150.

targeting innocent people.

Few definitions of terrorism are given here, in order to articulate the meaning of terrorism in more proper way.

1.5 Definitions

1.5.1 The American Heritage Dictionary

Defines terrorism as "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

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

Act of Terrorism = Peacetime Equivalent of War Crime

1.5.3 UN's " Academic Consensus Definition" by Schmidt (1988):

"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 a message generators. Threat-

²⁰ http://en.wikipedia.org/wiki/American_Heritage_Dictionary(last visited on 12/07/06)

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 the purpose of their intimidation.²¹

1.6 Definition of Terrorism in International Law

The word terrorism is not new in international law as UN Security Council makes it clear that the act of international terrorism constitutes one of most serious threats to international peace and security in the twenty first century.²²

Despite the fact that effects of terrorism are frequently and extensively occurring in our daily lives no single universal definition of it has been adopted under international law.

In 1972 an AD Hoc committee on international terrorism was made by UN. In 1977 no consensus was reached on a general acceptable definition of terrorism by the committee during its finding of terrorism.

In 1996 another AD Hoc Committee on terrorism was established by UN General Assembly in order to “elaborate a comprehensive convention on international terrorism... developing a legal frame work of conventions dealing with international terrorism.”²³

²¹ <http://www.google-analytics.com/urchin>(last visited on 10/12/06).

²² SC/RES/1377, NOVEMBER 12, 2001

²³ General Assembly Resolution 51/210 of December 17, 1996.

In 2001 Jan, general assembly resolution 55/58 let the member states to stay committed to the drafting of convention of terrorism which is still in process.

Due to lack of a single definition the member started taking counter measures in order to eliminate terrorism. These counter measures were taken under different conventions since 1963.²⁴As a result, anti terrorism conventions were drafted within UN's framework and were ratified by the states. At present these are 12 international conventions.

Due to the lack of universally accepted definition of terrorism in international law it prevents the effective counter terrorism strategy to be made by the nations. So a generally accepted definition is necessary for international community to fight against terrorism.

1.7 Terrorism and Human Rights

The issue of terrorism has become more prominent and important after the 9/11 incidents. International human rights law gives a body of legal rules enshrined in treaties and customary law that protects a number of human rights, from the right of liberty and security, freedom of expression and many others.

It entails "Positive" obligation on states to take necessary measures for the protection of these rights and "negative:" obligations on states, not to violate these rights. But these international human rights are no longer binding on USA, thus resulting in a very negative attitude towards international criminal court setup in

²⁴ Cassese A, *International Criminal Law* (Oxford University Press, 2003) p.120.

2002. Americans have ignored the abusive treatment of detainees in Afghanistan and Cuba.

In many democratic nations, public is of the opinion that the person who take part in war crimes should not be given any protection by the organs of states. USA was the first country, which gave the policy of homeland security, and now is adopted by other countries. The growth of terrorism in many nations resulted in a strict immigration Controls. As a result, there is an abuse of human rights, which let people to perceive a sense of insecurity.

Terrorism not only threatens democracy but it also seriously jeopardizes human rights. Terrorism and terrorists acts can never be forgiven on the basis of human rights.

Therefore the states are bound to protect these rights even in their fight against terrorism. A person accused of terrorist acts should be punished while keeping in view that his/ her human dignity should not be over looked.

Courts of human rights argue that states should not act in breach of international law or in breach of international humanitarian law. So when an accused of terrorist activities passes through legal proceedings he has a right to a fair hearing within a reasonable time.²⁵

Terrorism is no doubt a threat to most of the fundamental rights, even before the event of 9/11; the United Nation General Assembly and Commission on Human Rights were working on the relationship of terrorism with human rights.

²⁵ Thackrah ,*Dictionary of terrorism* pp.123.124

Consideration had also been given to the negative impact of counter terrorism measures on human rights. It is very important, that while countering terrorism the essence of human rights such as human life and dignity must not be compromised

The executive Directors of Human Rights watch explained this as;

“.... Terrorist believes that the ends justify the means, that their political or social vision justifies the deliberate taking of civilian lives in violation of the most basic human rights norms. To fight terrorism without regard To the constraints of human rights is to endorse that wrapped logic”.²⁶The states when countering terrorism, therefore must comply with their human rights obligations.

²⁶ Kenneth Roth, “*Counter Terrorism and Human Rights; An Essential Alliance*” (paper presented to Princeton Project on National Security Conference (Princeton University 2004), p. 3.

Chapter 2

THE LEGAL POSITION OF COUNTER TERRORISM INITIATIVES

When any legal system seeks to outlaw specific actions, it is always a requirement that system must have a mechanism, which would serve to punish the violators of law. Therefore, when United Nations was formed; it was believed that new international legal order would help to prohibit certain kind of use of force. For the enforcement of these laws, United Nations had established international institutions .Unfortunately, in regard to prohibition on use of force; these institutions of United Nations are facing some grave difficulties since 1945.¹

This chapter will be concerned with the legality of use of force in response to September, 11 terrorist incident .Two major aspects will be analyzed: firstly, it will look at the relevant law on the question, whether, and if so in what circumstances ,states are entitled to resort to use of force under International law. Secondly, it will look at whether the decision to take military action in response to 9/11 terrorist attacks was lawful or not.

2.1 United Nations and the Use of Force:

In deciding, how to response to a terrorist activity or incident, States have to keep in mind that they have an obligation to resolve dispute by peaceful means. These disputes

¹ See for details: Christine Grey, *International Law and Use of Force*(Oxford University Press, 2000),p.100

not only cover disputes between states, but also the other cases which are considered to be a part of international law, such as dispute between state on one hand and individuals, corporate and non-state entities on the other hand²

Article 2(3) of United Nations charter also states this obligation as:

“All members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, shall not be compromised”.

Peaceful means, mentioned here means the traditional methods such as judicial settlement, arbitration and non-adjudicatory methods such as negotiation, good offices, mediation, conciliation and inquiry. The principal organ of United Nation for settlement of dispute is International Court of justice (ICJ). This court is empowered to investigate the infringements done by one state, of the rights of another state and it can order to prevent or discontinue such violation. But due to lack of independent enforcement authority and reputation for slow proceedings, it seems to be a court of less utility in times of urgency.

The question regarding the lawfulness of use of force arises only in circumstances where there are no peaceful means at the aggrieved state's disposal, or where such methods have been exhausted or proved to be ineffective.

Chapter VII of the United Nation Charter gives the law which governs the use of force among states. It's an international treaty with almost a universal membership .This treaty gives a system of collective security along with the ban on use of force, which is

² I.A.Shearer, *Starkes International Law* (11th edition: Sydney, Butterworth's, 1994), p.441.

recognized as jus cogens.i.e, as imperative law from which no derogation can be allowed.³

The laws of armed conflict can be divided into two types, which are;

1. Jus ad bellum (the law towards war)
2. Jus in bello (the law in war).

Jus ad bellum basically seeks to limit the use of armed force whereas jus in bello is the one which governs and look for a moderate conduct of hostilities. Jus in bello is also called international humanitarian law. Here, in regard to use of force; jus ad bellum is required to look into rather than jus in bello.

Chapter VII (articles 39-51) and article 2 of the united Nation Charter gives the right understanding of jus ad bellum. Under international law, the legality of use of force is referred to as ‘jus ad bellum’’. Therefore, jus ad bellum is a body of rules which governs when force can be lawfully applied. Whereas jus in bello is a body of rules that apply after force has been used and a conflict is going on, and it applies irrespective of the fact that whether the resort to force was lawful or not. As mentioned earlier the rules relating lawfulness of the use of force are present in United Nation’s Charter and customary international law. Traditional legal concepts such as the ‘just war’ and lawful reprisals were altered by news laws of United Nations Charter. ⁴

³ See for details Martin Dixon, *A Text book of International Law*(Blackstone Press, London 2000),pp305.308.

⁴ Louis Henkin, *Use of Force; Law and US policy, Right v Might: international Law and Use of Force* (Council on Foreign Relations, 1989), pp. 37. 39.

2.2 Prohibition on the Use of Force:

Article 2(4) of United Nations Charter prohibited the use of force, which means that pre-emptive use of force would also seem to be prohibited. It gives an express prohibition against use of force, which reads as:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nation”.⁵

The words used in the article amount to a comprehensive prohibition on use of force.⁶ The general rule of use of force is that it is prohibited by United Nations. But it has certain exceptions as well, which are mentioned in the Charter. Irrespective of humanitarian intervention, which has not been invoked in present situation, there are two exceptions of prohibition on use of force which are;

1. In case of collective or individual self defence.
2. On the basis of authorization given by the Security Council, as it seems necessary for the maintenance or restoration of international peace and security.

2.3 Self Defence:

Self defence is one of the most controversial areas of use of force, and a lot of examples depict the problem of determining under what rules, the force can be enforced in regard to self defence.

⁵ Article 2(4) of United Nations Charter.

⁶ Clarke, B *International Law Nutshell Series* (pymont NSW: law book co, 2003), 151.

Generally, when a state wants to act in self-defence, there is no need of a formal approval of the Security Council. This right is given inherently to a state, which is a victim of aggression. This “inherent” right is clearly enshrined in the charter of United Nations. The only pre-requisite for this right to be legally invoked is the presence of an “armed conflict” or an “act of ‘aggression’”. The real problem arises here now, as according to international law, an armed attack can only be done by the state. Non-state actors are not considered to be a part of the Charter of United Nations.

Article 51 of the United Nations states that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of United Nations, until the Security Council has taken measures necessary to maintain international peace and security”.⁷

It is clear from the text of article that self-defence is to be taken as an exception to ‘general duty of all states to respect the territorial integrity of other states’. Therefore self defense is an exception to the prohibition on use of non authorized United Nations force. According to Oppenheim’s International law notes,” like all exceptions, it is to be strictly applied’.⁸

The scope of self –defence, however is of greater complexity as it has been a subject of ongoing debate. Detail study of article 51 leads to a situation where pre-emptive use of force by individual state or group of states seems to be precluded, and states are subjected to the permission of Security Council to reserve such use of force.

⁷ Article 51 of UN Charter.

⁸ Sir Robert Jennings QC and Sir Arthur Watts, *Oppenheim’s International law* (vol 1, 9th edition Longmans, 1996), pg.421.

The issue becomes further problematic in a way that there is no universal definition of the term “armed attack”.⁹

2.3.1 General Conditions for Use of Force in Self-defence:

The following prerequisites must be kept in mind, in order to decide whether use of force in self defence is justified or not.

2.3.1.1 Armed Attack

As mentioned above that there is no universally accepted definition of armed attack, which seems to be quite problematic. The closest definition which can describe the term is present in General Assembly Resolution 3.314. According to the Resolution few acts are qualified as an act of aggression. They are:

1. The invasion or attack by armed forces of a state on the territory of another state.
2. An attack by armed forces of a state on land, sea or air of another state.
3. Sending an army on behalf of a state, which carries out acts against another state.
4. Bombardment or use of any weapon by a state against another state’s territory.
5. A state allowing to use its territory to another state in order to bring an act of aggression to a third state.¹⁰

All these categories show that an act of a terrorist does not fit into an armed attack

⁹ Giorgio Gaja *In what sense was there an ‘armed attack’* (European Journal of International Law 9 wtc forum, vol12, no.5, 2001).

¹⁰ General Assembly Resolution, 3.314(XXXIX) adopted on 14 December, 1974.

or an act of aggression.

In regard to self defence, one has to look at the customary law as well. The principle of self-defence in customary law was laid down in Caroline case. This case gave a principle of proportionality i.e., response should be proportionate to the harm threatened or received.¹¹

Another important case is the Nicaragua case which “casts a considerable shadow of uncertainty over the right to use force in self defence”. In this case, certain actions of United States affecting Nicaragua were presented in International Court of Justice (ICJ), actions such as United States mined their waters and formed an army of rebellions and so on. America gave the justification that all actions were done in regard to self-defence of EL Salvador and Costa Rica. ICJ rejected the justification on the basis of the fact that the right of self-defence is only limited to the cases which involved an “armed attack”.

