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A critique of the international legal regime applicable to terrorism

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Abstract

Terrorism is a global phenomenon that permeates state borders and predominantly causes immeasurable suffering to civilians. The need for international cooperation and concerted efforts in combating terrorism cannot be gainsaid. Already, sectoral instruments have been passed to regulate certain aspects of terrorism. However, without a single terrorism specific instrument, acts of terrorism generally classified will fall under spheres of international law which include; public international law, international criminal law, international humanitarian law, human rights and refugee law. This paper makes a critical analysis of these spheres of international law and how they apply to states' counter-terrorism efforts.

Introduction

States are required to take measures and cooperate with each other in order to maintain international peace and security within their international obligations.[1] Terrorism is no doubt an issue that threatens international peace and security. Noting the absence of a comprehensive internationally binding terrorism specific instrument, it is important to interrogate the interplay between the different spheres of international law and terrorism and attempt to find a balance. In this discourse, this paper is divided into five parts. The first contextualises

[1] The United Nations Security Council has called upon states through UNSC S/RES/1456 (2003) High-level meeting of the Security Council: Combating terrorism, to take measures in countering terrorism which comply with all their obligations under international law and to adopt such measures in accordance with international law, especially international human rights law, refugee law and humanitarian law.

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terrorism within international criminal law while showing its connection with international crimes. The second interrogates the justification of the use of force in combating terrorism and whether it falls within the purview of the provisions of the Charter of the United Nations (UN Charter) on self-defence. The third explores the difficulties in classification of the fight against terrorism as a precursor in determining which regime of law is to be applied. The fourth explores the linkage between refugee law and terrorism. The last addresses what the author considers to be most important fallback and that is the relationship between terrorism and human rights. The paper concludes that modification and balancing will be vital to ensure the 'fight against terrorism' respects the rule of law.

International criminal law and terrorism

Defining terrorism

Internationally, there is no satisfactory and generally accepted definition of terrorism.[2] This is fundamentally due to the fact that unlike ordinary crimes, terrorism has an ideological coloration. Depending on one's point of view, a perpetrator could be classified as a hero, a normal criminal or a terrorist.[3] Mostly, international conventions have dodged the complex task of defining terrorism. However, different countries have specific legislations criminalising various acts of terrorism. Amidst these complexities, this article focuses on how terrorism fits within the sphere of international criminal law; and finally whether acts of terrorism fit in other categories of international crimes such as war crimes, crimes against humanity and genocide.

Terrorism as an international crime

Terrorism was under consideration for inclusion as an international crime during the discussions leading to the Rome Conference that culminated in the adoption of the Rome Statute of the International Criminal Court (Rome Statute). However, terrorism was not incorporated into the Rome Statute mainly because there was no general agreement of what terrorism entails.[4] Acts of terror, however, are crimes that have time and again shocked the conscience of

2 De Than C and Shorts E, *International criminal law and human rights,* Sweet & Maxwell, London, 2003, 232.

3 De Than and Shorts, *International criminal law and human rights,* 232.

4 The Rome Conference regretted that, 'no general acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court.' See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Done at Rome On 17 July 1998 (UN Doc. A/CONF.183/10).

humanity.[5] Despite the lack of a widely accepted definition of terrorism, the international community is optimistic that those who the bear responsibility of harming civilians will not go scot free. Indeed, when acts of terror are committed within the context of an armed conflict there is a possibility that they can amount to war crimes if they fulfill the necessary elements.[6] Similarly, acts of terror can amount to crimes against humanity as well as genocide. In the same breath, state excesses in combating terrorism risk falling within the categorisation of crimes against humanity.[7]

Acts of terrorism as crimes against humanity

Acts of terror committed systematically or in a widespread manner directed against a civilian population may amount to crimes against humanity.[8] Sporadic acts may not fit into this category but singular acts of a serious magnitude may fit in the definition.[9] The number of victims involved could be an important indicator of whether the crimes committed reach the threshold of crimes against humanity.[10] These acts may fall within the category of murder, torture, inhumane acts, among others,[11] whether done in peace time or in time of war. Reiterating this position, the Prosecutor of the International Criminal Court (Prosecutor) concluded that acts of terror committed by the Islamic State of Iraq and Syria

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5 Some of the 21st Century acts of terror that have had a huge impact on humanity include; the 11 September 2001 twin towers attack in the USA; the Westgate Mall attack and the Garissa University College attack in Kenya; see Institute for Economics and Peace, 'Global terrorism index 2014: Measuring and understanding the impact of terrorism'2014 http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdfon 19 September 2015.

