

The Big Concerns Regarding The Counter-Terrorism Operations Across The Globe

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Abstract: Terrorism and counterterrorism is not a new idea in the present world. In this 21st century, the frequent terror attacks and war against terrorism have raised some critical issues in the domain of the international law. The counter-terrorism operation is now an endless journey and a cause of serious sufferings of civilians. In counterterrorism operations the attacking States randomly reluctant to comply with the principles of international law and IHL (IHL). This article addresses only two important matters which are fundamental for taking the decision of using force against any State. Firstly; the study examines the rules of international law under which in what cases a State can be the object of attacks for any criminal act of an individual or terrorist group. Secondly; it determines whether a terrorist detainee gets any protection under international law where he was detained for committing any terrorist act.

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I. INTRODUCTION:

A prohibitive method of warfare or attack is terrorism (Art. 51.2. AP I, Art. 13.1. AP II, Art. 2. d. AP II, Art. 33, GC IV, Art. 3.d. Special Court of Sierra Leon Statute, Art. 4 (d) International Criminal Tribunal for Rwanda Statute). It is a preplanned use or threat to use of violence (Sandler, 2014: 1) or criminal acts (Convention for the Prevention and Punishment of Terrorism, 1937) committed by individual or clandestine agents or a group for social or political purpose directed against the government or civilians or minority group (Neuman, 2003:288) to create a state of terror in the minds of the general public. The US Army defines terrorism as the use of illegal violence or the threat of use of it by individual or group of persons being inspired by religious, political or ideological motivation and coerces the government to do some act in pursuit of their goal installing fear in the minds of the people (Karlsrud, 2017:1216). The two critical components of terrorism are the use of violence and motivation behind attacks. Terrorists always tend to commit horrific violence, such as the bombing in public places, downing the commercial airlines, beheadings, to intimidate the general public (Sandler, 2014: 1). Secondly; the terrorists intend to traumatise the people by their brutal terrorist attack so that they get the government ready to satisfy their demands (Sandler, 2014: 1). These horrific brutal acts, recently, are frequently happening in every part of the world. In 2016, total 25673 deaths caused by terrorism, is 13 percent less from those of 2015 but newly affected countries have increased from 65 in 2015 to 77 countries in 2016 and attacks against civilians increased by 17 percent from 2015 to 2016 and unfortunately the deaths from terrorism has risen up 67 per cent from 2006 to 2016 (the Global Terrorism Index, 2017). The Global Terrorism Index (2017: 2) reported that during 1970 to 2016 more than 170,000 terrorist incidents have occurred. Considering this worsen effects of terrorism many States of the world and international organizations have taken counter-steps, strategy or measures to combat the terrorism which is popularly known as counter-terrorism (Office of the United Nations High Commissioner for Human Rights [OHCHR], 2008: 19). It includes both preventive and responsive tactics and operational activities to halt terrorism.

In response to these repeated horrific brutal scourge of terrorism, a good number of international conventions, Additional Protocols (AP) and declarations like “UN Global Counter-Terrorism Strategy on 8 September 2006, 1980 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention), 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Airport Protocol), 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Convention), 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol), 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention), 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention), 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention), 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil

Aviation (Beijing Convention), 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing Protocol) have been adopted by the international community. And many more regional organizations namely the South Asian Association for Regional Cooperation (SAARC) adopted the SAARC Regional Convention on Suppression of Terrorism in 1987, European Union adopted the European Convention on the Suppression of Terrorism in 1977 and in 2005 adopted the Council of Europe Convention on the Prevention of Terrorism, the Commonwealth of Independent States signed the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism in 1999, Organizations of American States (OAS) accepted two documents i.e., Organisation of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance February 1971 and Inter-American Convention Against Terrorism, June 2002, the Asia-Pacific Economic Co-operation (APEC), the African Union (AU) and the Organization of Islamic Conference” have adopted strategy, action plans and counter-terrorism units to eradicate terrorism (Rosand, 2006:417). Not only the international and regional bodies have taken initiative to combat terrorism but the nation states have also adopted domestic measures to eradicate entire terrorism, like UK, Australia, USA, Canada, Pakistan, India, Bangladesh and many more countries. On the other hand to combat terrorism some States used force against the terrorists groups and even against terrorists harboring States, for example, a month later, after the USA 9/11 terrorist attacks, the USA invaded Afghanistan and launched the Operation Enduring Freedom (OEF) against Taliban (Lietzau, 2011:564).

In counter-terrorism operations, some critical issues of international and IHL need to consider. Among those issues, this article addresses only two most essential legal and political matters which are; (i) the criteria for attributing the responsibilities of the terrorist attack to a State (ii) determining the status and protection of detainees of terrorist groups or other persons in counter-terrorism

Attribution of Responsibilities of an Attack

Most of the terrorist attacks of the world have been done by an individual or any non-state actor but the long history of terrorism and counter-terrorism reveals that victim states randomly attack terrorists harboring State without sufficient proof of its involvement with the terrorist group. These attacks frequently result in the grave breaches of international law and led to the havoc loss of civilians` life and property.