Here, in this case again the meaning of armed attack in its full meaning was not explored, and it was suggested that even though if there is not an actual attack, the action must be of serious nature. In the judgment of the case, there is a high level of uncertainty as to what degree of force would be considered to be an “armed attack”, a problem which Sir Jennings in his dissenting judgment, pointed out as: “neither realistic nor just”.¹²

According to Brownlie and Kelson article 51 is conclusive, i.e., a state is bound to act according to the article 51 provisions only, whereas Bowett argues that where there is ambiguity one has to look at customary law as he said:

¹¹ D.J Harris, *Cases and Materials on International law* (6th ed. Sweet and Maxwell: London, 2004), pg .994.

¹² MacLean, *Public international Law* (1st Ed. Old Bailey Press, 1997) p.296

“It is fallacious to assume that members have only these rights which the Charter accords them”¹³.

In regard to armed attack, few issues in international law are unsettled. These issues are:

1. Anticipatory self defence
2. Defence of nationals
3. And state’s responsibility in relation to individuals for the attack.

Most of the commentators argued that it is unreasonable for a state to wait until an ‘armed attack’ occurs in order to defend themselves. They assert that irrespective of article 51, the customary law demands no such requirement and according to themselves defence is permissible. While others are of the view that it is unlawful, whereas a third opinion found in Oppenheim’s International Law, is that, “while anticipatory action in self-defence is normally unlawful, it not necessarily unlawful in all circumstances”.¹⁴

It is also a debatable issue, that when an attack has occurred against a state, whether it should be against a territory or political independence of a state or it should be against a state’s interest or nationals. Another unsettled issue regarding armed attack is that whether a state participation or responsibility is there in reference to the non –state actors.

Some commentators assert that state involvement should be there, in regard to justify self-defence i.e., acts of individuals or groups must be imputed to state, in

¹³ Ibid, p .293.

¹⁴ QC and Watts, *Oppenheim’s International law*, p.422.

accordance with state responsibility. Therefore, it has been suggested that “coercive action directed against a state without any responsibility for an existing or imminent attack could constitute an international wrong against that state”.¹⁵

Whereas other writers assert that a state must be involved in the armed attack. As one writer states that, “the controversy centers on degree of involvement are necessary to make the actions attributable to the state and to justify action in self-defence”.¹⁶

The question of whether states are responsible for the armed attack is therefore relevant to the lawfulness of a coercive response towards those states.

2.3.1.2 Necessity and proportionality:

Necessity and proportionality are the well recognized conditions of the law of self-defence. These conditions are present expressly under customary international law and impliedly in the United Nations Charter. For the justification of self-defence, there should always be an imminent threat of force or a continuing attack, and the response to it must be necessary to turn away that threat and it must also be proportionate to the threat.¹⁷

2.3.1.3 Report to the Security Council:

The final condition of self-defence is that, the Security Council must be informed of any individual or collective self-defence. This requirement is explicitly mentioned in the Charter of United Nations and therefore binding on all the members. According to

¹⁵ George M. Travaglio, *Terrorism, International law and Use of Military Force* (18wis: Int'l, L.J., 2000) p.32.

¹⁶ Christian Grey, *Use of Force in international law* (Oxford press, 2001), p.197.

¹⁷ Maxon, R G, “*Nature's Eldest Law: A Survey of a Nation's Right to Act in Self Defence*” (Parameters, autumn 1995), pp. 55.68

article 51 of United Nations Charter it is binding on all the member states to report to the Security Council. The article states as:

“.....measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take any time such action as it deems necessary in order to maintain or restore international peace and security”.¹⁸

Therefore, it is obligatory for the states to report any self defence measure to the Security Council and then the Council will decide how to act for peace and security.

2.4 Security Council:

The second option to the ban on use of force is that, the use of force can only be allowed by the Security Council, when the maintenance or the restoration of international peace and security seems necessary.

Article 42 of United Nations Charter gives the broad powers to the security council, such as

“to make the recommendations, or decide what measures shall be takento maintain or restore international peace and security” and it further authorizes the security council to take such actions “by air sea or land forces as may be necessary to

¹⁸ Article 51 of UN Charter.

maintain or restore international peace and security.”¹⁹

Under chapter VII ,if Security Council makes a Decision ,all the members of United Nations are bound under article 25 of the Charter ‘to accept and carry out’ that decision. Under article43, it also demands from all the member states to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaing international peace and security.

Security Council while deciding to allow use of force may appoint others to do so, instead of using force itself.²⁰

Many situations have arised, where states were permitted to take all the measures necessary to give effect to the Council decisions. For example, the Resolution 678 of 19th November 1990, in which Security Council authorized the member states to cooperate with the Government of Kuwait in order to uphold and implement Resolution 660.

The language used in the Resolution 678 openly allowed the use of force whereas those resolutions which emerged in regard to the events of 9/11 have a contrasting language as to that of 678.Resolution 1368(2001)of 12th September 2001 and Resolution 1373 (2001)of 28th September 2001 declared the situations as a threat to international peace and security. In resolution 1373, the states were asked to take other steps to prevent and suppress terrorist attacks. However, it stopped the use of force or to take necessary measures ,which was allowed previously in 678 Resolution. As a whole, the use of force would be considered legitimate only with prior permission of Security Council.

¹⁹ Article 42 of UN Charter.

²⁰ Thomas M.Franck, *‘When, If Ever, May Sates Deploy Military Force without Prior Security Council authorization?’* (5 Wash, University, J.L&pol’y), pp.31. 34.

TH 5185

The responsibilities given to the Security Council by the United Charter has been subject to criticism, because of the misuse of the veto power. Therefore, it has led the critics to have a deeper view of the concept of Self-defence. These concerns have not yet though disappeared, but they were diminished in a post cold war era of Security Council activism.²¹

Prior to 9/11, an act of international terrorism was never qualified as an act of aggression, by the Security Council. In response to such attack, use of force was not even allowed. Any state which tried to respond to such attacks was condemned by the Security Council .The legal argument given by these states was that self defence also covers forcible measures in response to terrorist attack. This argument was rejected by the Security Council.

Security Council now qualified state sponsored terrorism as a ‘threat to international peace and security’, in a number of resolutions, but these resolutions qualified the support to terrorism as a ‘threat to peace’ and not the acts of terrorism itself. The Security Council avoided from mentioning directly the terrorist organizations in its resolutions, as these organizations are not the subject of international law. Therefore, following the attacks of 9/11, what happened in Security Council is quite different from what was given in Charter.

As mentioned above, it passed two resolutions in regard to 9/11 incident.i.e, 1368 and 1373.1368 resolution qualified the terrorist attacks ‘as a threat to peace’ and recognized the right of individual and collective self-defence.In resolution 1373, which was adopted after few days of 1368, once again reaffirmed the right of individual and

²¹ Simon Chesterman, *Just War or Just Peace* (Oxford Press, 2001), pp.118.119.

collective self defence and ‘any future terrorist attack’ to come was characterized as a ‘threat to peace and security’.

The behavior of Security Council in this case seems quite unusual as it recognizes the right of self-defence without having determined an act of aggression. As discussed earlier, the right of self-defence can only be used in response to an armed attack, but Security Council without fulfilling this pre condition, had tried to skip the formal link between notion and aggression. Whereas, the terrorist attacks which were characterized as a threat to peace does not have the activation of self-defence as a legal (and logical) consequences.²²

Therefore a state can only use force when it becomes the victim of an armed attack and not when it only confronts ‘a threat to peace’. One more important point in this regard is that a state can only invoke this right of self-defence for a limited period i.e. “until the Security Council has taken the necessary measures”. In resolution 1373, the Security Council took a set of measures in order to recognize the US’ right of self-defence.

As discussed earlier that the Security Council has a right to authorize the victim of an armed attack, alone or in form of collective self-defence to use force against aggressor and it is considered to be a usual practice. The examples for it are Korean War of 1950 and Gulf War of 1990’s, in both cases, there was a coalition of states, led by US in which these states aided the state attacked, acting in self-defence. But after 9/11 incident, Security Council refused its authority to issue any authorization .

²²Antonio Cassese, *Terrorism is also disputing Some Crucial Legal Categories of International Law*(European Journal of International Law,vol 12, and no.5 ,2001), p.31.

As a whole the Security Council did declared the situation as ‘a threat to peace’ under article 39, but it did not authorized its enforcement under article 42.²³ Moreover, Security Council did recognize the right to self-defence for US under article 51, but without looking at its precondition of existence of an armed attack.

The fact that Security Council did not use the mechanism provided for in the charter for this case does not mean that its behavior is not right ,as the only limit given by the Charter to the council is that given in article 24(2),it states:

“It should act in accordance with Purposes and Principles of the United Nations”.²⁴

Therefore, legal experts agreed that, irrespective of the formal anomalies of the Security Council’s behavior in above mentioned resolutions allowed for the intervention in self-defence. But security council did not authorize the use of force ,it only admitted its legality.

2.5 Terrorism and States Responsibility in International Law:

In responding to 9/11 events, the question of state responsibility has caused much speculation and debate. It includes the lawfulness of responses to 9/11 and against whom any response should be directed.

In international law, states can be held liable for international wrongs, either directly or vicariously. If the wrong occurs at the hand of state officials, then the states are directly responsible and the act amounts to an “act of state”.²⁵

²³ See for details Article 39 and 42 of UN Charter.

²⁴ Article 24(2) of UN Charter.

²⁵ QC and Watts, *Oppenheim’s International Law*, p.501.

The question arises here is that does the states are held responsible, when the private individuals or groups does an international wrong with no 'transparent relationship' with the state. The answer to it is relevant to the point that whether state exercises 'effective control' over their actions or not. Some even argue that the encouragement or passive acquiescence in wrongs is considered to be a sufficient thing in order to hold a state responsible, but the law appears to indicate that it all depends on the state's ability to prevent or control the wrong in question. Moreover, it is well established that states are not strictly responsible for wrongs that are emanating from their territory.

In Nicaragua case, according to International Court of Justice, the test is whether the states or states in question exercised "effective control" over the wrongdoers.²⁶

The rejection of strict liability for a state on whose territory the wrongs are emanating has been established long before Nicaragua case. As ICJ mentioned in the Corfu Channel Case, it is impossible to conclude 'from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known of any lawful act perpetrated therein nor that it should have known the author',²⁷

From above discussion it is derived that although states are not strictly held responsible for international wrongs emanating from their land, but they are responsible for acts of individual or groups over whom they have "effective control".

However, there is still a difficult 'grey area' and 'the issue becomes more difficult

²⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V.US) 1986 ICJ 14(June 27) para 86-93.

²⁷ See http://www.icj-cij.org/icj.www/idecisions/isummaries/lccsummary490_409.html.(last visited on 2/09/06).

when a state, which has the ability to control terrorist activity nonetheless, tolerates and even encourages it'.²⁸

The international resolutions on eliminating terrorism therefore urges from states to refrain from 'acquiescing in or encouraging terrorist activity'.²⁹

Finally, it is an issue of fact that whether the individuals concerned were sufficiently closely associated with the state for their acts to be regarded as acts of state rather than as acts of private individuals.³⁰

In the light of current law, it is necessary to have a considerable proof of state involvement in order to demonstrate state responsibility under international law.³¹

2.6 Responding to 9/11:

In the aftermath of the attacks in the New York and Washington on 9/11, 2001, the United States, initially with the support of many other countries, declared a "global war on terror". These attacks shocked the international community and as a result the states and international organizations adopted new procedures, ideas and policies regarding the "war on terrorism".

This "global war on terror" or "war on terrorism" is a clear campaign that is initiated by United States, along with the support of NATO members. The aim of it was

²⁸ Travalio '*Terrorism, International law and Use of Military Force*' (18wis:Int'l, L.J, 2000) pp.32. 154.

²⁹ General Assembly Resolution 49/60 of a December 1994 '*Measures to Eliminate International Terrorism*' see Para 4.