6 Article 8(2), *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

7 The US has faced immense criticism of its counter-terrorism efforts. See Paust J, *Beyond the law: The Bush administration's unlawful responses in the "war" on terror*, Cambridge University Press, New York, 2007. He explains how the USA had to embark on what he calls 'dirty war' in its quest to counter terrorism. This involved breach of international laws as well as human rights law. Kenya has also come under sharp criticism with allegations of extrajudicial killings and forced disappearance. See Human Rights Watch, 'Kenya: Killings, disappearances by anti-terror police; donors should suspend support for abusive units' 18 August 2014, https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police on September 18, 2015.

8 Article 7, *Rome Statute of the International Criminal Court*, defines crimes against humanity to encompass acts such as murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape among other atrocities.

9 See Perisic P, 'Impermissibility of Targeted Killings in the War on Terror' The 10th International Academic Conference, Vienna, 3 June 2014.

10 It is estimated, from media reports, that almost 3000 people perished in the 11 September 2001 Al-Qaeda attack in New York while there were many non-fatal injuries, 67 people reportedly died in the Westgate Mall Attack and 148 students and staff of Garissa University College were reported to have died; see Institute for Economics and Peace, 'Global terrorism index 2014'.

11 Article 7, *Rome Statute of the International Criminal Court*.

(ISIS) amounted to crimes against humanity despite the International Criminal Court (ICC) lacking territorial jurisdiction.[12] The many civilian deaths resulting from terrorism may bring certain acts of terrorism within the purview of crimes against humanity.

Acts of terrorism as war crimes

The Rome Statute has defined war crimes as 'serious violations of the laws and customs applicable in international armed conflict' and 'serious violations of the laws and customs applicable in an armed conflict not of an international character.'[13] It is accepted that this definition has been established through state practice and has achieved the status of customary international law.[14] For terrorist acts to be classified as war crimes, they must have occurred within the context of an armed conflict whether international or non-international. An international armed conflict is considered to take place whenever there is resort to using force between states.[15] On the other hand, a non-international armed conflict is said to take place 'whenever there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'[16] Further, both the International Criminal Tribunal for Rwanda (ICTR) Statute and the Special Court for Sierra Leone (SCSL) Statute contain references to terrorist acts within the context of an armed conflict.[17] They outlaw the deliberate targeting of civilians.

Acts of terrorism as genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[18] and the Rome Statute define genocide as encompassing acts resulting in serious bodily or mental harm to members of a group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to pre-

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12 See, International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS' *ICC Weekly Update* #239, 6-10 April 2015, 3. The report indicates that ISIS is alleged to have committed mass executions, sexual slavery, rape and torture, all of which fall within the definition of crimes against humanity.

13 Article 8, *Rome Statute of the International Criminal Court*.

14 See International Committee of the Red Cross, 'Customary international humanitarian law' https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 on 10 August 2016.

15 *The Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 70.

16 *Prosecutor v Tadic* (Defence Interlocutory Appeal).

17 Article 3(d), *Statute of the Special Court for Sierra Leone,* 16 January 2002, 2178 UNTS 138 and Article 4 (d), *Statute of the International Tribunal for Rwanda*, 25 May 1993, 82 UNTS 280.

18 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

vent births within the group; and forcibly transferring children of the group to another group.[19] However, for these acts to be deemed as genocide, the mental element of intending to destroy the whole or in part, a national, ethnical, racial or religious group, is a precondition. Therefore, in relation to terrorism, this can result in cases where the fight against terrorism has a religious or ethnic coloration. Nevertheless, at times, they can be coalesced into genocidal terrorism.[20] If classified as genocide, terrorism can be the subject of ICC trial and also, the international community's exercise of universal jurisdiction. Recently, a group that has fashioned itself as the Islamic State of Iraq and the Levant (ISIL), whose activities are considered to amount to terrorism,[21] has enslaved, killed or otherwise displaced the Yazidi – a minority community in Iraq.[22] There are compelling reasons to classify these acts as genocide.[23]

