Keynote Address

*Terrorism and International Law:
Cure the Underlying Problem, Not Just the Symptom*

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1.00. Introduction

Terrorist activities are not of recent origin on the international plane. They have been there since the beginning of humanity. Although international law may not be accused of addressing the issue of terrorism with levity, it was after the 9/11 terrorist attacks on the United States that the international community’s efforts toward fighting terrorism garnered more strength and attention.

The debatable critical question is whether terrorism under international law should be studied and treated as a specific subject in developing the legal norms and principles for its fight and regulation, or whether terrorism should be fought and regulated based on the already existing relevant international legal norms and principles. We favor the later approach. Terrorism like piracy, torture, genocide etc. should be examined within the context of the already existing framework of international law since it does not as of the present time have its clear legal norms. Terrorism has become one of the top ranking problems threatening the peace and stability of the international community and challenging international law at the present time. Granted that the international community as a whole has not paid deaf ears to the challenges of this anathema, a lot still needs to be done to adequately combat terrorism. More cooperation among states and international organizations is a sine qua non in this direction. One major impediment to the efforts being made to contain terrorism is the inability of the international community to adopt a comprehensive and generally acceptable definition of terrorism, which would capture its constitutive elements.
The objectives of this paper are: to discuss the genesis of the doctrine of war, use of force, difficulties associated with the definition of terrorism, causes of terrorism, terrorism during both armed conflict and peace time; the United Nations efforts in dealing with the definition of terrorism; the legal responsibility for acts of terrorism; and attempt to outline how best to cure the underlying problem and not just the symptom. Hopefully, these efforts will help in identifying the best ways through which the fight against terrorism would be won ultimately. It is to the examination of these legal issues that we now turn.

2.00. The Just War Doctrine

The origin of the doctrine of just war can be traced to the Greeks and Romans. Thus Greek philosophers, who had striven to bring some reason, order, and essence to their society, tried to justify war on moral, religious, and legal grounds. The Roman writer, Cicero, characterized war as just if it was waged to recover lost goods. Just war doctrine was earlier influenced by the Church’s view of natural law. Even though the Romans generally believed that war was an aspect of nature, and was dictated by the natural order to which man had no control, they felt that the only justification for war was an injury accompanied by lack of atonement on the part of the wrongdoer. Among the non-Christian societies, there were thoughts about the need for rules that would reduce the negative effects of war. The authority of the Church became merged with the authority of the state, which led to a Christian pacifism that was later displaced by St. Augustine’s view of natural law.

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1 See Frederick Russell, The Just War Theory in the Middle Ages, 1 (Cambridge University Press, 1975)
2 Id. at 5
5 See Yoram Dinstein, War, Aggression and Self Defense, 60, 3rd ed. (2001). Under this philosophy, there was in existence, a City of God, in which God Himself ordained wars against evil. See Von Elbe, supra, 668
St Augustine, in his natural law thinking, espoused a just war theory under which war could not only be just, but obligatory under certain conditions. In his analysis of the just war doctrine, St Augustine identified the core attribute of a just war, namely, that it must be fought in order to promote or preserve peace, to punish the evil doer, or to recover possessions wrongfully taken. He propagated war as a last resort, and reasoned that a just war must be fought by a sovereign authority.

Following St. Augustine was St. Thomas Aquinas, another philosopher who discussed the just war theory from natural law prism. He elaborated on the work of his predecessor, St Augustine. In offering a negative answer to the question of “whether it is always sinful to wage war,” St Thomas Aquinas, however, identified three conditions that a just war should meet: proper authority, just cause, and rightful intention. He was in agreement with St. Augustine that the authority to fight a just war resided with a sovereign; such war must have been triggered by a just cause, supported by the right intention of those waging the war. The intention referred to here is the advancement of good, or the avoidance of evil. St Thomas Aquinas saw the need to punish both the wrongful conduct of the wrongdoer as well as his guilty mind, and felt that defense of a common good was a

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6 He noted that: “Just wars are usually defined as those which avenge injuries, when the nation or city against which war-like action is to be directed has neglected either to punish wrongs committed by its own citizens, or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains”. See Mark Janis, An Introduction to International Law, 169, 3rd ed. (1999)

7 Thus, “[P]eace is war’s purpose, the scope of all military discipline, and the limit at which all just contentions aim”. See St. Augustine, The City of God, (J. Healey trans.), in Basic Texts in International Relations 28 (Evan Luard ed., 1992)

8 See St. Thomas Aquinas, Summa Theological, II.2.40, quoted in St Thomas Aquinas on Politics and Ethics, 64 ( Paul E. Sigmund, ed. & Trans., W.W. Norton & Co. 1988)

9 Id., at 64-65

10 See Von Elbe, supra 666; Yoram Dinstein, supra, 62-63

11 The practical implication of this is that a war may be waged by a sovereign authority, and with a just cause, yet unlawful where it is fought with a wrong intention. See R.J. Araujo, Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst, 30 VAND Transnat'l L. 1, 8 (1997)
moral obligation to the extent that inaction in the face of a threat to a common good was as sinful as an unwarranted attack.12

An important aspect of St. Thomas Aquinas exposition of the just war doctrine is his introduction of the concept of “double effect,” wherein he explained that every course of action undertaken could produce two consequences: the one that is intended, and the other is outside the intended consequence.13 Thus, to determine the justness of war, an emphasis is placed more on what is intended rather than on the incidental consequence.14 War attained some secularization with an increase in the European sovereign states, which led to a difficulty in categorizing war. However, Francisco Suarez and Francisco de Victoria discussed the legality of use of force by states, and identified the basis of just war to be a need to redress and defend wrong16. Further work was carried out on just war doctrine by other writers. Hugo Grotius’ idea had a great impact on the doctrine of just war. He had a passion for regulated war, which led to him to enunciate the grounds upon which just war could be prosecuted, namely: self defense, enforcement of rights, reparation of injury, and punishment for wrongs.17 Grotius went further to identify three classes of legal frameworks; the first was the law of nations, which he believed was founded on sovereignty; the second was natural law, which was based on nature, and the third was Christian moral theology,