³⁰ QC and Watts, *Oppenheim's international law*.p550

³¹ "Note by Chairman"/of the CTC,S/AC,40/2001/CRP.1,October 16, 2001.

to end the international terrorism by stopping those groups which are said to be terrorist groups and by ending the state sponsorship of terrorism. In first three years of this war, there was a sustained campaign against Al Qaeda. In response to 9/11, the United States has had three main targets, i.e., the pursuit of al- Qaeda, the termination of Taliban regime in Afghanistan and the occupation of Iraq. From an American perspective the war in Afghanistan appeared to be successful in its initial three months. The United States was able to establish two large military bases at Bagram and Kandahar and the Taliban regime was terminated, al-Qaeda personnel and facilities were dispersed. Termination of Saddam Hussein regime was considered to be necessary because of the regime's production of the weapons of mass destruction and the support given by it to al-Qaeda.

2.7 The United Nations approach to 9/11:

The United Nations reacted with surprising attitude to the events of 9/11 .The collapse of twin towers made it clear that it is an international problem, which let the United Nation to lead a campaign in order to eradicate international terrorism.

On one hand ,the Security Council of United Nations adopted Resolution 1368(2001),whereas on the other hand the General Assembly adopted resolution 56/1,which condemned the attack and started a process of dealing with international terrorism. It has also been said that because the Security Council acted so quickly over 9/11there was no need by the General Assembly to add to the Security Council Resolution.³²

Other United Nations organs also adopted non-military policies and agendas to

³² J.Dhanapala, *"The United Nations' Response to 9/11", Terrorism and Political Violence* (vol.17, 2005),p.1-2.

deal with international terrorism; it includes issues like democratization, the eradication of poverty, diseases, money laundering and light weapons proliferation.³³

On 28th September 2001, the Counter -Terrorism Committee (CTC) was created by Security Council Resolution 1373(2001), in which measures against acts of terrorism throughout the world and against the perpetrators sponsors and facilitators of terrorist acts were adopted and imposed. The Resolution called on members not to provide any financial assistance or physical support to the terrorists, i.e., the states must assist one another through sharing information and ratifications of international conventions.³⁴ In order to implement Resolution 1373(2001), for the fulfillment of mandate of the CTC, three stages were involved. First stage basically examines that whether a state has the necessary legislation needed to combat terrorism, with emphasis on terrorist financing. Second stage, examines the entire anti-terrorist programme of the state. The final stage focuses on monitoring the compliance and implementation of Resolution 1373, which includes ratifying international conventions and protocols relating to terrorism, enhance information sharing etc.

In his address to the Security Council's Counter-Terrorism Committee, the Director of the New York Office of the Office of the UN High Commissioner for Human Rights, Mr. Bacre Ndiaye warned that "there is evidence that some Governments are now introducing measures that may erode core human rights safeguards. In some countries, non-violent activities have been considered as terrorism, and excessive measures have been taken to suppress or restrict individual rights, including the presumption of

³³ "A More Secure World"-Report of the High-level Panel on Threats Challenges and Change, United Nations, 2004.

³⁴ "Note by Chairman" of the CTC, S/AC, 49/2001/CRP.1, October 16, 2001.

innocence, the right to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum”

On 26th Mar, 2004, Resolution 1535 was adopted by the Security Council, in which the Counter Terrorism Executive Directorate (CTED) was established in order to reinforce CTC efforts.³⁵

The work of CTC and CTED resulted in the number of developments. The developments such as ,that there has been a substantial increase after 9/11 in the ratification of counter-terrorism conventions ,For example ,in convention for Suppression of Terrorist Bombings (1997)the membership has increased from 28 countries to 115.Approximately 100 countries had showed their interest in technical assistance to fight terrorism.

The Secretary General of United Nations, Kofi Anan, in Oct, 2001 established the Policy Working Group on United Nation and Terrorism (PWG).It was established in order to identify the implication and broad policy dimensions of terrorism, so that United Nation can more actively works towards combating terrorism.PWG called on United Nation to adopt a tripartite strategy of dissuasion, denial and cooperation.

In dissuasion process, more emphasis is on the uses of international legal instruments such as protection of human rights and along with that there are also 12 conventions on counter-terrorism, which the states and aggrieved party must know that these international instruments and norms can help in time of injustice.³⁶

³⁵ See for details SC Res.1535 (2004) of 26 March 2004.

³⁶ “Report of the Policy Working Group on the United Nations and Terrorism, United Nation Security Council A/57/273-s/2002/875.

The programme of “Strengthening the Legal Regime against Terrorism” which started in 2003 and ends in Dec 2006 is an example of dissuasion, as it encourages and assists states to ratify conventions.

The denial is a second part of tripartite strategy which relies on various organs and ideas of United Nation i.e., in case of crisis, dealing effectively, the international community forestalls the possibility of terrorists using a crisis to recruit or create a base of operation.

Lastly, cooperation is the third part of tripartite strategy i.e., calls for enhance cooperation are necessary. The PWG looked at the cooperation exists between the states to counter terrorism as the view being that the greater cooperation, the greater reward.

The United Nation as inter-government organization faced the challenge of international terrorism following 9/11 and made great strides in developing a comprehensive programme to deal and combat terrorism. This programme includes legal mechanism financial support, economics and aggressive (quasi military) policies through the application of chapter VII, but the actual position with UN effort is the fixation with semantics, which comes out of its large membership ,which comes out of its large membership, which demands consensus politics.

Chapter 3

ENSURING HUMAN RIGHTS WHEN FACED WITH SERIOUS ACTS OF TERRORISM

The third chapter of the thesis sketches out relevant provisions of international human rights law and international humanitarian law and touches briefly on the inter-relationship between the two bodies of law applicable during armed conflict.

In this chapter, the discussion would be on the legal framework of the phenomenon of terrorism and how to combat it by legal and humanitarian means and methods. For this, already there is a legal framework, which includes most important international instruments, that is Human rights covenants and Geneva conventions and in addition to this, there are 12 international conventions¹ and 7 inter-regional conventions that elaborate different aspects of terrorism.

The fundamental basis for UN fight against terrorism is its respect for human rights and the rule of law. Therefore it is considered to be inherent and essential to any counter terrorism strategy to ensure the defense of human rights. International human

¹ The 12 UN conventions on how to fight terrorism are - 1963, Convention Offences And Certain Other Acts, Committed on Board Aircraft. - 1970, Convention for the Suppression of Unlawful Seizure of Aircraft. - 1971, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. - 1973, Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents. - 1979, International Convention against the Taking of Hostages. - 1980, Convention on the Physical Protection of Nuclear Material. - 1988, Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. - 1988, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. - 1988, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. 1991, Convention on the Marking of Plastic Explosives for the Purpose of Detection. - 1999, International Convention for the Suppression of Financing of Terrorism.

rights experts continue to express their concerns that many counter terrorism measures infringe the fundamental freedom and human rights.

Proposals for protecting human rights have been discussed throughout the UN resolutions for uniting against terrorism. Protection of human rights and effective counter terrorism are not conflicting goals, but they are taken as complementary and mutually reinforcing ones. So it is essential part of counter terrorism strategy to protect human rights. The central role of human rights is therefore highlighted in every substantive section of UN strategy to counter terrorism in addition to a UN instrument on human rights per se.

3.1 History of Human Rights (A Short Look):

Human Rights history begins with the Universal Declaration of Human Rights in 1948. It was taken as the first internationally codified human rights law. Article 1 of the Declaration states: “All human beings are born free and equal in dignity and rights”²

Moreover article 28 states:

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.³

After World War II, the codification of human rights began which was considered to be later as compared to international humanitarian law. However, essential elements of modern human rights are found in various cultures of much earlier times: in 6th century

² Article 1 of UDHR.

³ Article 28 of UDHR

B.C, democracy developed in Athens, while, French Declaration of Rights of Man, Magna Carta, and American Declaration of Independence were milestones in the struggle for democracy and individual freedom. Various provisions based on principles contained in those fundamental sources have been integrated in many National constitutions.

In 20th Century, reigns of terror without being challenged by free nations were established by totalitarian regimes. In 1943, the Nazi prosecution of Jews, communists and gypsies began, which, by the way, was realized in full observance of the democratic rules of the German Weimer Republic: Principle of non-interference in internal affairs was taken as international politics, which ultimately led to the reality that modern democracies stood by as the Nazis prosecuted certain groups within their own population according to a horrific political and racist ideology. That is why the Preamble of Universal Declaration states that the “recognition of the inherent dignity and of equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world.” Therefore, all members of the international community are bound to respect for human rights in order to bring peace and security of the entire world.

Totalitarian regimes based on torture, discrimination and other absences of justice, as a result finally constitute a threat to security of mankind because they are taken as a source of armed conflicts and terrorism. Failed States may also threaten security because they have no longer control on use of force in such situations. As arms and money gives a base to exert unlimited power, failed states are considered to be the ideal breeding grounds for international terrorism and crime. The threats posed by totalitarian regimes and failed states are more increased by the global environment, which includes modern communications technology, such as air travel, which permits the crossing of geographical and cultural barriers without any difficulty. It also leads to the availability

of weapons of mass destruction, which allows modern society to be terrorized at a time and place as chooses by the terrorist.

Therefore, a set of common basic rules and values for the entire world has been essential and unified efforts have to be done by international community to challenge those who refuse to abide by the rules.

3.2 State's Responsibility of Respecting and Promoting Human Rights:

The question arises here is that who is basically responsible for respecting and promoting the human rights law? The answer to it also reveals one of the major differences between International Humanitarian Law and human rights, i.e., IHL binds both state and individuals including non state actors (at least partially), whereas in case of human rights, it is taken as exclusive responsibility of State to promote and respect human rights. The logic behind it lies in the origin of human rights, which were primarily designed to create international minimum standards of rights designed to protect individuals against a State's excessive exercise of its legitimate monopoly of force. It limits to a certain extent, the State's freedom of action, especially in a case of promulgation of laws and regulations that binds individuals in their mutual relations in their relation with the State.

However, these limitations apply usually in fundamental areas, for e.g., the right to life or prohibition on torture and inhumane or degrading treatment done by State organs such as armed forces or police. Human rights basically act as a safeguard against the arbitrary use of force, which results in dictatorship and totalitarian systems.

Further human rights are set forth as civil and political rights, as for e.g. contained

in 1996 International Covenant on Civil and Political Rights. Several instruments issued by the United Nations System are considered to be a part of human rights treaty law.

There is also a network of regional treaties, in which, Africa, the Americas and Europe are taken as the one, which complements the human rights treaty.⁴

These treaties are implemented in different ways, as the United Nation Systems depends mainly on periodic reporting done by specialized commissions (e.g. the Human Rights Commission, the Sub-Commission on Prevention of Discrimination and Protection of Minorities or Commission on Status of Women). Moreover regional treaty system provides implementation and arbitration mechanism through Court that basically deals with inter-State individuals complaints (e.g. the European Court for Human Rights, the Inter American Court of Human rights and African Commission on Human and People's right). All these systems work in order to compel those states that violate human rights treaties to change their practices and compensate the victims.

Gross violations of International Humanitarian law and Human Rights have made United Nation Security Council to pay more attention, as these violations constitute a threat to international peace and security. In order to bring peace and security special tribunals were created.⁵

⁴ The most important of these treaties are; "International Covenant of Civil and Political (1966)", with two optional protocols" for further details see [http://www.hrweb.org /legal/cpr.html](http://www.hrweb.org/legal/cpr.html), the "International Covenant on Economic and Social Rights (1996)", the "Convention on the Prevention and Punishment of the Crime of Genocide (1948)", the "International Convention on the Suppression and Punishment on the crime of Apartheid", and the "Convention against Torture, Cruel Inhuman or degrading Treatment".

⁵ The International Criminal tribunal for the Yugoslavia (ICTY) was established by security Council resolution 827 of 25 May 1993. See <http://www.un.org/icty/>.