Terrorism and use of force; justification

International law lays down a prohibition against the use of force between states as expressed in Article 2(4) of the UN Charter. This prohibition has attained the status of *jus cogens*.[24] However, the UN Charter allows two exceptions to the prohibition against the use of force. First, under Chapter VII, the UN Security Council (UNSC) can allow for the use of force in extraneous circumstances to restore international peace. Secondly, Article 51 allows for use of force in the exercise of a state's inherent right of self-defence. Increasingly though, invoking the latter justification has been marred with controversies since not every instance of the use of force against a state is deemed to be an armed attack, under Article 51. Escalating this controversy is the fight against terror that is often a hit-and-run scheme with no direct nexus with a responsible state. A third exception will be in situations where a state consents to such an invasion.[25]

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19 Article 2, *Convention on the Prevention and Punishment of the Crime of Genocide* and Article 6, *Rome Statute of the International Criminal Court*.

20 See *Presbyterian Church of Sudan v Talisman Energy, Inc*. 244 F. Supp. 2d 289 (SDNY 2003). In this case, the Canadian firm was sued for facilitating genocidal terrorism.

21 United Nations Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, 13 March 2015.

22 'Yazidi Attacks may be genocide says UN' *BBC News,* 19 March 2015 http://www.bbc.com/news/world-middle-east-31962755 on 18 September 2015.

23 'Yazidi Attacks may be genocide says UN'.

24 See Green JA, 'Questioning the peremptory status of the prohibition of the use of force' 32 *Michigan Journal of International Law,* 2(2011).

25 See Deeks AS, 'Consent to the use of force and international law supremacy' 54 *Harvard International Law Journal*, 1(2013).

Use of force and UN resolutions

With an absolute provision mandating the UNSC to invoke force in restoring international peace and security, it is important to examine the impact of this decree in fighting terrorism. Perhaps, in the 1990s, one would have doubted whether terrorism could attain the attention of the UNSC. However, since the '9/11' attacks, the debate has focused increasingly on whether terrorist attacks give rise to the right of self-defence or are compelling enough to allow the UN to invoke force to maintain peace.[26] Vide UNSC Resolution 1368 it might be argued that the UNSC implicitly conferred on the US the right of self-defense in its pursuit of the Al Qaeda and affiliate groups in Afghanistan. If this is the case, other questions such as how the UNSC permits such actions will follow.[27] Whereas subsequent resolutions have stated authoritatively that support for terrorists in the form of allowing the use of a state's own territory for planning and training for terrorist actions may necessitate use of force,[28] there is still a grey area as to the limits of the use of force and when the threat will be considered neutralised.[29] Drawing from the UN resolutions, support for terrorism or allowing the use of a state's territory by terrorists can be deemed contrary to international law thus forming an exception for the UN Charter's prohibition against the use of force.[30] Nevertheless, for purposes of consistency and predictability of international law, where a resolution allows use of force against a state, it should be explicit and case specific.

Use of force as self-defence

Provided in Article 51, it has always been argued that recognition of a state's right to self-defence was an appreciation of the pre-UN Charter situation.[31] If this is the case, issues with regards to its scope will arise.[32] Combating terrorism is not a *carte blanche*. Often, terrorists operate parallel to states' armed forces.

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26 Ulfstein G, 'Terrorism and the use of force' 34 *Security Dialogue*, 2 (2003), 156.

27 See Ulfstein, 'Terrorism and the use of force'.

28 UNGA, *Declaration on measure to eliminate international terrorism*, UN A/RES/49/60 9 December 1994; UNGA, *Declaration on principles of international law on friendly relations and co-operation among states in accordance with the Charter of the United Nations*, UN A/Res/2625(XXV) 24 October 1970, lays down that member states shall not tolerate the use of their territory for terrorist acts.

29 See Arend AC, 'International law and the preemptive use of military force' 26 *The Washington Quarterly*, 2 (2003).

30 See Ulfstein, 'Terrorism and the use of force'.

31 Arend, 'International law and the preemptive use of military force'.

32 This debate extends to interrogate whether the operation of the UN statute mandates some limitations of this right. See Arend, 'International law and the preemptive use of military force'.

Therefore, there is a requirement that the level of force involved be of a certain magnitude. In the *Nicaragua* case, the International Court of Justice (ICJ) examined the question of whether the United States of America (USA) was responsible for acts performed by the contras in *Nicaragua*. One of the ICJ's findings was that border incidents could not be deemed to constitute an armed attack upon the state.[33] The ICJ held that 'substantial involvement' in sending irregular forces into another country may be deemed an armed attack giving rise to the right of self-defence.[34] Applying these standards for terrorists, there must be a substantive connection between them and the harbouring state. Also, there will be need to ensure the imminence of a threat which is often difficult to ascertain in hit-and-run terrorist attacks.