12 See Frederick Russell, supra, 262
13 See St. Thomas Aquinas on Politics and Ethics, supra 70-71.
14 This approach is objectionable, for instance, when it is applied to the fight against terrorism since, according to its tenets, a sovereign state may prosecute a war against another state, once there exists in the mind of the sovereign a right intention for so doing, even if there are evil consequences resulting from such war. The concept would seem to give support to a situation where a state abuses the human rights of individuals in the guise of fighting terrorism.
16 See Francisco de Victoria, De Indis et de Jure Belli, Second Reflection, 429, para 13 (1696); Francisco Suarez, Selection from Three Works, De Triplica Virtute Theologica, Fide, Spe, et Charitate (1621). Suarez maintained that the only just cause for war was a grave injustice which could not be avenged or repaired in any other way.
which he said was based on the New Testament\textsuperscript{18}. Hugo Grotius’ perception of just war theory was not limited to theology, but extended to rationalist considerations\textsuperscript{19}.

It would seem that the just war theory lost its relevance following the adoption of the UN Charter, and in fact some writers have maintained this position\textsuperscript{20}. However, whether wittingly or unwittingly, reference is still made by academics, authors and even political leaders to the doctrine of just war in their analysis of use of force\textsuperscript{21}. Thus, the just war doctrine has not lost total relevance under the current international law regime.

\textbf{2.01. International Law on the Use of Force}

While it was not so clear in the various international law instruments preceding the Charter of the United Nations whether or not the use of force by states was prohibited, owing to the fact that those instruments seemed to have focused on the regulation of war\textsuperscript{22}, it became glaring upon the coming into effect of the UN Charter that there is a general prohibition of the use of force in international law. This is by virtue of Article 2(4), which provides that: “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 other manner inconsistent with the Purposes of the United Nations”. As can be seen from

\begin{footnotesize}
\begin{enumerate}
\item See Mark Janis, An Introduction to International Law, 162-167, 3rd ed. (1999)
\item See generally Hugo Grotius, De Jure Belli Ac Pacis, 15, Chapter 1. Grotius dealt so much on sovereigns and their obligations in the community of sovereigns, an approach which led to the distinction between positivists and naturalists. See Robert Beck et al, eds., International Rules: Approaches from International Law and International Relations, 36 (1996)
\item See Yoram Dinstein, The Rule of Law in Conflict and Post-Conflict Situations: Comments on War, 27 HARV J.L. & PUB. POLY 877, 879-880 (2004); Interview with Michael Schmitt, Charles H. Stockton Prof. Of International Law, US Naval War College, at TJAGLCS, in Charlottesville, Va (February 22, 2008)
\item See, for example, the Covenant of the League of Nations 1919 and the Kellogg- Briand Pact 1928
\end{enumerate}
\end{footnotesize}
that provision, not only is the use of force prohibited, but also the threat of its use. Despite the controversy surrounding what categories of actions by state that will amount to use of force under Article 2(4) and the varying interpretation given to the provision, it is incontestable that an armed attack is a manifestation of use of force. It then follows that a terrorist attack amounts to use of force. The language of Article 2(4) is broad enough to cover any type of military action against another state, and not only war. The prohibition of the use of force is not sacrosanct as it admits two exceptions: the first is the UN Security Council authorized action by virtue of Chapter VII; the second is the use of force in exercise of the right of self defense under Article 51.

3.0. International Humanitarian Law and Terrorism

International humanitarian law has its foundation in the notion that every individual is entitled to some cognizable rights both in times of peace and war. It is essentially the law of war between states. International humanitarian laws exists in two categories: jus ad bellum which deals with the rules that govern situations when it is permissible to attack, and jus in bello dealing with the rules that govern behavior in situations of war. The problem that will engage the attention of this part of the paper is whether international humanitarian law, especially jus in bello, is applicable to terrorism. For this purpose, we would identify

24 See Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 14 103-123
25 See Murphy, “Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter”, 43 HARV INTL L. J. 41, 42
26 See U. O. Umozurike, Introduction to International Law, 212 (Spectrum Books Limited, Ibadan, 2005)
27 See generally Pictet, Humanitarian Law and the Protection of War Victims (1976)
28 See Dan Belz, “Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?”, 7 THEORILAW 97, 100 (2006)
terrorist activities under two regimes: terrorism during an armed conflict, and terrorism in peacetime.

3.01. Terrorism During Armed Conflict

Despite the obvious difficulty in adopting a generally acceptable definition of terrorism, it will not be out of place to say that terrorism is an instrument of warfare. It then follows that where terrorist acts are employed as an armed conflict strategy, then international humanitarian law or the law of armed conflict will apply, especially where the terrorism is committed on the territory of a party to the armed conflict. The notion of international armed conflict presupposes the existence of a state of belligerency between two states. There has been a lingering debate as to what will be the position, or rather, the characterization, when one of the parties to the armed conflict is not a state. Where acts of terrorism are used to initiate hostilities, whether or not the methods are lawful, such acts would be in violation of jus ad bellum if they are attributable to a state, using the traditional methods of attribution. It has been thought that a terrorist group which is not subject to the control of any state cannot be in violation of jus ad bellum, and that its activities do not amount to a use of force that can trigger the exercise of the right to self defense. This view has not escaped opposition. Where terrorism is part of an on-going armed conflict, the

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29 This paper is yet to attempt a definition of terrorism. This is dedicated to part II
aspect of international humanitarian law that will apply to it is jus in bello\textsuperscript{34}. The earlier codification of international humanitarian law was done at the Hague Peace Conferences of 1899 and 1907, and later by the four Geneva Conventions and their Additional Protocols of 1977\textsuperscript{35}.