The decisions given by Security Council shows that there is a link between United Nation Charter and Human Rights instruments, for e.g. under chapter VII of the Charter certain sanctions are mentioned which can be used, in order to put a pressure on States that seriously and constantly violates their human rights obligations. But still a consistent practice has not developed. Neither universal nor regional instruments and mechanism at times have successfully changed State's practice.⁶

3.3 Human Rights and Terrorism: According to the Legal Framework:

The basic relationship between international human rights law and the phenomenon of terrorism is to be examined here, with particular focus on the inter relation between international human rights law and military responses to terrorism.

International human rights law, is a body of law that protects a range of human rights from the right to life, liberty, security, freedom of expression, or religion, to social, cultural and economic rights such as rights of education and food. The human rights protection is the most important in times of national and international strains. However, the law does not have the inherent flexibility, as in first place, certain specified rights may be restricted where it is necessary, for example to protect public order or fundamental rights of others. In second place, a broader range of rights may be suspended (or 'derogated' from) in times of 'public emergency' in a way that a more restrictive

⁶ Annual Reports of the United Nation Human Rights Commission as well as reports provided by International non-governmental organizations such as Amnesty International or Human Rights Watch too clearly show how far we are from a systematic approach by international community towards Human rights violations. See <http://www.amnesty.org> /<http://www.hrw.org/>.

body of 'core' human rights applies.⁷

International human rights law and international humanitarian law boundaries are not contiguous, but rather overlapping. These boundaries are often poorly understood. International Humanitarian and Human right law clearly gives the norms which explain that intentional and deliberate attacks on the innocent men, women and children are always unlawful, irrespective of it whether there is a war or not and regardless of the fact that it is for some political or ideological cause. In the name of fighting terrorism if we dilute or turn our back on International human right law, then it means, weakening the best standard that we have to convince people, that terrorism is always wrong.⁸The first question, which arises here, is that, whether terrorism is to be taken as crime, which violates the human rights or revolution by another name?

In international law, the general concept is that States, as the subject of that law, are the guarantors and violators of human rights. Terrorism is generally understood as unlawful, politically motivated violence, coordinated against innocents or civilians in order to terrorize the population, which seems attributed to non-State actors. Terrorism when defined in relation to non-state actors, it runs a range of groupings, as it is well established saying, "One man's terrorist is another man's freedom fighter".

Rebel forces are subject to international humanitarian law in case of armed conflict. At another end of the spectrum, it seems that global terrorism network resembles to the loose criminal carter rather than armies, as a result a doubt comes that whether

⁷ Rosalyn Higgins, '*Derogations under Human Rights Treaties*'(48 Brit. Year book, Int'l Law) p.281

⁸ In general, IHL protects persons associated with one party to a conflict who find themselves in the hands of an opposing party. Human rights law by contrast applies to all persons on a state's territory or under its jurisdiction, irrespective of nationality.

International humanitarian law applies or not, though criminal law does apply. Terrorist's acts are always taken as crime, but usually not, strictly speaking, a human rights violations, shockingly evil though they may be. It may be appropriate to speak of such violations, where a state fails to counter or suppress terrorists. A doubt is there that terrorism has a damaging and profound effect on human rights. Due to terrorism, the economy of states affects either through discouraging trade and investment or by shifting state resources to counter terrorism measures. As a result of all this, economic and social rights such as health care and education of the people may suffer. Moreover civil and political rights such as privacy and security of correspondence and home may be shortened. The freedom of speech may also be repressed in an atmosphere of crisis.⁹

Systematic State violations of basic human rights can disgrace social norms more commonly, and make terrorist acts seems more acceptable publicly. A pre condition and a guarantee for individual freedom are the human rights. One of the major achievements of second half of 20th century is the observance and realization of human rights by States, although the concept has not yet been realized globally.

The annual reports of UN High Commissioner for human rights and the Human Rights Committee, as well as reports of non governmental organizations such as the Human Rights Watch and Amnesty International, reveals that how much still is required to be done in this regard.

Protracted and systematic violations of human rights are considered to be one of the main sources of contemporary armed conflicts. There is always a need to have a respect for human rights by States when fighting International terrorism, as it affects the

⁹ See, HRW, *"We are not Enemy: Hate Crimes against Arabs, Muslim and Those Perceives to be Arab or Muslim after September 11"*, in A Human Rights Watch Short Report, vol.14, no.6 November 2002.

common security of the citizens.

When State violates human rights for some shortsighted advantages, for example during interrogations of suspects state allows the torture .In such cases, the winner will always be terrorist as such the human rights violation can be used by media to show the ruthlessness of government, which as a result increases the direct or indirect supporters of terrorist organizations. Therefore human rights must be defended against the temptation to limit their application when derogation is inappropriate.

3.4 International Humanitarian Law:

In the struggle against terrorism, several bodies of law, such as criminal law (including national and international) are relevant. International humanitarian law is a body of rules, which applies in a situation where the struggle against terrorism is waged by means of armed conflict i.e. international humanitarian law basically applies in times of war. Its rules are supposed to be adequate enough to deal with security risks in war as its provisions were developed to deal specifically with exceptional situation of armed conflict. The main objective of International humanitarian law is to protect those who do not (or no longer) take part in hostilities. IHL also limit the methods and means of warfare for all. ¹⁰

International humanitarian law was created to minimize the horrors inherent in war to the level where the political purposes of war is proportional with the horror it causes .It setout minimum standards for treatment of hors de combat and it also ensure to people in war zone that they would receive a humane treatment according to fundamental

¹⁰ International Court of Justice (ICJ) Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons (8 July 1996), ICJ Rep 226 Para 75.

human rights.

The basic principles regarding International Humanitarian Law are found in the four 1949 Geneva Conventions ratified by most of the states. Two protocols were added in 1977 but these are ratified by few States. These conventions give a set of rules drawn up by International Committee of Red Cross and these rules describe in detail how to treat captives and protect civilians during international armed conflict. Warring forces must distinguish combatants from non-combatants.¹¹

3.4.1 Applicable Law:

International Humanitarian Law can be found in treaties and customary law, but the rules that govern any armed conflict depend to some extent, on the nature of the conflict, that is, whether it is international or non-international. Moreover the applicability of some treaties also depends on whether they have been ratified by the parties of conflict or not. However, irrespective of treaty ratification or the conflict's nature certain rules of customary law are applicable.

3.5 Relationship of Human Rights with International Humanitarian Law:

The provisions of international humanitarian law show a careful balance between considerations of State security and the preservation of human life and dignity even in times of conflict. International humanitarian law gives protection to individuals which must not be seen as an obstacle to justice i.e. the Geneva Conventions and their

¹¹ Art 4A(1), (2), (3) and (6) of the Third (Prisoners of War) Convention list persons who are members of armed forces or who are otherwise entitled to combatant status and thus have the right to engage in hostilities.

Additional protocols do not prevent justice. The only requirement in these conventions is that due process of law should be applied while dealing with persons accused of violating their norms. These Conventions and Protocols basically bound the State to bring the preparators of war crimes to justice.¹²

There is a misconception that human rights do not apply in time of war and only international humanitarian laws apply. This is inaccurate, i.e., human rights though subject to derogation in times of declared national emergency, but co-exists with humanitarian law.

In case of an armed conflict, human rights law, with permissible derogation, is then supplemented by the guarantees of International Humanitarian Law.

In order to understand this relationship in more detail, it would be useful to understand the scope of restrictions, which are permissible to be put on human right guarantees including derogation.

Apart from the issue of derogation, most civil and political rights allow in their terms for limitation. An example of it is the right to peaceful assembly, which is recognized in most regional human rights covenant and also in article 21 of the International Covenant on Civil and Political Rights (ICCPR). Article 21 provides:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in democratic society in

¹² See for example, Art. 51(2) Additional Protocols I and Art. 13(2) Additional Protocols II: “the civilian population as such, as well as individual civilians, shall not be the object of attack.”

the interest of national security or public safety, public order (order public) the protection of health or morals, or the protection of the rights and freedom of others.”¹³

From this article, it can be easily understood that substantial restrictions on public gatherings may be allowed, so long as they are grounded on a legal authorization and serve one of the enumerated interests.

However, any restriction, which is to be imposed, must be the one that is also “necessary” in a democratic society, qualifications that impose a requirement of a strict proportionality on one proposed restriction in view of the importance of free assembly to pluralism and other democratic rights such as freedom of speech or association.¹⁴

On the basis of this it might be possible and reasonable for the authorities to prohibit or break up a demonstration that appears aimed at inciting acts of racial hatred or terror but it would not be reasonable to put a ban on all meetings of a given political group that propounds extremist’s views.¹⁵

Derogation is basically taken as an extraordinary restriction of the right beyond what is normally allowed by its terms. As derogation allows a strict limitation of a treaty right, which would be taken as a matter of legal interpretation, are strictly construed. Most human rights instruments mention rights, which are considered to be non-derogable.

¹³ Article 21 of ICCPR.

¹⁴ Manfred Nowak, “*UN Covenant on Civil and Political Rights: ICCPR commentary*” (Engel, Publisher, , Strasbourg, Vol 1993), p.379.

¹⁵ In cases involving derogation due to 'terrorist threats', the threat has arisen in the state itself. See for example, *Aksoy v Turkey* 23 EHRR 553, para 68

Among these are right to life, freedom from torture and cruel, slavery and servitude, inhuman and degrading punishments; debt imprisonment, freedom of conscience and religion, ex post facto criminal liability and punishment and recognition as a person before the law.

3.6 'War' on international terrorism and human rights: Potential Dilemmas:

The main focus here is to answer the following questions:

1. Are there any dilemmas between the requirements of antiterrorism operations and the non-derogatory human rights?
2. Is there a need of derogating other human rights provisions? If yes then what would be the conditions for introducing such limitations?
3. What are the major problems of operations in the 'grey zone' between armed conflict situations short of armed conflict?

Firstly there is a need to look at the details of non- derogatory rights in order to answer the above-mentioned questions.

3.6.1 Non-Derogatory Human Rights at Odds Due To the War against International Terrorism:

The non-derogatory rights, which are necessary to be discussed in reference to the war against international terrorism, are as follows:

1. Right to Life:

It is obligatory on a State to ensure all the persons present on its territory that their

right to life is given to them as a fundamental right. States have to create a safe environment by maintaining public order and rule of law.¹⁶

Articles 2 and 15 of European Convention on Human Rights (ECHR) specifies those situations which also involves the death of a person during an action by the State organs, that do not constitute violation to the right to life.

Article 2 states:

“Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more that absolutely necessary:

In defence of any person from unlawful violence;

- a) In order to effect a lawful arrest to prevent an escape of a person lawfully detained;
- b) In action lawfully taken for the purpose of quelling a riot or insurrection.

Article 15(2) links the human rights system to International Humanitarian law:

“No derogation from Article 2 except in respect of deaths resulting from lawful acts of war (...) shall be made under this provision”¹⁷

Although the other human rights instruments do not contain similarly detailed provisions, but it may be easily argued that ECHR reflects customary international law.

¹⁶ See for details The “*European Convention of Human Rights and Fundamental Freedoms*” (1950) with 11 facultative *Protocols*, <http://www.echr.coe.int/Eng/BasicTexts.htm>; the “*American Convention on Human Rights (1970)*”, <http://www.oas.org/juridico/english/Treaties/b-32.htm>; the “*African Charter on Human and Peoples Rights (1986)*”, <http://www1.umn.edu/humanrts/instree/z1afchar.htm>. (last visited on 24/12/06)

¹⁷ Article 2 and 15(2) of ECHR.

To differentiate between an armed conflict and non-armed conflict is very important. During armed conflict, fighters (non-international armed conflict) and combatants (international armed conflict) can be attacked without a prior notice i.e., even in case when they are sleeping. But in situations where there is no armed conflict, all other measures, which can neutralize the opponent, must be taken first, such as arrest or non-lethal use of force.