These dynamics in invoking the right to self-defense seem to have necessitated the rise of preemptive or anticipatory self-defense. Though not acknowledged by the UN Charter, it is often claimed to fall under the broad inherent right of self-defense. The exercise of the right to self-defense in post '9/11' has posed serious challenges regarding legal justification. Increasingly, the USA's exercise of the right to self-defence in preemptive strikes against alleged terrorists after the attacks of 11 September 2001 has gained approval both by NATO and a large number of other states in the world.[35] This approach, popularly known as the 'Bush Doctrine', is gaining notoriety within states in defence of their citizens outside their borders. Kenya's incursion into Somalia in pursuit of Al Shabaab prior to joining the African Union Mission in Somalia is a closer example of the propagation of this doctrine. Further, the US continues to offer air support through the use of drones in Somalia in the fight against Al-Shabaab. Is there sufficient evidence therefore at the moment to conclude that customary international law in regard to self-defence and particularly anticipatory self-defence has changed?

Even though pre-dating the UN Charter, the 1837 *Caroline case*, remains of great importance in this discourse. Here, the US Secretary of State formulated the 'Caroline test' requirements of burden of proof, immediacy, necessity and

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33 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, 103.

34 *Military Activities in Nicaragua*, para 195.

35 The North Atlantic Treaty Council (2001) resolved on 12 September 2001 that if the attack against the USA 'was directed from abroad', this should be deemed to trigger collective self-defence under Article 5, *North Atlantic Treaty*, 4 April 1949, 34 UNTS 243. On 2 October 2001, North Atlantic Treaty Organisation's Secretary General announced that, on the basis of information provided by the USA, the NATO Council had ascertained that the attack 'was directed from abroad'. See also the resolution passed by the foreign ministers of the member-states of *Inter-American Treaty of Reciprocal Assistance*, 2 September 1947, 21 UNTS 77, on 21 September 2001, which declared that the attacks were to be considered as 'attacks against all American states'.

proportionality.[36] *Necessity* and *proportionality* have been reiterated in the *Nicaragua* case[37] and in the ICJ's advisory opinion on the legality of the threat or use of nuclear weapons (the Nuclear Weapons case).[38] Whereas it is not within the scope of this paper to explore whether counter-terrorism efforts across state borders have satisfied the *Caroline test* or whether customary international law has expanded the scope of self-defense, it is without doubt that states are treading on dangerous ground by opening floodgates in ignoring the restrictions on the use of force in international law.[39] This may in itself constitute a threat to international peace and security or be indicative of state practice necessitating the realignment of international law.

Consented use of force

Perhaps a new justification, mostly in the fight against terrorism, is upon consent by a state. It is arguable that there are sound equitable grounds for states to be able to use force in another state if that state does not have the will or ability to address acts of terrorism originating within its own territory.[40] However, such an invasion can be justified once the regime in force supports or consents to the invasion.[41] Without such consent, a state cannot claim an express right of self-defense against any other state that does not take sufficient steps to combat terrorism within its territory. Controversies could emanate on determining sufficient steps considering the economic and technological disparities between states. Therefore, unless invited or supported by the state concerned, the point of departure must always be restricted to Article 2(4) of the UN Charter and its narrow exceptions. This exception seems to be the only one independent of the UNSC's politics in justifying the use of force.

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36 *The Caroline v United States* 11 US 496 (1813).

37 *Military Activities in Nicaragua*, para 176.

38 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, para 41.

39 In the advent of the *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, cases such as the Cuban missile crisis, the 1967 six-day war, and the 1981 Israeli attack on the Osirak reactor in Iraq, NATO and US actions against Yugoslavia in Kosovo in 1999 are among the cases where force has been used outside the *Charter of the United Nations*.

40 Vöneky SNU, 'Response – the fight against terrorism and the rules of international law – comment on papers and speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department' 8 *German Law Journal*, 7 (2007), 751.

41 For example Kenyan Mission in Somalia. See 'Universal TV: Somalia PM stated that Kenya has the right to fight Al Shabaab inside Somalia' *Amisom Daily Media Monitoring,*26 October 2011 http://somaliamediamonitoring.org/26-oct-2011-daily-monitoring-report/ on 11 August 2016.