A determination of whether or not international humanitarian law or the law of armed conflict applies to terrorism occurring in the course of an armed conflict can be made by examining some of the provisions of the Geneva Conventions and their Additional Protocols. Article 33 of the Geneva Convention No I. provides that:

\begin{quote}
No protected person may be punished for an offense he or she has not personally committed. Collective penalties, and likewise all measures of intimidation or terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.
\end{quote}

Article 51(2) of Protocol I. has the following provision:

\begin{quote}
The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
\end{quote}

\textsuperscript{34} Although jus ad bellum and jus in bello are distinct aspects of general international humanitarian law, there is a close relationship between them, in that an armed attack which amounts to use of force, which is governed by jus ad bellum often results in armed conflict, which is regulated by jus in bello.

Article 4(2) of Protocol II provides that: “Without prejudice to the generality of the foregoing, the following acts against the persons referred to in Paragraph 1 are and shall remain prohibited at any time and in any place whatsoever.

(d) Acts of terrorism

(b) Threats to commit any of the following acts.

Article 13(2) of Protocol II provides that: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the purpose of which is to spread terror among the civilian population are prohibited”.

One striking difficulty from a reading of the above provisions, as they relate to terrorism during an armed conflict, is that the protection from terrorist acts granted to the civilian population is dependent on whether or not those acts are primarily intended to terrorize the civilians. In other words, where combatants carry out some military actions close to the neighborhood of the civilian population, with any purpose other than to terrorize the civilians in the course of a war, the afore-stated provisions will not apply and the combatants will not be in breach of the provisions. This, in effect, is to say that the application of the provisions is a function of the intention or objective of the military in carrying out the supposedly terrorist acts in question, and is independent of the consequences of the acts on the civilian population36. This may leave the military with much discretion to determine the purpose of its action taken during armed conflict. The protection from terrorism during an armed conflict offered by international humanitarian law as

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36 This takes us back to the propositions of St. Thomas Aquinas on the doctrine of just war, precisely his concept of “double-effect”.
contained in the Geneva Conventions and their Additional Protocols, applies only to protected persons, that is, civilians. It would appear that unprivileged combatants who are actively engaged in an armed conflict cannot benefit from this protection.

International humanitarian law generally applies to international armed conflicts, but to some extent it has relevance to non-international armed conflicts pertaining to national liberation and self determination. Article 3 common to the four Geneva Conventions calls for minimal humanitarian considerations in cases of armed conflict not of international character. However, acts of violence committed by private persons or groups, which are considered terrorist acts, internal disturbances and tensions which are sporadic in character and other acts of similar nature, are outside the purview of international humanitarian law.

It is arguable, and in fact was argued by the United States that the terrorist acts of September 11, 2001 against the United States, as at the time they occurred could not be situated under an armed conflict, and so cannot be placed within the jus in bello regulation. But those acts fit into the sphere of jus ad bellum as they amounted to armed attack, giving rise to the exercise of the right of self defense by the United States, and ultimately marked the beginning of hostilities between the United States and Afghanistan, which had provided shelter for Al Qaeda. So at that point, the law of armed conflict became applicable to the conflict.

37 See Article 14 of Protocol II
39 See Hamdan v Rumsfeld, 548 U.S. 557 (2006), where the United States Supreme Court rejected this argument.
It should be noted here that, in spite of what has been stated so far, there is no general agreement as to the propriety and extent of the application of the law of armed conflict to terrorism in international law. One school of thought argues that the scope of the law of armed conflict as it is presently, is inadequate to regulate modern terrorism. It is therefore suggested by the proponents of this view that the law of armed conflict be adjusted for it to be able to grapple with the challenges of contemporary terrorism\(^{40}\). The second side of the debate maintains that the rules of international humanitarian law are adequate and wide enough to regulate the gamut of terrorist activities. The representatives of this view express worry over any review of the law of armed conflict on the pretext of combating terrorism, as that may have some unpleasant effects on human rights\(^{41}\). There seems to be yet another view that queries the basis for the application of the law of armed conflict to current terrorism, arguing that terrorist acts lack the character of military threat, and therefore should not merit the application of the law of armed conflict\(^{42}\). While, not testing the veracity of these positions, it should be stated here that such debate as engaged by writers and commentators, may contribute little or nothing in addressing the current problem of terrorism. Whether or not terrorism is viewed from the context of armed conflicts, or from a combination of perspectives, one thing appears clear, namely that the body of international law rules as currently exists, seems adequate to tackle the incidence of terrorism, so long as there are concerted efforts and cooperation among the subjects, as well as objects, of international law.

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\(^{42}\) See Matthew C. Waxman, The Structure of Terrorism Threats and the Laws of War, 20 DUKEJICIL 429, 430-431
3.02. Terrorism in Peacetime

There is always a purpose for engaging in armed conflicts. Perhaps it is in recognition of this fact that war is not absolutely prohibited in international law. Instead, there exist rules regulating its conduct. While the employment of terrorism in armed conflict situations is allowed as a warfare strategy, except in some circumstances, like its use on the civilian population, the same assertion cannot be made concerning acts of terrorism committed during peacetime. Professor Sompong Sucharitkul contends that peacetime terrorism, being an internationally organized crime, isolates itself from other crimes found in a single legal criminal system, and therefore should be treated separately from sporadic, individual attacks. Peacetime terrorism has some problematic implications on international humanitarian law. Clearly, the Geneva Conventions and their Additional Protocols apply to armed conflicts, but not to “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.” A conspicuous element of peacetime terrorism lies in the fact that it is targeted at a community of states. In the midst of the limited application of international humanitarian law to armed conflict situations, an inference could be drawn that terrorism occurring outside war situations is regulated by anti-terrorism conventions.