Therefore in the battle against terrorism, it is very crucial to carefully distinguish between operations amounting to an armed conflict and operations outside of an armed conflict. Moreover, political use of the term “war” is not right and helpful. War basically implies notion of combatants, and to use the force against them without any restriction, which seems totally inappropriate in certain situations.

Under today’s human rights law, extra judicial killings without the necessity for self defence or defence of others as mentioned in article 2(a) of ECHR, or unrestricted and misappropriate use of force in a civilian environment are not permissible.¹⁸

2. The Prohibition of Torture, Inhuman or Degrading Treatment:

This prohibition is present in both universal and regional treaties and there is a specific convention against torture. It is an absolute one in a way that there are no exceptions on any ground whatsoever. Therefore, torture, inhuman or degrading treatment is prohibited in all situations. So major conflict arising here is, with regard to the questioning of detainees, particularly in exceptional cases, where a detainee could

¹⁸ The European Court of Human Rights has produced interesting case law; see e.g., the case of “Mc Cann and others vs. The United Kingdom”, app NR 00/8984/9/of 27/09/1995.

provide evidence on a planned terrorist attack.

Even if we try to construct a dilemma between the right to life of persons endangered by the attack and prohibition on torture of the detained person, but the binding legal instrument do not allow any further interpretation i.e. the prohibition on torture and inhuman or degrading treatment is absolute. Therefore it is not possible to draw a line between general practices of torturing or treating detainees inhumanely or exceptional single cases and also it's not possible to torture 'a little'. The only way out left for investigators is to use interrogation techniques similar to that, used by civil police forces i.e. without making use of physical or psychological coercion. It is not allowed to go further down the road of extracting information from a person who is unwilling to confess.¹⁹

3. Right to Recognition Everywhere, as a Person before the law:

It may be strange to mention these provisions as potentially being in conflict with the struggle against terrorism. But as in the further discussions, surrounding the detainees in Guantanamo Bay, it may be worthwhile to have a closer look at this provision.

At one hand, some lawyers are of the opinion that the detainees do not fall under the protection of Geneva Convention of 1949 because they do not fulfill the standards as combatants that are given in article 4(2) of the Third Convention protecting Prisoners of War (POWs). So they claim that in such case, the detainees should be treated as civilians who have violated the obligation to abstain from hostilities, something for which they might be tried and punished.

¹⁹ See for details, "Convention against Torture", Article 3.

Whereas on the other hand, Geneva law prohibits deportation of civilians from their native country, a provision that would not apply to non-Afghan fighters such as Al-Qaeda. But at the same time, they cannot get any benefit from U.S constitutional rights, including habeas corpus, as they are being held outside of United States. As a result, it would then allow their detention without providing an opportunity to determine their status before a competent court or having to try them for any offences respecting the procedural guarantees. Such interpretations stands-in the case of Guantanamo detainees denied Prisoner of Wars status under IHL –in contradiction to the non-derogatory right of recognition as a person before the law.

Therefore, respect for the procedures that are given in international law.i.e, both in international humanitarian law and human rights law, in no way hampers the struggle against international terrorism.

3.6.2 Derogation of Human Rights Provisions:

Certain conditions for derogation are set out in article 4(1) of the ICCPR.²⁰

It states:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination

²⁰ A similar clause is given in ECHR, Art 15.

solely on the ground of race, colour, sex, language, religion or social origin”

Therefore the test required would be as follows: Was a State of Emergency declared?

- If so, then was it immediately communicated to the other States party to ICCPR?
- Is the derogation limited in time and space, and are there any periodic reassessment as to whether the conditions still exist which led state of emergency declared.
- Are the measures taken in a non-discriminatory way?

Derogation can be limited to a certain part of national territory and it can also cover the entire country, all it's depends on the seriousness of the situation. But at minimum they should be limited in duration i.e. there should be at least a regular review of the necessity for prolonging the derogation provided. The reason and the extent of derogation under a State of Emergency should be communicated under a State of Emergency.

3.6.3 Problem of “Grey Zone Operations”

The most difficult issue of today is that, how to define the beginning and end of an armed conflict. As politicians do not seems very eager to admit that a situation amounts to an armed conflict.

Aftermath of Sept 11, resulted in the occurrence of an exception i.e. when an international terrorist network committed a crime against humanity, then it was declared as a war. Here, topic of interest is the brief military operations on foreign territory conducted to apprehend suspects or to battle a group suspected of terrorism. In this regard, the terms “snatch operations “is used by military experts. Here, there is no need of discussing the difficult jus ad bellum questions that relate to the use of force; those

military operations are usually governed by the rules and principles of international law of armed conflict applicable to international armed conflict, the *jus in bello*.

3.7 Counter-Terrorism Initiatives and its Conflict with International Humanitarian Law and Human Rights Regime:

One of the interesting problem and difficulty that is faced by the human rights and counter-terrorism regime is that, how to conceive fight against terrorism. The question arises here is that: "Is the State engaged in 'war' or 'law enforcement'?" The choice between these paradigms has led profound implications on human rights i.e. whether we have entered the territory of derogation or not. There are implications for the powers of arrest and detention, use of force and administration of justice. Easy resort to the institutions and rules of war has a deliberating impact on civil institutions and norms that protect human rights. Wherever possible, it is important to avoid the easy rhetorical resort to "war talk" and defend the character of democratic societies. The remainder of the thesis surveys a handful of issues that straddle these legal regimes including the lawful use of lethal force against individual and detention of those who were not charged with a crime, military vs. civilian courts and responsibility for the behaviour of proxies.

Combatants, are legally entitled in war to lethal use of force against enemy combatants. Therefore they may not be punished for killing the enemy intentionally and they are not even necessarily subject to reporting or review. It is known as 'combatant privilege'.²¹ So answer to the question that whether a killing was lawful or not? , depends on whether a person attacked was a combatant or not and if, not, whether the person was

²¹See for further details, George H. Aldrich, "*The Taliban, al Qaeda, and the Determination of Illegal Combatants*" (vol 4, 2002) p.202.

killed incidentally to an attack legitimate military objective and also whether that death was proportionate to the military objective to be gained or preventable through taking feasible precautions. Although right to life is taken as non-derogable and armed conflict presents this important and universally recognized qualification.

There is no 'combatant privilege' outside the war. Military personnel, as well as police acting in law enforcement capacity are held to strict standards on the use of force. These rules are very clearly articulated, in the Basic Principles on the Use of force and Firearms by Law Enforcement Officials and are given in most legal systems.²²

In self-defence, one may and to defend others against "the imminent threat of death or serious injury", in order to prevent a "particularly serious crime involving grave threat to life" or to arrest such a perpetrator and only when less extreme measures will not suffice. One may also shoot to kill only "when strictly unavoidable in order to protect life".²³

In armed conflicts, though it is not always prudent but it is legal, to target officials who are in chain of command, either formally or functionally, including commander in chief, even when they are undefended or sleeping (but not in a case when they lay down arms and surrender). Other than war, the deliberate killing of a public enemy is unlawful except under the above-mentioned circumstances and in every incident, such a killing must be thoroughly investigated. In this regard one important case is McCann case. In this case, the European Court of Human Rights, in a closely split decision that reserved a

²² "Basic principles on the use of Force and Firearms by law Enforcement Officials", adopted by the Eighth United Nations Congress on the prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N.Doc.A/Cone.144/28/Rev.1.P, 112, 1990.

²³ The officers are bound to report every incident of firearms used by them in performance of their duty and also subject to review, particularly, where death, injury or other grave consequences result.

split decision of the European Commission, upheld the killing of IRA operatives by a British SAS unit in Gibraltar. But while the particular circumstances and information at the time justified the resort to lethal use of force by the shooters, the court held Britain in violation for the planning of operation, which did not show sufficient preparation for apprehension as a preferred option, nor adequate investigation subsequently.²⁴

With respect to detention, there are likewise gaps two regimes. Under Human Rights law, a person who is arrested or detained on a criminal charge must be brought properly before a judicial officer and is entitled to a trial within a reasonable time or to be released.²⁵

Those who are detained for other purposes are entitled to have a court review for the legality of their detention.²⁶

Even under an administrative detention regime, in definite the detention is considered to be an arbitrary and a violation of international human rights law.²⁷

In times of war, the prohibition of arbitrary detention is replaced and interpreted through reference to the *lex specialis* of International Humanitarian Law, under which enemy combatant who was captured may be detained and civilians of an occupied territory may be interned. In case of privileged combatants, such as regular forces of the

²⁴ "McCann and others vs. the United Kingdom", Judgment European Court of Human Rights, September 27, 1995, Series A, No324, Application number 0018984/91.

²⁵ ICCPR, art, 9(3), the prohibition on 'arbitrary' detention is considered a *jus cogens* norm.

²⁶ For example the detention of minors in State custody arrangement or the protection of the mentally ill. ICCPR ART 9(4).

²⁷ There are numerous pronouncements of the UN Working Group on Arbitrary Detention to this effect in the context of compulsory labor, immigration, detention, and other situations. See e.g. Report of the Working Group on Arbitrary Detention, Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, Deliberation 04, sec, III, E/CN.4/1993/24, 12 Jan 1993.

opposing party, the Third Geneva Convention applies i.e. it governs their treatment as prisoners of war. Whereas the Fourth Geneva Convention governs the treatment of protected persons in the hand of occupying enemy.²⁸

At present, a matter of research and debate is that, which law governs captured combatants who are not “privileged” with the status of Prisoner of Wars (POWs), but at a minimum they are covered by customary international law guarantees of humane treatment, non-discrimination, fair trial standards and protection against unlawful detention.

These norms find articulation in common Article 3 to the Geneva Convention, and Article 75 of protocol I, the latter of which was derived substantially from corresponding provisions of the ICCPR.

One of U.S citizen Jose Padilla detained by U.S, as an “enemy combatant”(i.e. an unprivileged combatant) based on secret information that he proposed to Al-Qaeda, to build and detonate a device (a second U.S citizen Yaser Hamidi was captured in Afghanistan and is also being detained in the U.S as an enemy combatant). Initially the Secretary of Defense Rumsfeld stated, that the objective of Padilla was not to try Padilla for any crime, but to hold him indefinitely for questioning.

After a month of his arrest as a “material witness”, the President designated him an enemy combatant and transferred him from civilian to military custody .On Dec 4, a federal district court held that Padilla could ask his counsel to further his petition for

²⁸ The presumption is that protected person are civilians .Art 5 of the Convention provides that those protected persons who are “definitely suspected of or engaged in activities hostile to the security of the State” are not entitled to claim such rights and privileges under the convention as would be prejudicial to the security of the State, although such persons must be treated with humanity and “in case of trial, shall not be deprived of the rights of fair and regular trial”.

habeas corpus, but that the President could only lawfully detain persons as enemy combatants so long as there was 'some evidence' to do so. This case seems interesting as it highlights the lack of any alternate legal basis to hold a citizen indefinitely in contrast to the use of immigration rules to detain aliens suspected of terrorist connections. The question arises here is that, "were Padilla indeed an unprivileged combatants, he could be held without access to an attorney until the end of hostilities."²⁹

Yet Padilla was arrested at an airport and not on a battlefield, allegedly for having had contact with senior Al -Qaeda officials. In this case, the connection to the war in Afghanistan is questionable. If there is no connection other than his association with Al-Qaeda figures, than only human rights law is the most directly applicable international law, which also includes its guarantee of the right to be formally charged and permitted access to the counsel, as well as the prohibition of indefinite detention as arbitrary. As a whole, Padilla's status, as a combatant or criminal, should be determined by an independent court and not by executive fiat, lest the door be opened to indefinite detention of anyone on the basis of unsubstantiated accusations of collaboration with terrorist.

The resort to military tribunals to try persons who are not combatants is also a questionable of wisdom and dubious legality. As opposed to court-martial military tribunals, are a relatively unusual phenomenon, generally established in occupied territory to try cases that the civilian courts of the enemy cannot be entrusted to do reliably.