International humanitarian law and terrorism

Within the purview of international humanitarian law (IHL), terrorism is only fathomable where such acts occur as part of an armed conflict.[42] Once an armed conflict is identified, it necessitates a further distinction between an international armed conflict and a non-international armed conflict. Even though IHL does not provide a definition for terrorism, it prohibits most acts committed in armed conflict that would commonly be considered 'terrorist acts' if they were committed in peacetime.[43] Additionally, where the fight against terrorism meets the threshold of an international armed conflict or non-international armed conflict, IHL will accord combatants minimum guarantees.

Combating terrorism within the context of armed conflict

Common Article 3 to the Geneva Conventions of 1949 assumes that an 'armed conflict' exists where the situation reaches a level that distinguishes it from other forms of violence to which international humanitarian law does not apply, namely 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. Further, the *Tadic case*[44] puts forth the requirement of organisation and intensity. All these are likely to be above the reach of most contemporary terrorist incidents. However, where it results in protracted violence as in the case of Afghanistan, Somalia and Syria, such a classification is possible. Also, with foreign states taking part in the fight against terrorism, it does not escape the possibility of being classified as an international armed conflict.

Fundamentally, the IHL principle of distinction entails that persons fighting in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives.[45] All attacks not directed against combatants or military objectives are deemed 'indiscriminate attacks,' thus prohibited.[46] This principle also has implications on the means of warfare selected, if they cannot target a specific military object. Mostly, terrorists target civilians and civilian installations, thus outrightly violating this principle. Howev-

42 Article 2 and Article 3 Geneva Conventions of 12 August 1949.

43 These include indiscriminate attacks on civilians, disproportionate attacks among others.

44 *The Prosecutor v Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para 561-568.

45 Article 52, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

46 Article 51(4), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).*

er, response of the state should not be disproportionate. Humanitarian law, once applicable, should be adhered to regardless of whether the other party complies. Another cardinal principle is that of proportionate attacks whose aim should be to neutralise the threat posed by an adversary.

Beyond these principles, IHL also proscribes 'measures of terrorism' or 'acts of terrorism.' Additional Protocol II prohibits 'acts of terrorism' against persons not or no longer taking part in hostilities.[47] This proscription aims to highlight individual criminal accountability and protect against collective punishment and 'all measures of intimidation or of terrorism.'[48] Additionally, 'acts or threats of violence with the primary purpose of spreading terror among the civilian population' are also strictly prohibited under IHL.[49] This is basically aimed at 'attacks that aim specifically to terrorise civilians, for example campaigns of shelling or sniping at civilians in urban areas.'[50] Finally, hostage-taking and use of civilians as human shields is prohibited by IHL.[51]

Challenges of applying IHL

Many contemporary armed conflicts are associated with amorphous groups operating across porous borders of two or more states.[52] This means that one state or many states find themselves battling a group that operates across their borders. A closer example of this is the Al Shabaab that operates mainly in Somalia but has carried out attacks in Kenya and Uganda.[53] Armed conflicts in the context of combating terrorism are not the traditional conflicts that are easy to classify. The following challenges attend efforts towards classification.

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47 Article 4(2)(d), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

48 Article 33 and 4(2), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, states that, 'Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.'

49 Article 51(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* and Article 13 (2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*.

50 Article 51(4), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, provides: 'Indiscriminate attacks are prohibited'; Rule 11, Customary International Humanitarian Law Rules.

51 Article 34, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*; Article 51(7), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*.

52 Organisation for Economic Co-operation and Development, *Improving international support to peace processes: The missing piece, conflict and fragility*, OECD Publishing, Paris, 2012, 19.

53 Stanford University, 'Mapping militant organizations: Al Shabaab' http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61 on 10 August 2016.