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44 See Motley, Terrorist Warfare: Formidable Challenges, 9 Fletcher F. 295, 297 (1985)
supplemented by international criminal law. Some aspects of humanitarian law do apply to armed conflicts as well as in peacetime. A suggestion has been made to treat those categories of terrorism as the “peacetime” equivalent of war crimes. But this approach, if adhered to, may not have good implication. As it entails the application of the law of armed conflict to outside-war-theater- terrorism, it will confer some entitlements on terrorists, such as the status of prisoners of war. It would in addition, increase the incidence of insurrection, as insurgents would be treated as combatants, rather than as common criminals.

4.00. Defining Terrorism

The problem with a meaningful discussion of international law of terrorism stems from the difficulty of a proper examination of the phenomenon itself. It is a mistake to suppose that merely by describing a group or entity as terrorist one is formulating its capacity in law. The conventional approach to solving a problem has been to first understand its nature, which includes its definition. This approach should equally apply to terrorism. Unfortunately, terrorism in international law admits of no generally acceptable definition. Efforts at defining terrorism have fallen short of adopting a definition that is generally acceptable to the international community. It is ironical that a concept, or rather, a problem that has so much implication on international security is met with this fate. The


46 See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 1


general feeling among writers seems to be that the task of evolving and adopting a definition of terrorism that would be acceptable to international law is not achievable. Thus, so many expressions⁴⁹, funny as they may be, have been crafted by writers and commentators to reflect the seeming impossibility of reaching at a compromise definition of terrorism. Notwithstanding the absence of a comprehensive definition of terrorism, it would be vain to conclude that terrorism lacks a core meaning⁵⁰. The importance of a universally acceptable definition of terrorism cannot be overemphasized, as such definition would enhance intelligence sharing and international cooperation, and bring harmony and unity of purpose in the fight against terrorism⁵¹. The search for a legal definition of terrorism has led some states to adopt as criminal, acts that do not reveal the intent of the “culprit” to produce a state of terror, and in some situations, those definitions are unnecessarily broad⁵².

In the words of Professor Christopher Blakesley, terrorism amounts to “...violence committed by any means; causing death, great bodily harm, or serious property damage; to innocent individuals; with the intent to cause those consequences or with wanton disregard for those consequences; and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, religious, or other philosophical benefit”⁵³. This definition is neutral and

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⁵² See Jordan Paust, “An Introduction to and Commentary on Terrorism and the Law”, 19 Conn.L.Rev. 697, 703-705 (1987); Naomi Norberg, supra, 32-34

⁵³ See Christopher Blakesley, Terror and Anti-Terrorism: A Normative and Practical Assessment, 31 (2006)
covers terrorism by both state and non-state actors. It deviates from the definitions often found in the domestic laws of states.\footnote{See, for example, India's Prevention of Terrorism Act, No. 15 of 2002; India Code (2002); El Salvador's Special Law Against Acts of Terrorism, Article 5.}

Terrorism, according to Dinstein constitutes \textit{“acts of violence committed to instill fear (to terrorize) [sic] a state or a social group, where the victims are chosen either at random or because of mere association with a target entity”}\footnote{See Yoram Dinstein, \textquotedblleft Humanitarian Law on the Conflict in Afghanistan, 96 AM. SOC'Y OF INT'L L. PROC., 23, 23 (2002)}.

Terrorism seems to have been first used as a legal term in 1931 at the Third Conference for the Unification of Penal Law at Brussels, where it was defined in terms of \textit{“...international use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, property or physical integrity of persons, or directed against private or state property, with the purpose of expressing or executing political or social ideas...”}\footnote{See Bogdan Zlataric, History of International Terrorism and Its Legal Control, in International Terrorism and Political Crimes (M.Cherif Bassiouni ed.) 474,479} . This definition, by using \textquotedblleft terrorism\textquotedblright-, the concept being defined, merely begs the question. There have been attempts, both by the UN and international treaties to make provisions on terrorism. The League of Nations in 1937 did produce a treaty- the Convention on the Prevention and Punishment of Terrorism, following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934\footnote{See V.S. Mani, \textquotedblleft International Terrorism: Is a Definition Possible? 18 INDIAN J. INT'L L. 206, 208 (1978)}. The Convention defined terrorism to include \textit{“all criminal acts directed against a state and intended and calculated to create a state of terror in the minds of...”}\footnote{See V.S. Mani, \textquotedblleft International Terrorism: Is a Definition Possible? 18 INDIAN J. INT'L L. 206, 208 (1978)}.
particular persons or a group of persons or the general public"\textsuperscript{58}. This definition, although broad, contemplated terrorism committed by non-state actors and wittingly or unwittingly avoided to include terrorism by state actors. Unfortunately, and perhaps not surprisingly, the 1937 Convention never entered into force, because only few states signed it, with only India ratifying it, apparently owing to its broad definition of terrorism\textsuperscript{59}.

The early attempts to define terrorism through the instrumentality of treaties was followed by UN conventions, which provisions relate to only specific acts of terrorism that occur in specific circumstances. The conventions therefore have failed to give a general definition of terrorism. Other UN treaties that can give an insight into a definition of terrorism include conventions concerning nuclear material\textsuperscript{60} and plastic explosives\textsuperscript{61}. In 1997, the UN General Assembly adopted the International Convention for the Suppression of Terrorist Bombings. Without defining terrorism, Article 2 of the Convention provides that for the purposes of the Convention, a person is guilty of an offense if that person “unlawfully and intentionally delivers, places, discharges or detonates an explosive, or other lethal devices in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious

bodily injury or with the intent to cause excessive destruction of such a place, facility or system, where such destruction results in or is likely to result in, major economic loss.

In 1999, another convention was adopted by the General Assembly—the International Convention for the Suppression of the Financing of Terrorism. By its provisions, it is doubtful if the Convention gave a clear definition of terrorism.