²⁹ However some authorities argue that where duration of hostilities or occupation becomes extremely prolonged or uncertain rendering International Humanitarian Law, such as the services of the International Committee of the Red Cross inadequate, human rights mechanism such as habeas corpus may be required to adequately protect the right of detainees.

The Human Rights Committee however has stated, that the trial of civilians by military tribunals should be exceptional and only under condition that afford full due process rights.³⁰

Moreover it is difficult to justify the resort to military tribunals, when the civilian court system of prosecuting nation is fully available and functional.

Finally both human rights and international humanitarian law have principles for liability for the behaviour of proxies. This is named as law of command responsibility, in crimes of war. An officer may be held responsible for the crimes of irregular forces that are under his effective command and control, but 'control' must be more than a simple influence over the proxy. If the officer has control over who is deployed, and knowingly deploys undisciplined forces with a record of abuse, crimes that result may be foreseeable and imputed to him, particularly if he is in position to take action subsequently and fails. This is a sobering consideration for those who endorse the trend of using Special Forces to direct operations with local forces.

Strong norms are present in human rights laws against sending persons back to territory in which they may be persecuted (the customary international law norm against refoulement) or tortured (the jus cogens norm) and forbid handing suspects over to allies who are less than scrupulous about interrogation techniques.³¹

In the Soering case, the European court, found Britain would be in potential violation of

³⁰ Human Rights Committee General Comment 13, Article 14, Para, 4 (Twenty first session 1984) "compilation of General Comments and General recommendations Adopted by Human Right Treaty Bodies, U.N Doc.HR 1 /GEN/1/Rev.1 at 14 (1994)

³¹ See "convention relating to the Status of Refugees" Art .33, 189 U.N.T.S 150, entered into force April ,22 1954 and convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment", Art,3, G.A res ,39/46 .U.N.Doc.A/39/51(1984) entered into force June 26, 1987.

the prohibition against torture and cruel, inhuman and degrading treatment if it were to extradite a suspect to the United States, where he might face indefinite stay on death row, it is a result which is also supported by the Convention against Torture.³²

The norm against torture is of preemptory character and of non-derogable nature, which is also strongly asserted in International Humanitarian Law .No justification can be given for relying on allies to conduct impermissible interrogations or to imprison terrorism suspects in violative conditions with the expectations of escaping responsibility.

These issues and many others are the subject of intense of intense debate and legal evolution. However, what is clear now is those human rights norms do not disappear on mention of war, much less the ill-defined “war on terror”. Attempting to evade human rights obligation through resort to ill-defined notions of derogation or usurpation can ultimately damage both system of international law.

³²“Convention against Torture”Art3.

Chapter 4

ANALYSIS OF COUNTER TERRORISM INITIATIVES IN VIEW OF ITS IMPLICATIONS ON HUMAN RIGHTS

In this chapter, we will have a brief look at some jus in Bello aspects of September 11 al-Qaeda terrorist attacks and the threat from international terrorist generally, as well as the U.S response to those attacks and threat, and finally what is the impact of such response on the human rights. The main stress in this chapter is on the point that what the international human rights conditions are and what power was used by the United States in its “war on terrorism”.

4.1 United States Strategy for “War on Terror”:

United States strategy for war on terror was a flaw, as it led to further terrorism. The September 11, 2001 attacks on the twin Towers and Pentagon were considered to be the most devastating acts of terrorism, ever perpetrated on the U.S soil by the al-Qaeda operatives. The response of U.S was swift “Global war on terror” was declared by President George Bush.¹ It was basically led by the United States but supported by many States with varying roles.

The consequences for international law and international polity of both the actual

¹ George W. Bush, Address to a Joint Session of Congress and the American People, Sept. 20, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited on Oct. 21, 2006)

and perceived terrorist threat, and the response of United States and other States seems already to be of far reaching consequences. Moreover the medium and the long-term effects on the fragile edifice, that is on the international law concepts and institution of global governance and the international community, remain unpredictable. 9/11 terrorist attacks and the aftermath events have accentuated the exceptionalist tendencies that have long characterized U.S foreign policy. They have provided not only the U.S administration with a political and legal context and cover for its pre existing rejection of multilateralism, but also weakened the institution of global governance and security to the extent that their very existence have been called into question. The rejection of multilateralism although it does not affirm and support U.S foreign and domestic policy, but affects every branch of international law. The matter over here is not regarding the question of rejecting new attempts that are being made by international law making, i.e., of improving the law already exists, but it is more related to the rejection of the pre-existing legal norms (in fact, the rule of international law) where they do not dovetail with or further U.S policy aims or deny of their applicability in particular cases, resulting in a pick n 'mix approach to international law. The terrorist threat in general reveals a confusion or blurring of jus ad bellum and jus in bello, and other rules of international law. "The global war on terror"-the response of the U.S and its allies is equally muddled from the legal perspective. Counter-terrorism has been assimilated with armed conflict where actually applicable, the laws of armed conflict have not been fully or properly applied. As a whole 9/11 terrorist attacks gave rise to a rethinking of the relationship between liberty and security. These attacks pose a fundamental challenge to United States and international law. Recently, Anne Marie Slaughter and William Burke White described in global politics this critical juncture as an "international constitutional

moment.”²

If we pay attention to the language that is used by the Pentagon and the Whitehall, we come to know that the “global war on terror” is considered to be a war to which international humanitarian law could apply. Indeed part of international humanitarian law might usefully be applied (even when there is no actual armed conflict) those parts, that is, that the further the interests of those fighting the “war” and those parts that do not “fit” can be ignored.

As a result of these attacks, the U.S confronted the challenge by initiating several important changes in its law and policy i.e. the architecture of the “war on terrorism”.³

The U.S response, to be sure, generated substantial controversy concerning three related issues:

1. The need for the most appropriate forum in order to prosecute the individuals responsible for 9/11.⁴
2. The international legal status of combatants captured in Afghanistan.⁵
3. The most appropriate role of law in any comprehensive strategy against

² Anne Marie Slaughter and William Burke White, *An International Constitutional Moment* (43 HARV J. INTL'L L. 1, 2002).

³ George W. Bush Address to a Joint Session of Congress and the American People, Sept 20, 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/200109208.html>. (last visited on 11/06/06).

⁴ Harold Hongju Koh, *We Have the right courts for bin laden*, (N.Y. TIMES, Nov. 17, 2001), p. 23.

⁵ The major part of concern in the controversy is that whether detained al-Qaeda and Taliban fighters qualify the criteria given for "Prisoners of wars" (POWs) status given under the Geneva Conventions. For further details see Geneva Convention Relative to the Treatment of Prisoner of War, Aug. 12, 1949, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

international terrorism.⁶

The most striking thing in these debates is that which law, if any, applies in the "war on terrorism". These debates frame the questions such as: "Does the constitution protect enemy aliens"? Does the Geneva Convention protect "unlawful combatants". It is very obvious that these are critical questions and as a result the focus on U.S constitutional law and international humanitarian law has unfortunately obscured the importance of another potentially relevant body of law, i.e., international human rights law. International human rights law, if applicable would, establish conclusively - irrespective of applicability of the Geneva Conventions or U.S constitution -that all the persons subject to the jurisdiction of United States, as a matter of law, are entitled to certain basic rights including: the right to humane conditions and treatment if detained, not to be detained arbitrarily and, the right to fair trial on any criminal charges.

4.2 International Due Process Standards:

International due process standards are given in international law. For example, international human rights law informs the legal analysis of the most controversial aspects of United States anti terrorism policy which includes: the suspected terrorist's trial done by military commission⁷; the indefinite detention of persons designated as "enemy combatants"⁸ and prolonged detention of aliens who are suspected of terrorist

⁶ See for further details Soafer and Williams, *Responding to Terrorism Crime, Punishment and War* (HARV.L.REV.1217, 2002).p.115.

⁷ Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833, (Nov. 16, 2001).

⁸ See Amnesty International, Memorandum to the U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay (April 2002), available at Amnesty International Online,

activity.

It is worth mentioning that several international human rights declarations treaties and resolution give minimum procedural protection for all those who are deprived of their personal liberty. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states that, no one shall be "subjected to arbitrary arrest or detention"⁹ or "deprived of his liberty except on such grounds and in accordance with such procedures as are established by law"¹⁰. It also specifies that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"¹¹.

Moreover Article 9(3) states, that all the persons those are arrested or detained on a criminal charge "shall be promptly brought before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release"¹².

The provision is interpreted by United Nations (UN) Human Rights Committee, according to their interpretation, the provision requires at minimum that an individual must be brought before a judge or officer within "a few days"¹³.

The ICCPR, finally, provides the right to habeas corpus, or amparo. This provision states that, anyone deprived of liberty by arrest or detention has the right to "take

<http://web.amnesty.org/ai.nsf/recent/AMR510532002> (last visited 21/10/ 2006).

⁹ Article 9(1) of ICCPR

¹⁰ Ibid.

¹¹ Article 9 (2) of ICCPR.

¹² Article 9(3) of ICCPR.

¹³ See Office of the United Nations High Commissioner for Human Rights, Right to Liberty and Security of Persons (art. 9), 16th Session., ICCPR General Comment 8, para. 2(1982).

proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"¹⁴. Extensive inventory procedural rights for individuals facing criminal charges has been established by the International human rights.

The Universal Declaration on Human Rights (UDHR)¹⁵, International Covenant on Civil and Political Rights (ICCPR), African Charter On Human and People's Rights (Banjul Charter)¹⁶, International American Convention on Human Right (ACHR)¹⁷ (20) and the European Convention on Human Rights (ECHR)¹⁸ all include detailed fair trial provisions. Article 14 of ICCPR specifically recognizes the right to "a fair trial and public hearing by a competent, independent and impartial tribunal established by law"¹⁹. This provision gives the minimum procedural requirements of a fair trial, which also include the right to be presumed such person innocent"²⁰, the right to be tried without undue delay²¹, the right to prepare a defense²², the right to defense oneself in person or through some counsel, the right to call and examine witnesses²³ and the right to protection from retroactive criminal laws²⁴.

¹⁴ Article 9(4) of ICCPR.

¹⁵ Article 10 of UDHR.

¹⁶ Article 7 and 27 of Banjul Charter

¹⁷ Article 8 of ACHR.

¹⁸ Article 6 of ECHR

¹⁹ Article 14(1) of ICCPR

²⁰ Article 14(2) of ICCPR and Article 6(2) of ECHR

²¹ Article 14(3) (c) of ICCPR and Article 6(1) of ECHR.

²² Article 14(3) (d) of ICCPR and Article 6(3) (b) of ECHR.

²³ In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. See, ICCPR art. 14(3) (e). See also ECHR art. 6(3) (d); ACHR, art. 8(2) (f).

²⁴ See ICCPR, art. 15(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when

4.3 Violation of International Human Rights By United States:

United States has ratified several human rights treaties'; including the ICCPR. So the international human right clearly applies. All these treaties are made lawfully under the United States Constitution and are considered to be the part of the "supreme law of the land".²⁵ Agencies of the U.S government, such as the Department of Defense, are required by Executive Order to comply with the ICCPR.²⁶ Although U.S clearly mentioned that the substantive provisions of the ICCPR are "non self-executing" and the treaty nevertheless establish international legal obligations binding on the executive and legislative branches of government.

The nature of international human rights law also suggests that it applies in all the circumstances i.e., international human rights law gives the minimum rights protections necessary to prevent the arbitrary exercise of power .As a whole this body of law reflects the collective normative aspirations of the international community and as such, provides an indispensable framework for evaluating specific policy option in the "war on terror".

Many of the measures adopted by US government after Sept 11 attacks contain clauses which violates the fundamental provisions of international human right law and international humanitarian law .It basically includes secret and arbitrary detention of non-citizens, secret deportation hearings for persons suspected of having connections to terrorism ,the authorization of military commission to try non citizen terrorists and in the treatment of detainees held in US military custody in Cuba and elsewhere, a failure to abide by Geneva Conventions and finally the military detention without charge or access

it was committed").

²⁵ See U.S. CONST. art. VI, .S 2.