First, states are reluctant to admit that acts of terrorism within their borders have reached the threshold of an 'armed conflict.' In the *Tadic* case, the ICTY determined that an armed conflict occurs when there is '…protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.'[54] With regard to the issue of protracted armed violence, the terrorist attacks in Kenya, for instance the Westgate Mall attack, lasted three days and involved both the elite paramilitary unit of the Kenya Police Service and the military.[55] Are these indications that there was an existing armed conflict? Some commentators suggested that the involvement of the military rather than the police indicates the existence of an armed conflict.[56] My view would be that taking every situation where the military is involved as a situation of existence of an armed conflict would be an exaggeration. Kenya, for instance, has seen increased use of military in law enforcement to assist the police efforts, but within the strict parameters of respect for human rights.[57] The military's role in many states is not restricted to protection against external aggression but in disaster management and providing back-up response to emergency situations that do not provide a chance to evaluate whether an armed conflict is in place.[58]

Secondly, the aspect of organisation as enumerated in the *Tadic* case implies that the group must have some command structure in addition to the criteria under Article 1 of Additional Protocol II. Additionally, these groups ought to conduct their operations in accordance with IHL. This criterion is a tall order for suspected terrorists groups whose activities, targeted at civilians, are contrary to humanitarian laws; they neither wear a distinctive insignia nor carry arms openly.[59] Mostly, they prefer fighting amidst civilians in order to delay or subvert

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54 *Prosecutor v Tadic* (Judgment), para 561.

55 Kenya National Assembly, *Report of the joint committee on administration and national security; and defence and foreign relations, on the inquiry into the Westgate Mall terror attack, and other terrorist attacks in Mandera in North Eastern and Kilifi in the Coastal Region*, 2013.

56 Schindler D, 'The different types of armed conflicts according to the Geneva Conventions and Protocols' 163 *Recueil des Cours* (1979), 147. The author suggests that involvement of the military is a stronger indicator of existence of an armed conflict. He states: '*The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces…*'(Emphasis added).

57 Articles 241(3)(b) and (c), *Constitution of Kenya* (2010), for example, require that where the defence forces are deployed internally, they should report to the National Assembly in the case of emergency and disaster situations, and seek the approval of the National Assembly in the case of restoring peace and stability.

58 See, for example, Article 241(3)(b), *Constitution of Kenya* (2010), which provides that: 'The Defence Forces shall assist and cooperate with other authorities in situations of emergency or disaster…'.

59 Bhuta N, 'States of exception: Regulating targeted killing in a "global civil war"' in Alston P and

retaliatory measures.[60]

Thirdly, problems stem from counter-terrorism activities that occur beyond states borders. Difficulties may arise in respect of legal categorisation of those 'terrorists' taking a direct part in hostilities especially if they are acting in proxy or alongside a state that is harbouring them.[61] States tend to take advantage of legal black holes in respect of the status of those captured which, mostly means denying them the 'prisoner of war' status.[62] In some instances, it is difficult to classify a war as that of national liberation.[63]

With these challenges, it is without doubt that human rights law (as discussed below) provides better protection, and states must be willing to conduct counter-terrorism activities while guaranteeing suspected terrorists the minimum guarantees under national and international human rights law.[64]

Refugee law

To win against terrorism, it is a precondition that all methods resorted to must be premised on the rule of law.[65] Failure to which, states end up exacerbating violence as terrorists find sympathisers who they recruit.[66] As states wrestle with balancing between national security and international obligations, the UNSC has been at the fore-front urging them to implement counter-terrorism measures that safeguard the status of refugees.[67] From the refugee law perspective, the principle of non-refoulement has been contentious in its application

Macdonald E (eds), *Human rights, intervention and the use of force*, Oxford University Press, Oxford, 2008, 265.

60 For example in Somalia, before being forced out of Mogadishu, Al-Shabaab insurgents used the high population in the by conducting attacks from various parts of the city which exposed the civilians to attacks by the TFG/AMISOM forces thus delaying the mission. See Human Rights Watch and Harvard Law School's International Human Rights Clinic, Documentation of the Use of Explosive Weapons in Populated Areas, November 2011http://www.hrw.org/sites/default/files/related_material/2011_armsother_EWIPA_0.pdf on 23 July 2015.

61 Vite S, 'Typology of armed conflicts in international humanitarian law: Legal concepts and actual situations' 91 *International Review on The Red Cross*, 873(2009).

62 Steyn J, 'Guantanamo Bay: The legal black hole' Twenty-Seventh FA Mann Lecture, 25 November 2003, 12.

63 For example, the militias advancing the Islamic State war in Syria among other states could claim it is a war on liberation.

64 Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

65 Barak A, *The judge in a democracy*, Princeton University Press, Princeton, 2006, 287.

66 Khalil L, 'Authoritarian and corrupt governments' in Forest J (ed), *Countering terrorism and insurgency in the 21st century: International perspectives*, vol 2, Praeger Security International, London, 2007, 85.