The United Nations has equally resorted to declarations and resolutions in its efforts to provide a definition of terrorism. Thus, in 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism, the provision of which is: Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

In response to the 9/11 attacks on the United States, the General Assembly set up a working group to fashion out a comprehensive convention on international terrorism. In its deliberations, the group proposed a general definition of terrorism. However, this

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63 The Convention makes reference to “An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex, or; … any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. See G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, 3, 25, U.N. Doc. A/54/109 (1999).
65 The proposed definition was that: “[Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility… when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act”.
definition could not be adopted as a result of Malaysia’s insistence to add some provisions to the definition to the effect that, “peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self determination in accordance with the principles of international law shall not be considered a terrorist crime”66. That has been responsible for the failure of the project.

Whatever definition that is ascribed to terrorism, it is worthy to note that terrorism has a core meaning. It is this core meaning that manifests in the objective elements shared by most, if not all, terrorist acts. In the first place, the purpose of a terrorist act is to achieve an outcome of terror on its target. So the mens rea of terrorism as an act is the creation of terror67. A definition of terrorism must therefore contain this terror element for it to be objective. Such a definition would exclude acts that are carried out merely to threaten, intimidate, frighten, coerce or for such other purposes that are less serious, which do not reveal the terror motive68. Terrorism is not committed by only state actors; rather it is an act that is perpetrated by non state actors as well. Non state actors include private persons and groups, such as insurgents. Another objective element of a terrorist act is that it is aimed at achieving some political, military, ideological, religious, ethnic, or other goals69. A definition of terrorism that is bereft of these elements will not be good enough.

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67 This is without prejudice to the fact that terrorism can be a war strategy, for example during an armed conflict. Except in those circumstances where its use is not permitted, the use of terrorism by combatants during an armed conflict is not prohibited.
This paper would like to see terrorism as any act or conduct borne out of political, religious, philosophical, ideological, racial, ethnic, religious or any other motive whatsoever or no motive at all, intended to cause, or capable of causing, terror in, or death or serious bodily injury on, any person, or serious damage to a State or government facility or any public infrastructure facility whatsoever, or intended to intimidate or capable of intimidating a population or part of a population, or to compel, or capable of compelling, a government or a branch of government or an international organization to do or refrain from doing an act.

4.01. Causes of Terrorism

Terrorism is caused by a number of factors. The first factor that is often linked to terrorism is politics. Dissatisfaction with government policies, or even with a particular regime can lead to terrorism. Where members of a group feel the government in power is insensitive to their welfare, and that they have exhausted all other avenues to attract the attention of that regime to their plight, a resort could be made to terrorism as a way of driving home their grievances. The issue of marginalization, where a minority group feels it is being excluded from the scheme of administration plays itself out in this regard. Many, if not all, attempts at defining terrorism contain this political element. Lack of, or rather, denial of, political participation, and concrete grievances constitute a major factor that leads to the commission of terrorist acts. But, it has been argued that the root causes of terrorism should be disregarded in a consideration of the ways to combat terrorism. This view is rather objectionable. Closely connected to the issue of politics are economic factors. The

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prevalence of poverty and lack of development are other factors contributing to terrorism. Thus, structured inequalities within countries have been identified as breeding grounds for violent political movements in general and terrorism in particular. Social stratification and economic deprivation can lead to terrorist acts. A perception of unfairness or subordination in economic opportunities triggers terrorism.

Another aspect of the economic factor is the financing of terrorism. A successful terrorist outing has some cost implication. And so terrorists are first involved in a cost assessment of their planned activities, and they only proceed if they are able to secure the necessary financing. Thus, terrorism relies on the financial market in order to thrive. This raises the issue of terrorism financing through the use of the banking system and money transfer, including money laundering. However, it has been noted that terror financing is distinguishable from money laundering, in the sense that while money laundering involves illegal funds, terror financing does not necessarily have to do with illegal funds; rather “in terror financing,... the actual illegality often occurs only after the actual transfer, when the money is ultimately used for funding terrorism”. The fact remains that there is a relationship between money laundering and the financing of terrorism.

Another cause of terrorism is religion. It has an interaction with the other factors, and in extreme cases, such as religious fanaticism, religious activists could see as enemies those states or groups of people whom they believe are opposed to their religious practices.

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or views. They may use acts of terrorism to show their anger towards them.

5.00. Legal Responsibility for Acts of Terrorism

The fact that terrorist acts are prohibited under international law is not contestable. This is notwithstanding the lack of unanimity surrounding the definition of terrorism, and despite the fact that there is no comprehensive legislation proscribing acts of terrorism. Instead what exist are bits of instruments outlawing terrorism. But the collective effect of these instruments show a consensus that terrorism bodes bad for international law. It is a general principle of international law that a breach by a state of its international law obligation engages the responsibility of that state. The obligation of a state extends to the duty not to commit acts of terrorism, and where terrorism is linked to a state, that state would be responsible for its commission.

5.01. Terrorism and Self Defense Against Non-State Actors

A question may be posed if Article 51 of the United Nations Charter applies to acts of terrorism. In other words, can the provision of Article 51 be invoked in response to terrorist acts? This provision provides for the exercise of the right of self defense by a state if an armed attack occurs. The natural interpretation of Article 51 would be that it is only when a state is a victim of an armed attack that it can take the benefit of the defense of self defense. There is nowhere in the UN Charter that “armed attack” is defined, perhaps because its drafters did not see any reason to do so. It becomes pertinent to determine if terrorism amounts to an armed attack. There is no doubting the fact that modern terrorism

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74 See the Corfu Channel case (United Kingdom v Albania) 1949 I.C.J. 4, 23
75 See the Nicaragua case, supra
is committed with arms, and even sophisticated weapons. The disposition of the UN has led credence to the view that terrorist acts amount to armed attack. This is inferable from the two resolutions passed by the Security Council- Resolution 1368 (2001) and Resolution 1373 (2001), following the September 11 terrorist attacks against the United States, recognizing and reaffirming the inherent right of individual and collective self defense contained in the Charter of the United Nations. There is no better construal that can be given to this action by the Security Council than that the 9/11 terrorist attacks triggered an affirmative right of the United States to use force in self defense. Terrorist attacks therefore amount to armed attacks for purposes of Article 51.