²⁶ Executive Order 13,107 directs all members of the executive branch to comply with the ICCPR. See Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998), reprinted in 38I.L.M. 493 (1999).

to counsel of U.S citizens designated as "enemy combatants".

In connection with the investigation of Sept 11 attacks ,almost 12 hundred non-citizens some of whom were legal permanent residents ,were detained, although the Government has never disclosed the exact no. Almost half of them were held on criminal charges or as material witness and others were held on immigration charges. The mistreatment of non citizens detained in the Sept 11 investigations has been documented by Human Rights watch which includes custodial interrogations without access to counsel, prolonged detention without charge, executive decisions overriding the judicial orders to release detainees on bond during immigration proceedings, and unnecessary restrictive conditions including solitary confinement.

4.3.1 Guantanamo Bay Detainees:

After Sept 11, the United States captured about 650 men in connection with the Afghan war or who were suspected of having links to al-Qaeda. These men were transferred to the U.S military base at Guantanamo Bay, Cuba. In the beginning, these detainees were held in makeshift open air facilities with chain link walls until they were moved to a newly constructed facility on April 28, 2002. According to press reports, about eighty of the prisoners were kept in special high security cells with steel walls that prevents them from communicating with other prisoners. According to United States these detainees are not subject to the applicability of the Geneva Conventions i.e., U.S has refused to recognize them as "enemy combatants". Although US has insisted that it treats them humanely, but it refused to allow competent tribunals to determine whether any of the detained combatants were entitled to prisoner of war status. Not only U.S has refused to recognize the applicability of the Geneva Conventions to these detainees, but it

has also refuse to abide by principles of international human rights law, asserting, in effect, that no legal regime applies to them and that U.S may hold such combatant as long as it chooses under the banner of "war against terrorism".²⁷

As a result these detainees remain without a legal forum in which they can challenge there detention, as under judgment given by a federal judge ,the U.S federal judge courts do not have jurisdiction to hear constitutional claims brought by aliens held by the U.S outside Us sovereign territory. Moreover the U.S also denied the request made by the Inter-American Commission on Human Rights to provide for a lawful tribunal or court to determine the status of these detainees. Even U.S did not respond to letters from the U.N working Group on Arbitrary detention seeking information on the Treatment and Legal status of Guantanamo detainees.

4.3.2 "Enemy Combatants":

U.S is holding two U.S citizen who it claims are "enemy combatants" at U.S military facilities, these two may be held indefinitely without charges and without access to counsel. José Padilla, (Abdullah al-Mujahir) was arrested at the Chicago international airport on May, 2002 and initially kept as a material witness pursuant to federal court order. He was designated as an enemy combatant by President Bush in June and he was then removed from the criminal justice system and incarcerated in a military base in South Carolina. According to U.S officials Padilla had connections with al-Qaeda and he had met al-Qaeda representatives overseas, in order to help them in the preparation for acts of international terrorism and then he had returned to U.S to advance plans to

²⁷ See United States Mission to the European Union, "*Bush Says Geneva Convention Applies to Taliban, Not AlQaida*", Feb.7,2002,<http://www.useu.be/Terrorism/USResponse/Feb0702BushGenevaGuantanamo.html>.(last visited on 26/12/06).

explode a radioactive "dirty bomb" in U.S. Whereas other U.S enemy combatant ,Yaser Esam Hamdi was captured in Afghanistan in Nov,2001 where according to U.S officials he was reportedly fighting with the Taliban and he was then transferred to Guantanamo Bay ,Cuba. Later on when U.S officials learned that he was a U.S citizen, they transferred him to U.S Navy brig in Norfolk, Virginia.²⁸

Federal Appeals Court agreed with the United States' position, in case of Yaser Esam Hamadi i.e., according to it a citizen alleged to be an enemy combatant could be detained indefinitely without charge or access to counsel if a court, agrees that there is "some basis" for the enemy combatant designation ,based on document provided by the Government Hamidi's petition for habeas corpus was rejected by the court, even though Hamidi was never given an opportunity to context(or even review)the facts alleged against him by the Government and he was never permitted to meet with his attorney. Whereas in case of Jose Padilla, the court ruled that he has a right to present through his counsel in order to argue against his detention. But U.S Government has still refused to give Padilla access to his lawyer, by arguing that to do so would disrupt ongoing interrogations and thus harm national security.²⁹

4.4 International human right laws in wartime and other "states of exception":

The procedural rights which are given in the ICCPR would, if applicable, call into question several aspects of U.S anti-terrorism policy. Infact, the U.N Human Rights Committee for several times declared special military courts and "national security" detention laws inconsistent with ICCPR Therefore it may be understood that the

²⁸ See "Padilla v Bush", US Dist-LEXIS 23086,62,S.D.N.Y Dec.4,2002

²⁹ See "Hamadi v Rumsfield"U.S App-LEXIS.198(4th Cir,2003).

application of ICCPR to U.S action in the context of an ongoing, formally proclaimed national emergency and an international armed conflict.

So in order to define the scope of the application of the ICCPR, it requires an assessment of the degree to which international human rights applies in time of war and other states of emergency.

Under International Human Rights treaties, some of the rights can be suspended in public emergencies(such as in times of war).Article 4 of the ICCPR provides that when there is a situation, which threatens the life of a nation ,the government may in such situation issue a formal declaration suspending certain human rights guarantee provided that:

1. There should exist a state of emergency that threatens the life of the nation.³⁰
2. The exigencies of the situation “strictly require” such a suspension.³¹
3. Such a suspension does not conflict with the nation’s other international obligations.
4. The emergency measures are applied in a non-discriminatory fashion.
5. And finally, the government notifies the United Nations Secretary General immediately.

³⁰ See Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, (19 FORDHAM INT’L L. J.1995)p39.

³¹ This requirement incorporates the principle of proportionality into derogation regimes. This principle requires that the restrictive measures must be proportional in duration, severity, and scope. Implicit in this requirement is that ordinary measures must be inadequate; and the emergency measures must assist in the management of the crisis.

However, even in the times of public emergency, some rights are not subject to derogation. Each convention containing a derogation clause provides an explicit list of nonderogable provisions³²

Under ICCPR there are several rights which are specifically taken as non-derogable rights, such as the right to be free from arbitrary killing.³³

Although rights such as right to fair trial and personal liberty are as a formal matter, derogable one. Proposed drafts of ICCPR Article 4 submitted by French and U.S. representatives would have made the prohibition on arbitrary arrest, the right to prompt notice of charges, and the right to fair and prompt trial non-derogable. Both proposals, however, would have made derogable the right to take prompt judicial proceedings to challenge the lawfulness of detention.³⁴

Although the U.N Human Rights Committee has made clear that many restrictions of these rights are inappropriate even in times of emergency. Although the Human Rights Committee recommended against adopting an Optional Protocol to the ICCPR re-categorizing Articles 9 and 14 as non-derogable, the Committee noted that states should not derogate from several of the protections included in these articles. The Committee reasoned that:

The Committee notes that the purpose of the possible draft optional protocol is to add article 9, paragraphs 3 and 4, and article 14 to the list of nonderogable provisions in article 4, paragraph 2, of the Covenant . . . The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies

³² Art. 4(2) of ICCPR.

³⁴ See U.N. Doc. E/CN.4/325 (1949) (U.S. Draft).

provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.

U.N Human Rights Committee in its General Comment 29 stated that:

“Safeguards related to derogation.....are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of opinion that the principle of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence”.³⁵

Moreover, the Committee also mentioned the point that these procedural rights such as fair trial rights must be respected even in times of emergency in order to protect other non-derogable rights. The Committee concluded that:

It is inherent in the protection of [non-derogable] rights . . . that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of

³⁵ UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 16, *available at* <http://www.unhchr.ch/tbs/doc.nsf> (last visited Oct. 21, 2006).

the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights Thus, for example, as article 6 [the right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition on retroactive penalties].

Finally, it was declared, in the Committee that the right to habeas corpus (or amparo) is non-derogable.³⁶

As a result of all above mentioned law, the United States has not and arguably could not; invoke Article 4 to preclude application of the ICCPR in the “war on terrorism”.

At first place, a derogation notice has not field by United States with the other States parties, which was required to give through the Secretary –General of the United Nations as mentioned in Article4 (3).Infact,as a matter of domestic law, the United States has not proclaimed that emergency conditions necessitating the suspension of fundamental rights exist.

Secondly several of the “derogation measures “are not strictly required by the exigencies of the circumstances, as suggested by substantial evidence. As a matter of fact, the United States has offered no evidence that specific derogation measures are strictly necessary to meet the immediate threat of catastrophic terrorism. Moreover ,it is also important to mention here that the investigation ,trial, and conviction of al-Qaeda operatives has been successfully conducted by using ordinary criminal procedure and

³⁶ See Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), 8 Inter-Am. Ct. H.R. (ser. A) at 33, OEA/ser.L./V/111.17, doc. 13 (1987).

without compromising national security ,strongly shows that many of most controversial measures are not necessary to confront the emergency conditions.

Thirdly, the nature of emergency may fail itself to satisfy the threshold requirements of article 4. September 11th attacks although constituted almost an emergency “threaten the life of the nation” but this continuing, non specific and ill defined threat of terrorist activity does not satisfy this requirement. Moreover as “states of exception” are of limited duration by their nature, so the U.S may not manufacture an ongoing state of emergency by waging a protracted in fact indefinite –“war on terrorism”.

Finally, the derogation measures arguably suspend the non derogable rights by violating the personal liberty and fair trial provision of the ICCPR. The derogation measures do not, however, necessarily violate the prohibition on discrimination in Article 4(1). Of course, many of the derogation measures are applied in a discriminatory fashion. For example, the Military Order providing for trial by military commission facially discriminates on the basis of citizenship.³⁷

4.5 The Human Rights Impact of Counter Terrorism Measures: Current Issues:

Respecting and upholding human rights enhances the security, rather hinders it, but most of the Governments fail to understand this fact. Efforts for countering terrorism by the Governments thus results in undermining of the human rights principles. Policies and actions adopted by the Governments have resulted in a wide range of human rights violations such as, unlawful killings, torture or other ill treatment, arbitrary detentions including secret detentions, unfair trials, enforced disappearances, denial of right to

³⁷ Article 4(1) of ICCPR prohibits discrimination “solely on the ground of race colour, sex, language, religion, or social origin.”

international protection for refugees, unlawful discrimination, curtailment of freedom of expression and attacks on human rights defenders.

Examples of most grievous violations are:

1. The use of torture and other ill-treatment particularly in conflict situations in Iraq (For example, at Abu Gharib), in Afghanistan and in several other countries of the world. These ill treatments are also present in secret prisons which are run by the U.S central Intelligence Agency(CIA).As a result of these tortures, the evidences has been obtained which were used in the court proceedings.
2. Deportation and Extraditions of individuals to those countries where they have a fear of being subject to torture, unfair judicial proceedings and death penalty.
3. The secret prisons run by CIA and the use of arbitrary detention in places such as Guantanamo Bay.³⁸
4. The extrajudicial execution of individuals detained by the official law enforcement agencies in the Northern Caucasus, especially in Chechnya and the enforced detainees.
5. The impunity of intelligence officials, law enforcement and military which are responsible for human rights violation and crimes committed in the context of "war on terror".
6. In International conflict such as Iraq and Afghanistan and in internal conflicts

³⁸ See for futher details DoD Press Release, "DoD Announces Draft Detainee Review Policy" (March 3, 2004),available at [<http://www.defenselink.mil/releases/2004/nr20040303-0403.html>].(last visited on 7/09/06)

such as north Caucasus, there is a flouting of standards of international humanitarian law and international human right law.

7. The indiscriminate use of force in Iraq and Chechnya in the name of "counter terrorism operation".
8. Under the banner of the "war on terror", there is a forceful erosion of democratic institutions and attempts were made to establish control over civil society, such as the incident of Lal Masjid which took place at Islamabad in Pakistan.³⁹

Instead of stopping terrorism, these counter terrorism policies may result in supporting the terrorist groups. As a result these policies are considered to be counterproductive and these policies do not promote legal security.