67 UNSC S/RES/1373 (2001) Threats to international peace and security caused by terrorist acts, urges states to prevent the movement of terrorists by implementing effective border controls and securing the integrity of identity papers and travel documents. Further, it reiterates the need to uphold the *Convention Relating to the Status of the Refugees*, 14 December 1950, 189 UNTS 150.

and at times abused.[68] In addition, states have adopted restrictive legislations that limit the right to asylum.[69]

Non-refoulement and challenges

Non-refoulement is a universally acknowledged principle. It is expressly provided for in human rights treaties.[70] Both regional and domestic courts have interpreted the right to life and freedom from torture to include prohibition against *refoulement*.[71] States have an obligation to conduct any transfer of detainees in a manner that is transparent and consistent with human rights and the rule of law. Some states have reportedly extradited, expelled, deported or otherwise transferred foreign nationals, some of them terror suspects, to their countries of origin or to countries where they face a risk of torture or ill-treatment, in violation of the principle of *non-refoulement*.[72]

A further interpretation of the principle includes an obligation on states not to expose individuals to 'the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.'[73] International law has established absolute prohibition of *refoulement* if there is a risk of torture or other cruel, inhuman or degrading treatment. The principle of *non-refoulement* prohibits not only the removal of individuals but also the mass expulsion of refugees.[74]

States have an obligation to uphold the right to *non-refoulement*.[75] In emphasising the importance of this right, the providing clause does not allow for reservations; that is, contracting states cannot place a reservation on this fun-

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68 Office of the United Nations High Commissioner for Human Rights, *Human rights, terrorism and counter-terrorism*, Fact sheet No.32, 2008.

69 Office of the United Nations High Commissioner for Human Rights, *Human rights, terrorism and counter-terrorism*, 18.

70 Article 3, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, and Article 22(8), *American Convention of Human Rights*, 21 November 1969, 1144 UNTS 123.

71 *R (on the application of) ABC (a minor) (Afghanistan) v Secretary of State for the Home Department* [2011] EWHC 2937 (Admin.) (U.K); *M.S.S v Belgium and Greece* [GC], No. 30696109, ECtHR Judgment of 1 January 2011.

72 Article 33 (1), *Convention Relating to the Status of the Refugees*, Article 3, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 16, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, 2716 UNTS 3.

73 Article 7, *International Covenant on Civil and Political Rights*, interpreted in *CCPR General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992.

74 Article 12(5), *African Charter on Human and Peoples' Rights,* 27 June 1981, 1520 UNTS 217.

75 Article 33, *Convention Relating to the Status of the Refugees.*

damental clause.[76] However, this right is not afforded to persons contemplated under Article 33(2).[77] There are only two instances when a state can be relieved of its international obligation under refugee law. First, persons who qualify as refugees may not claim protection under this principle where there are 'reasonable grounds' for regarding the refugee as a danger to the national security of the host country; and second, where the refugee, having been convicted of a particular serious crime, is a danger to the host community.[78] This can only be exercised when certain fundamental elements are met.[79]

In its 20th Session, in October 1996, the African Commission on Human and Peoples' Rights held that the expulsion of Burundi refugees living in Rwanda without opportunity to contest their removal violated their rights under the African Charter on Human and Peoples' Rights.[80] The decision by Kenya to expel refugees of Somali origin from Daadab Camp as a counter-terrorism measure has likewise not escaped criticism.[81] Also, the international appeal on European nations to admit refugees from Syria is a clear indication that regardless of how complex the fight against terrorism might be, the law must be upheld.

Human rights

Human rights can be described as universal values and legal guarantees that guard individuals and groups against acts predominantly carried out by state agents that interfere with fundamental freedoms, rights and human dignity.[82] They are universal in nature and indivisible. Basically, human rights involve respect, protection and fulfilment of civil, cultural, economic, political and social

76 Article 33, *Convention Relating to the Status of the Refugees.*

77 *Convention Relating to the Status of the Refugees.*

78 Article 33(2), *Convention Relating to the Status of the Refugees.*

79 These elements are (a) particular serious crime; this entails the commission and subsequent conviction for the said crime, (b) he/she must be convicted by a final judgement; this clause contemplates that only a conviction that is a product of due process meet the threshold, (c) he/she constitutes a danger to the community of the country of refugee; the said refugee must not only constitute danger but this danger should be directed to the host state.