However, a more difficult problem is whether the right of self defense in response to terrorist acts is exercisable with respect to terrorism committed by non-state actors. Would the state from which territory the terrorists operate be responsible for the conduct of the non-state actors? This goes to the root of state responsibility, and central to a determination of such responsibility is the principle of attribution. A conservative interpretation of Article 51 would seem to suggest that it applies to armed attack by states to the exclusion of non-state actors, but this interpretation is widened by the invocation of the doctrine of attribution. The attribution principle, which applies the effective control test, essentially

79 It is for this reason that it has been asserted that the two resolutions passed by the Security Council in reaction to the 9/11 attacks have added a completely new element to the concept of self defense, one that is not present both in Article 51 and the Nicaragua case examples of armed attack. See Maj. Jennifer Bottoms, “When Close Doesn't Count: An Analysis of Israel's Jus Ad Bellum and Jus In Bello in the 2006 Israel-Lebanon War”, 2009-APR ARMLAW 23, 38 (2009)
provides that a state is responsible for the actions of non state-actors in its territory if that state had effective control over the non-state actors. Thus, where a state can attribute the activities of non-state actors to the state from which territory the terrorist attacks emanated, that would engage the responsibility of that state. In the United States- Afghanistan case, the Taliban government provided the needed environment conducive enough for Al Qaeda to execute its terrorist project against the United States, and there is sufficient literature supporting this view. Therefore in the midst of these authorities, an argument to the contrary would surely asphyxiate. Another ground for attributing responsibility for terrorist acts committed by non-state actors to a state is where the state has failed, neglected, or refused to prevent its non-state actors from committing such terrorist acts on another state, or even where the state has lost control over its non-state actors.

It is not always easy to establish this nexus between a state and its non state actors or a particular terrorist group for the purpose of finding responsibility on the part of that state. This results in a state, which has been a victim of terrorist attacks by non-state actors, mounting attacks on another state which it considers as having sponsored the terrorism. This wrong imputation leads to illegal attacks, which can amount to aggression. The United Nations needs to adopt a uniform and comprehensive convention to avoid such situations. However, the responsibility of states is not absolute and there are certain exceptions to this rule. For example, a state is not responsible for acts of non-state actors if it has no direct control over them. Moreover, a state cannot be held responsible if it did not have prior knowledge of the terrorist activities and did not have the opportunity to prevent them. The United Nations has recognized these exceptions in its conventions and treaties. The United Nations also has provisions to hold states responsible for acts of non-state actors in certain circumstances.

81 See the Nicaragua case, supra, para. 99-100
83 See Allen Weiner, supra, 433; Lawrence Azubuike, supra, 134-136, 140
States attacks on Iraq in 2003 have been condemned in the light of the foregoing analysis. There was no evidence linking Iraq to the terrorist attacks of 9/11\(^\text{85}\).  

The 2006 Israel-Lebanon crisis presents yet another example where a claimed exercise of a right of self defense against terrorists attacks by non-state actors, came into play. While it may appear clear that the actions of the Hezbollah guerillas against Israeli military post amounted to use of force, it appears murky if they qualify as armed attacks giving rise the right of self defense\(^\text{86}\). However, the actions of Hezbollah attracted condemnation from the international community\(^\text{87}\). It was not in doubt that the guerillas operated from Lebanon, but could their actions be attributable to the state of Lebanon? It has been asserted that not only is Hezbollah a terrorist organization, but also a recognized political party in Lebanon, and that no faction in Lebanon is authorized by the government to carry arms except Hezbollah\(^\text{88}\). If this were the case, then its actions can be attributed to the government of Lebanon. Whatever assessment of the situation is to be made, it should not be forgot that prior to the actions of the Hezbollah militants against Israel, there had been a rift between Israel and Lebanon, which has not escaped the consciousness of history\(^\text{89}\). Even if it is conceded that from the circumstances of the Israel-Lebanon crisis, Israel had the right of self defense, the manner in which Israel exercised such right was


\(^{86}\)The I.C.J. has ruled that not every use of force amounts to armed attack. See Sean D. Murphy, “Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter”, 43 HARV. INTL. L. J., 41, 44 (2002)


\(^{88}\)See Maj. Jennifer Bottoms, supra, 24

illegal, especially considering the human casualties recorded in that operation, many of whom were innocent civilians. The attack was therefore not proportionate to the raid committed by Hezbollah on the Israeli military outpost.

6.00. International Human Rights and Counter Terrorism

The UN Charter has provisions that make reference to the respect for and promotion of human rights\(^90\). But there is no agreement on whether or not these provisions confer rights on individuals, and whether they are legally binding or not\(^91\). Without going into details about the arguments surrounding those provisions, suffice it to say that there are now separate instruments wholly devoted to human rights. First, the Universal Declaration of Human Rights was adopted in 1948\(^92\), although as a non-binding General Assembly resolution\(^93\). The Declaration made provisions for political and civil rights, and economic, social and cultural rights\(^94\). The Declaration has come to be considered as having a great impact on human rights\(^95\). In 1966, the International Covenant on Civil and Political

\(^{90}\) See, for example Articles 1(2,3), 13, 55, 56, and 68

\(^{91}\) One school of thought argues that the provisions do not create an obligation on states, and that what the provisions confer on individuals are benefits, not rights. See H. Kelsen, The Law of the United Nations, 29 (1950); J. G. Starke, International Law, 350 (1984). The other view is that the provisions are legally binding on states. See Philip Jessup, A Modern Law of Nations, 91 (1949); Ezeijiofor, Protection of Human Rights, 113 (1962); Schweb, “The International Court of Justice and the Human Rights Clause of the Charter”, 66 A.J.I.L. 337 (1972)