³⁹ See for further details, <http://www.sauhassan.com/articles/LalMasjidSaga>.(last visited on 10/10/07).

Conclusion

CONCLUSION

Conceptualizing the terrorism phenomenon is a very complex and challenging task. Efforts to regulate this phenomenon have been made by the different institutions of the International community .But still a number of issues remain unresolved, and as a result the solution to it has been further complicated by the emergence of new forms of terrorism.

After September 11, the American policy on the law of war/or humanitarian and human rights has evolved in a generally sensible direction. However, this policy has not shown a clear understanding of how to apply international humanitarian law in a proper manner and above all in case of military operations conducted for countering terrorism.

One thing is certain today that we cannot abandon the existing legal framework. In spite of some lacunas, the existing laws of war are irreplaceable .There is a need of more clarity concerning the interpretation and observance of the existing law and the principles are to be followed. At international and regional levels, we basically need an elaborated and stable structure, i.e, a 'command structure' in military terms while fighting against terrorism.

A relatively straightforward framework for the use of force is given under international law. The United Nations Charter article 2(4) prohibits Member States from using force. There are only two exceptions on use of force:

1- Self-defence.

2- Chapter VII action by the Security Council and other provision of the Charter.

The right to self defence is given in United Nations Charter, Article 51, according to which, only in case of an “armed attack”, a defensive response can be made. According to Article, three requirements are essential to be fulfilled in regard to use of force. These are:

1- First of all the defensive response can occur only in face of an armed attack.

2- Secondly, the Member State acting in self-defence must report to Security Council of its actions.

3- Finally the article states that a preference for a community response is to be given in a way that States may act in self-defence until the Security Council has taken necessary steps to restore international peace and security.

After discussing the use of force in reference to counter terrorism, one may conclude that, at present we are witnessing the emergence of new understanding of international law regarding use of force in response to terrorism. Moreover, it is very important to understand that it is not new law in light of changed circumstances.

If we want our fight against terrorism to be effective, then unity is required at legal, political, and humanitarian levels. Along with it, military level is an issue which should be resolved urgently. It is all obvious that this kind of unity can only be obtained by competent recognized bodies which are already engaged in counter-terrorist operations and campaigns. Therefore, this unity is considered to be an essential factor for

the success of counter-terrorist operations.

International law (the international humanitarian law, human rights law and charter of United Nations) is one of the strongest tool, if correctly applied by the international community would help to re-establish the international order and stability. In the struggle against terrorism several bodies of law are relevant, for e.g, national and international rules of criminal law.

Whenever this struggle is waged by means of armed conflict, then only body of rules which applies is that of international humanitarian law. Even in times of conflict its provisions are taken as a careful balance between considerations of State security and the preservation of human life and dignity.

The 'war on terror' may well at times and in different places assume the characteristics of an armed conflict as understood by the laws of war. For example, in context to 'war on terror' the U.S attack on Afghanistan (as U.S considered that Afghanistan is harboring al-Qaeda) was clearly taken as an international armed conflict.

Moreover U.S attack on Iraq in regard to 'war on terror' is again a clear example of international armed conflict as it involves at least two States. If war between United States armed forces and the armed forces of Afghanistan (Taleban) constituted an international armed conflict, then what will we declare the U.S conflict against al-Qaeda on Afghan Territory. As al-Qaeda is not a state so we cannot say that it can engage in any international armed conflict against U.S.

U.S has also refused to give the captured persons the status of combatants and prisoners of war (POWs) .In any event, if the prisoners do not qualify the status of Prisoners of War (POWs) under the Geneva Convention, even than few provisions of the

Geneva Convention are derived from the principles of humanity and military necessity i.e. they may apply as customary law. It is important to treat at least all persons who take no active part in hostilities humanly without discrimination as mentioned explicitly in common Article 3 of Geneva Convention, which is clearly binding as customary law for all conflicts.

Moreover human rights provisions also apply to such prisoners of war under state's jurisdiction and considered to be supplement for the specific provisions of International Humanitarian Law.

The protection which is given to individuals under international humanitarian law must not be seen as an obstacle to justice. So as a whole, Geneva Conventions and their Additional Protocol do not stop justice. When dealing with persons accused of violating their norms, the only requirement is that due process of law must be applied.

There have been some encouraging and positive examples of measures adopted to combat terrorism, but there have also been examples of measures that (even though they may have been adopted in good faith) have negatively affected people those are in need of international protection.

The inalienable and universal nature of human rights is well established, as it can be seen in most of derogation clauses themselves. At one place there is a core of rights which are to be protected at all times i.e. there are few rights which are available for every individual at all times (non-derogable rights) .Out of these non derogable rights, the most important are right to life, freedom from torture, inhuman and degrading treatment or punishment and freedom from slavery and the prohibition of retrospective legislation.

The ICCPR is ratified by United States and Afghanistan and as an international

convention it deserves specific attention. Moreover, it is to be noted that the obligation to treat all detainees 'with humanity and respect for their inherent dignity' and prohibitions on 'abductions' or 'unacknowledged detention' are non-derogable and it cannot be justified in any circumstances i.e. deviating from fundamental principles of fair trial, including presumption of innocence. Even right to remedy is a right that remains effective in time of emergency.

As a whole there is a need to ensure that all these non-derogable are being given a continued procedural method which gives protection to these rights. This is a point where American Court of Human Rights (ACHR) is of opinion that "the judicial guarantees are essential for protection of such rights as non-derogable which also include habeas corpus and minimum due process rights.

Moreover rights which have 'jus cogens' status, whether by customary doctrine or treaty provisions, can never be abrogated.

Terrorism and international crime pose a threat to democracy, rule of law and individual freedom. It is obligatory duty of states to control terrorists and criminals and maintain law and order. Moreover human rights must be protected properly by the States i.e. should not become the first victim in the war against terrorism. In fact, the States should try to their level best to adjust human rights to the best standard available.

The States should also co-operate with international specialized organizations i.e. by improving their human rights records. Thus, in doing so, States will increase their ability to co-operate internationally while fighting against terrorism.

In order to provide an effective answer to terrorism, the world community needs to go beyond security measures. Every person on this globe should be given a way to

cherish his or her own rights and to give respect to the rights of others. Moreover, it is also necessary to ensure that innocent people do not become the victim of counter-terrorism anymore.

For ensuring the fundamental rights of people on Earth, we need a unifying framework that is made up of common values, common standards and common obligations so that these universal rights may be upheld in a proper way. Under this framework the entire world can be defined as one global community and which will enable the world to act beyond their differences.

The war against terrorism is dealt in different strategic situation, which ranges from peace to international armed conflict. States agents must be clearly instructed on the means and methods available at a given time in a given environment to fight against terrorism. The rights such as right to life, and prohibitions on torture and inhuman or degrading treatment (i.e. non -derogatory rights) must be respected under all the circumstances.

So as a result, if a torture is committed, in order to facilitate interrogations and extrajudicial killings of suspects, it would definitely amount to be crimes under international law.

Obviously there are dangers to fundamental rights of people while countering terrorism. But we may hope that these initiatives may give a trend which would be generally positive in light of the present global security environment.

Bibliography

Books and Articles

1. A, Cassese, *International Criminal law*: Oxford University Press, 2003.
2. Aldrich, George H., "*The Taliban, al Qaeda, and the Determination of Illegal Combatants*" vol 4, 2002.
3. B, Clarke, *International Law Nutshell Series*, Pymont NSW: law book co, 2003
4. Chesterman, Simon, *Just War or Just Peace*, Oxford Press, 2001.
5. Cassese, Antonio, *Terrorism is also disputing Some Crucial Legal Categories of International Law*, *European Journal of International Law*:vol 12, and no.5 ,2001
6. Dhanapala, J., "*The United Nations' Response to 9/11*", *Terrorism and Political Violence*, vol.17, 2005.
7. Dixon, Martin, *A Text book of International Law*, London: Blackstone Press, 2000.
Franck, Thomas, M., '*When, If Ever, May States Deploy Military Force without Prior Security Council authorization?*', Wash University: J.L&pol'y.
8. G, Maxon, R., "*Nature's Eldest Law: A Survey of a Nation's Right to Act in Self Defence*", *Parameters*: autumn, 1995.
9. Gaja, Giorgio, *In what sense was there an 'armed attack'* *European Journal of International Law* forum, vol12,:no.5, 2001.
10. Grey, Christine, *International Law and Use of Force*: Oxford University Press, 2000.
11. Guelke, Adrian, *The age of terrorism and the international political system*, I.B Tours:

- New York, 1998.
12. Harris, D, J., *Cases and Materials on International law*, 6th ed. London: Sweet and Maxwell, 2004.
 13. Henkin, Louis, *Use of Force; Law and US policy, Right v Might: International Law and Use of Force*, Council on Foreign Relations, 1989.
 14. Higgins, Rosalyn, '*Derogations under Human Rights Treaties*', 48 *Brit. Year book, Int'l Law*.
 15. Hoffman, Bruce, *Inside Terrorism*, Columbia University press: New York, 1998.
 16. Koh, Harold Hongju, *We Have the right courts for bin laden*, N.Y. TIMES, Nov.17, 2001.
 17. Kushner, Harvey, W., *Encyclopedia of terrorism*, SagePublications: Inc, 2003.
 18. L, Betakes, and S, Nash., *International Criminal Law: 2nd edition: Portland, Cavendish*, 2003.
 19. Liqueur, Walter, *The Age of Terrorism*, Boston: Little Brown and Company, 1987.
MacLean, *Public international Law*, 1st ed.Old Bailey Press, 1997.
 20. Nowak, Manfred, "*UN Covenant on Civil and Political Rights: ICCPR commentary*"
Engel, Publisher, , Strasbourg,Vol ,1993.
 21. Pillar, Paul, R., *Terrorism and U.S Foreign Policy*, Brookings Institute Press:
Washington DC, 2001.
 22. QC, Sir Robert Jennings and Watts, Sir Arthur, *Oppenheim's International law*, Vol 1:9th
edition Longmans, 1996.
 23. Rapport, David., "*The Politics of Atrocity*" in Yonah Alexander and Seymour Maxend

- Finger (Eds) *Terrorism: Interdisciplinary Prospective*: New York: John. Jay press, 1977.
- Roth, Kenneth, "*Counter Terrorism and Human Rights; An Essential Alliance*": paper presented to Princeton Project On National Security Conference: Princeton University, 2004.
24. Shearer, I, A., *Starkes International Law*, 11th edition. Sydney, Butterworth's, 1994.
25. Slaughter, Anne Marie, and White, William Burke, *An International Constitutional Moment*, 43HARV J.INTL'L L.1, 2002.
26. Stern, Jessica, *The Ultimate Terrorists*, Cambridge: Harvard University Press, 2001.
- Travalio, George, M., *Terrorism, International law and Use of Military Force*, 18wis:Int'l, L.J, 2000.
27. Williams and Soafer, *Responding to Terrorism Crime, Punishment and War*, HARV.L.REV.1217, 2002.
28. Aolain, Fionnuala Ni, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L. J.1995.
29. Webster's third new international dictionary, Merriam: Webster, 1984.

Documents

G A Res. 3314(XXXIX) of December; 14, 1974.

G. A. Res 49/60 of a December 1994

S.C.Res .1377, of Nov; 12, 2001

SC Res.1535 (2004) of March; 26, 2004.

Websites

<http://www.fordham.edu/halsal/mod/robespierre.terror.html>

<http://www.google-analytics.com/urchin.html>

http://en.wikipedia.org/wiki/American_Heritage_Dictionary.html

http://www.icj_cij.org/icj.www/idecisions/isummaries/Iccsummary490_409.html

<http://www.un.org/icty/html>.

<http://www.amnesty.org/html>.

<http://www.unhchr.ch/tbs/doc.nsf.html>

<http://www.sauhassan.com/articles/LalMasjidSaga.html>