80 *Organisation mondiale contre la torture, Association internationale des juristes democrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda,* Communications No. 27/89-46/90-46/91-99/93.

81 'Alvin Attalo: The ramifications of Kenya's decision to expel refugees from Dadaab Camp' *OxHRH Blog,* July 2016 http://ohrh.law.ox.ac.uk/the-ramifications-of-kenyas-decision-to-expel-refugees-from-dadaab-camp/ on 10 August 2016.

82 Office of the United Nations High Commissioner for Human Rights, *Human rights, terrorism and counter-terrorism.*

rights, as well as the right to development.[83] Terrorism has a direct impact on the enjoyment of a number of human rights as it aims at the very destruction of human rights, democracy and the rule of law. The disparaging impact of terrorism on human rights and security has been recognised at the highest level of the UN.[84]

International and regional human rights law prescribe that states owe a duty to protect individuals under their jurisdiction from terrorist attacks, recognised as part of the states' obligations to ensure respect for the right to life and the right to security.[85] In fulfilling their obligations under human rights law, to protect the life and security of individuals under their jurisdiction, states have a right and a duty to take effective counter-terrorism measures, to avert and deter future terrorist attacks. Additionally, states should bring to justice those responsible for such acts. On the other hand, the universality of human rights calls for the respect of human rights even for those accused of the most egregious offences in society.[86] In essence, suspects of terrorism must be accorded their rights such as due process, fair hearing, prohibition of torture and other cruel, inhuman or degrading treatment or punishment and prohibition against *non-refoulement* among others.[87]

This means therefore that as part of states' duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must in themselves, conform with states' obligations under international law, in particular international human rights, refugee and humanitarian law. Terror cannot be fought with

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83 Office of the United Nations High Commissioner for Human Rights, *Human rights, terrorism and counter-terrorism*.

84 See UNSC S/RES/1373(2001) Threats to international peace and security caused by terrorist acts; UNSC S/RES/1377(2001)Threats to international peace and security caused by terrorist acts; UNGA, *Human rights and terrorism*, A/RES/48/122, 20 December 1993; UNGA, *Measures to eliminate international terrorism*, A/RES/49/60, 9 December 1994; UNGA, *Human rights and terrorism*, A/RES/49/185, 23 December 1994; UNGA, *Human rights and terrorism*, A/RES/50/186, 22 December 1995; UNGA, *Human rights and terrorism*, A/RES/52/133, 12 December 1997; UNGA, *Measures to eliminate international terrorism*, A/50/160, 3 July 2001; UNGA, *Human rights and terrorism*, A/RES/58/174, 22 December 2003; UN Commission on Human Rights, *Human rights and terrorism*, E/CN.4/RES/2001/23, 23 April 2001; UN Commission on Human Rights, *Human rights and terrorism*, E/CN.4/RES/2004/44, 19 April 2004; UN Human Rights Council, *Protection of human rights and fundamental freedoms while countering terrorism: mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Resolution 6/28, 14 December 2007; UN Human Rights Council, *Protection of human rights and fundamental freedoms while countering terrorism*, Resolution 7/7, 27 March 2008.

85 Article 30, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

86 Article 14, *International Covenant on Civil and Political Rights*.

87 Pati R, *Due process and international terrorism: An international legal analysis*, Martinus Nijhoff Publishers, Leiden, 2009, 288.

terror. While noting the tension that exists between combating terrorism and state security, the retired Israeli Judge Aharon Barak urges states to distinguish themselves from terrorists by upholding the rule of law.[88] This contribution reiterates this position also as states endeavour to maintain national and international peace and security and human rights.

Conclusion

Acts of terror continue to inflict untold suffering on civilians throughout the world. On the other hand, the international legal regime for combating terror is almost comprehensive but only in an ideal situation. Contemporary terrorism and conflicts associated with it present challenges to states. In an attempt to defend the citizenry against acts of terror, states find themselves acting outside the realm of the law. This article reaches the conclusion that states should cooperate within the various spheres of international law to ensure the maximum protection of victims of terrorism especially refugees and displaced persons. In addition, measures should be taken to ensure accountability for those responsible through international criminal law by furthering the discussion to establish terrorism as a crime *sui generis* and, lastly, states have a chance to foster more respect for human rights by respecting the rights of those suspected of terrorism.

[88] Barak, *The judge in a democracy*, 286.