\(^{92}\) See G.A. Res. 217 (III), Pt. A (Dec. 10, 1948)

\(^{93}\) See Buergenthal, “The Evolving International Human Rights System”, 100 A.J.I.L. 783, 784-785 (2006); Lauterpacht, International Law and Human Rights, 408-417 (1950). In the words of the United States representative to the UN at the time of the adoption of the Declaration, Eleanor Roosevelt: “it is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation”. See 19 U.S. Dept. of State Bull. 751 (Dec.9, 1948)

\(^{94}\) It recognizes the equality of all persons, both in dignity and in rights. It guarantees the right to life, liberty and security of all persons. Under the Declaration, torture or cruel, inhuman or degrading treatment or punishment; slavery, servitude and slave trade, are all prohibited. It prohibits arbitrary arrest and detention, and ensures fair and public hearing, in which the accused person is presumed innocent until the contrary is proved. Other rights are enshrined in the Declaration. See U. O. Umezuriike, supra,143-145

Rights \(^{96}\) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights \(^{97}\) (ICESCR) were adopted but they did not enter into force until 1976. The two Covenants drew inspiration from the provisions of the Universal Declaration of Human Rights. Among other provisions, the ICCPR states that no one shall be arbitrarily deprived of his life \(^{98}\), and that no one shall be subject to torture \(^{99}\), and arbitrary arrest or detention \(^{100}\). Article 2 provides that state parties undertake to respect and ensure the rights provided by the Covenant to individuals are guaranteed them within their territories, and subject to the jurisdiction of each state. The ICESCR, inter alia, recognizes the right to work \(^{101}\), and to just and favorable working condition \(^{102}\). It guarantees the right to form and join trade unions \(^{103}\), and to social security \(^{104}\). It provides for adequate food, clothing and housing \(^{105}\), and protects the family, mothers and children \(^{106}\). Under the Covenant, adequate standard of living is guaranteed \(^{107}\). Apart from these human rights documents, there are other instruments, including those operating on regional level, that make provisions for human rights \(^{108}\).

It is thus evident that, international law has much concern, at least theoretically, for the respect and protection of human rights. It is incontestable that terrorism infringes upon

\(^{96}\) 999 U.N.S.T. 171, Dec. 16, 1966 (hereinafter, ICCPR)
\(^{97}\) 993 U.N.T.S. 3, Dec. 16, 1966 (hereinafter, ICESCR)
\(^{98}\) Article 6(1)
\(^{99}\) Article 7
\(^{100}\) Article 9
\(^{101}\) Article 6
\(^{102}\) Article 7
\(^{103}\) Article 8
\(^{104}\) Article 9
\(^{105}\) Article 11
\(^{106}\) Article 10
these guaranteed human rights\textsuperscript{109}. It has been asserted that “there is probably not a single human right exempt from the impact of terrorism”\textsuperscript{110}, and one would have thought or presumed that a move towards countering terrorism, would be a way of ensuring that those human rights are protected. However, the trend of events on the international plane seems to suggest that counter terrorism is used in a way that its effects on human rights coincide with those of terrorism itself. Any measures, including legislation, adopted with a view to combating terrorism, must recognize the importance of human rights. The issues of torture and wrongful prosecution, and repression seem to be central in a discussion of the counter-terrorism- human rights link. It has been asserted that states seem to bask in the belief that as far as counter-terrorism is concerned, their actions cannot amount to terrorism\textsuperscript{111}. A situation where governments infringe on human rights, especially on political ground, in the guise of anti-terrorism, is as condemnable as it is appalling. Cardona gives a narrative of how, in El Salvador, the police arrested, and even commenced prosecuting for terrorism, members of a rural organization, who had carried out a demonstration in reaction to a government's administrative program. The arrest and prosecution were even extended to a journalist, who was covering the demonstration, in line with the call of her profession\textsuperscript{112}. In November 2010, people who were traveling for the Thanksgiving celebration around the United States were subjected at the airports, to a terrorism security check, which entailed the passing of some radio-active lights through their bodies. This could have some human rights implications. Some counter-terrorism laws contain provisions that are clear violations of


\textsuperscript{111} See Mirna Cardona, “El Salvador: Repression in the Name of Anti-Terrorism” 42 CNLILJ 129,137 (2009)

\textsuperscript{112} Id, 145-146
human rights. There were complaints against the United States from the International Committee of the Red Cross indicating how the United States military authorities inflicted torture and degrading treatment on Iraqi detainees in the aftermath of the 9/11 attacks. There was also arbitrary detention of non-United States citizens, secret deportation hearings for persons suspected of having connections to terrorism, the authorization of military commissions to try non-citizens accused of terrorism, and the military detention without charge or access to counsel of United States citizens considered as “enemy combatants.”

It was in recognition of the human rights implications of counter terrorism measures that the immediate past Secretary-General of the United Nations, Kofi Annan, while observing that terrorist acts constitute serious violations of human rights, however cautioned that “...our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy...”. Similarly, the General Assembly's 2004 resolution on human rights and terrorism recognizes that terrorism is a violation of human rights, and should be fought in a such a way that complies with international norms.

113 For example, Article 8 of El Salvador's Special Law Against Acts of Terrorism prescribes a five to ten year jail term to anyone who publicly “justifies terrorism or incites another or others to commit any of the crimes listed in the law”. This could lead to a denial of, and an infringement on, the right to freedom of speech. See Mirma Cardona, id, 139
In the efforts to combat terrorism, security and human rights have been treated as if they were mutually exclusive. This should not be so. Embedded in the element of security is the protection of human rights at all times. Those entrusted with the security of state and who by that fact, take up the function of fighting terrorism should not have the impression that the rising wave of terrorism suggests that it be fought by whatever means, even if human rights are violated in the process. Granted, national security is a public concern and for public benefit, and in some situations, override private interest. However, in actual fact, what constitutes public interest is the sum total of the individuals' rights. State security is ultimately for the benefit of the individuals. Of course, a state is an abstraction, and does not exist in vacuum. If the individuals, the ultimate beneficiaries of public security, including security from terrorism, are subjected to the violations of their rights in the guise of counter-terrorism, comparable to the evils of terrorism, a vicious circle would have been established. Therefore, whatever effort that is geared towards combating terrorism should make the issue of the protection of human rights its prime consideration.

7.00. Efforts at Fighting Terrorism: UN Counter-terrorism Measures

Some measures have been initiated by the UN as a way of combating terrorism. There have been numerous international conventions and other instruments adopted toward fighting terrorism. But it remains to be seen if these initiatives have really produced tangible results. In 2004, the former UN Secretary-General, Kofi Annan constituted the High-level Panel on Threats, Challenges and Change\textsuperscript{118} to address the issue of international threat and security. Part of the Panel's recommendations on terrorism included a proposed definition of

terrorism and a comprehensive global strategy for combating it. In this regard, efforts are to be made at reversing the causes and facilitators of terrorism by the promotion of social and political rights, the rule of law and democratic reform. The United Nations should also address major political grievances. Included in the recommendations is the need for the United Nations to develop better instruments for global counter-terrorism cooperation, which would equally respect civil liberties and human rights. As a follow-up to the Panel's recommendations, the Secretary-General, Kofi Annan, in his keynote address at the International Summit on Democracy, Terrorism, and Security on March 10, 2005, recognized and included those recommendations in his plan of action. In 2005, the General Assembly adopted a Global Counter-terrorism Strategy, which required every state to implement and fully cooperate with all General Assembly and Security Council resolutions aimed at combating terrorism. The Strategy also require states to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. States are encouraged, under the Strategy, to contribute to measures strengthening the role of the United Nations towards fighting terrorism. International organizations also contribute towards countering terrorism. The World Bank and International Monetary Fund have intensified their initiatives on anti-

119 These include: efforts to deter the disaffected from using terrorism as a means of achieving their goals; to deprive terrorists of the means to carry out their attacks; to dissuade states from supporting terrorists; to develop the capacity of states to prevent terrorism; and to protect human rights in the fight against terrorism. See Kofi Annan, The Secretary-General, United Nations, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit for Democracy, Terrorism and Security (Mar. 10, 2005), available at http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html


money laundering and combating the financing of terrorism\textsuperscript{122}. This is in recognition of the fact that money laundering is a means of financing terrorism. These measures still need to be supported with other efforts from all quarters of the international community, in order to achieve the set objectives.

\textbf{7.01. How Best to Combat Terrorism (Curing the Underlying Problem)}

The fact that terrorism still persists despite the efforts made toward combating it, is perhaps a revelation of the inadequacy of those measures. It also underscores the need for a more viable, result-oriented approach to solving the problem of terrorism. There remains the great need to find the right causes of the underlying problems and not just focus on their symptoms. The United Nations Organization has been on the fore-front without success to come up with a universal and comprehensive definition of terrorism, which would serve as a yardstick against which violent actions would be gauged to determine whether or not they amount to terrorism. For fourteen years and more, the United Nations has battled with this task through committee work, resolutions and calls for concerted State actions to fight the problem. The inability of states to adopt a Comprehensive Convention on International Terrorism, which will provide an adequate definition of terrorism owing to unnecessary parochial interest, should be deprecated. Solving the problem of terrorism calls for a multidimensional approach, and does not lie in using only military action, which can only cure the symptom of terrorism- the outward manifestation, and not the problem itself. It is one thing to recognize the need to tackle terrorism using a complex approach, as the UN has observed in the recommendations of the High-level Panel, and it's another thing to take bold steps in the direction of combating terrorism. There is a need for a change in the way people

perceive terrorism. This change can be achieved by campaign, both at the grassroots and upper levels. This is where the role of NGOs and other international organizations becomes indispensable. This paper places much premium on this approach.

Having found a link between politics and terrorism, it becomes crucial that those who control the machinery of government should be committed to democracy. A periodic election is a necessary tool for achieving democracy. It is time leaders discarded the idea of clinging to power at the displeasure of the governed. The recent happenings in Egypt are still fresh in the mind, and those of Libya are fresher. They are the conditions that breed terrorism, especially when the individuals feel that the government is being supported by a foreign state. Governments and financial institutions should be more vigilant over, and where necessary, place stricter monitoring, on the transfer of funds. To the extent permissible by international law, states should be more cautious in the area of international trade, so as not to allow the movement of arms which can be used for terrorist purposes. There is the need for promotion of international cooperation in criminal matters, especially as it pertains to terrorism. Criminal sanction still has a deterrent purpose, in spite of whatever objections trailing its application. States and individuals should see themselves as stakeholders in whose hands the task of combating terrorism is entrusted.

Above all, counter terrorism should not be divorced from human rights, rather both are complementary and should be adopted in the cause against terrorism. Anything to the contrary would lead to abuse and denial of human rights, which would have a negative impact on the job at hand. In fact, the efforts at combating terrorism should be given a
human rights approach. Human rights bodies should increase their participation and should liaise with other stakeholders towards achieving a terrorism-free international community.

8.00. Conclusion

It is important to emphasize one thing which this paper has not done. The position of this paper has not been to write off the efforts so far made by the international community, especially the United Nations, toward combating terrorism. Rather, the paper has called for more activism on the part of states, individuals and international organizations to show more commitment in the cause against terrorism. Until this is done, it is not yet uhuru, and only then can the international community go ahead and beat its chest that it has won the war against terrorism.