Under international law, a question always arises when the liabilities of a criminal act of an individual or group or non-state actor can be vested on his/their nation State or harbouring State. In this regard the “International Law Commission (ILC) Draft Articles on State Responsibility provides that non-state actors` actions may be attributed to the state if the entity ‘is acting on the instructions of, or under the direction or control of, that state in carrying out the conduct (Art. 8).” Explaining this article Prof Crawford (2003) argues that usually, a State is not responsible for the acts of any individual or group of that State if they function separately without control of that State. He also mentions in some exceptional cases where a true relation is found between non-state actor and the State then the State can be made liable for the acts of group or individual. But the precondition must sufficiently be proved that a real connection remain present between the State and terrorist group. Crawford (2003: 110-113) again justifies that the three terms “instruction, direction and control” used in article 8 of Draft Articles on State Responsibility are disjunctive. So to attribute the liabilities of NSA or individual on the State it is essential to establish the presence of any one of them. Without the presence of any one of these, mere supplying weapons and providing financial assistance to the non-state armed groups is not sufficient for attribution of the liabilities of the atrocities committed by that group. Even where a State tolerates a terrorist group on its territory and that group commits any terrorist attack any place out of the State in that case also the liabilities of the acts of the terrorist group cannot be attributed to that state.

In *Nicaragua v USA* the question was raised whether the USA would be held responsible for the breaches of IHL by Contras where the contras was supported by USA by providing arms and financial assistance. The court held that the USA was responsible for planning and supporting the contras but the USA could be held liable for contra`s conduct. The court stated that the USA would have been made liable if it had effective control over the contras rebellious group, but it was found that the USA had just only provided financial assistance and arms but they had not any control over their activities. (*Nicaragua v USA*, Para. 115).

Where terrorism is committed by any non-state actor or any organised group with the authorisation and effective control of a state then the responsibilities of the attack can be attributed to the State under whose authorisation and control the attack was done. Sassoli (Sassoli 2006: 961) mentions that when a State supplies arms, financial assistance, necessary advice, technical help, transport facilities and also authorizes to do terrorist act then it can reasonably be said that the attack is imputable to that State even if the attack is not a part of any AC.

The above shows that the responsibilities of an attack of a terrorist group or individual can be attributed to a State if it is beyond doubt proved that it had effective control over the terrorist group. In many cases it was held in the present world that the victim State has attacked a State for a terrorist attack without adequate

evidence of showing sufficient link between the terrorist group and the State, e.g., the US invasion in Afghanistan. The degree to which Taliban exercised effective control over Osama Bin Laden and Al-Qaeda is an empirical question, and report shows that Al-Qaeda was not under control of Taliban government. The effective control test as prescribed by Nicaragua case has not been satisfied here for attribution of liabilities of Al-Qaeda arose from the attack on the USA, to Afghan government (Glennon 2002: 539-558). After considering the decision of the International Court of Justice in many cases, it can be stated that the accusations raised by the US are not sufficient for attribution of the responsibilities of an individual or non-state actor to a state (Nicaragua v. USA, Para).

Determination of status of detainees of terrorists or other persons in counter-terrorism

A captured individual either civilian or combatant in an AC gets a certain level of protection, privileges, rights and fair and impartial trial under the relevant treaties and if that person is a combatant, he is entitled to the POW (POW) status (Art. 5, GC, III). In International AC (IAC) the detainee deserves a wide range of protection and privileges in compare to the detainee in non-international AC (NIAC). The Geneva Conventions (GCs) and AP I apply in IAC whereas in NIAC, CA 3 of GCs and AP II, article 75 of AP I and other domestic and human rights law are applied. When the civilians directly take part in hostilities and are detained by the opposite party, under IHL, they are not entitled to get the status of POW but will not lose the general protection and privileges. Regarding their status scholars opine in two ways. One group thinks them as “unprivileged combatants” and as such is entitled to protection under CA 3 of GCs and article 75 of AP I as customary law or treaty law. The other view is that they are entitled to protection under the rules relating to IAC if they fulfill the conditions enumerated in article 4 of the 3rd GC. This view is more compatible with IHL and the author of this paper also supports this view. It means they are entitled to get the POW status.

However, now the big challenge is to determine the status of detainees in counter-terrorist attack. In determining the legal status and rights of persons detained in connection with so-called “War on Terror” a case by case approach may be the best solution. Terrorism a prohibited method of war is used as a part of IAC or NIAC or as a distinct terror attack across the globe. If it is part of IAC or NIAC then the detainee even if a terrorist is entitled to get the protection under the IHL, but the controversy arises regarding the status of those detainees who have been captured by a State who in response to a terrorist attack by a terrorist group attacked that group and captured some of them.

Where the distinct terrorist attack is attributed on a state and counter attack is committed against that attributed State in that case, it is considered as IAC where IHL is fully applied. In an IAC, if the terrorist is a member of armed forces or militia or volunteer corps forming part of the armed forces (Art.4 (a) (1), GC III) or any person who belongs to any one of the categories as prescribed in article 4 of third GC then he is entitled to POW status under third GC, though he may be prosecuted before the international or domestic court for violation of IHL (Art. 8, ICC, Rome Statute 1998). If he is not a member of armed forces even in that case also he, as an unprivileged combatant, is entitled to protection but not POW status. Where the responsibilities of a terrorist attack by a group or individual cannot be attributed to a state and the result of the attack reaches to the level of AC and its effect is equal to or more dangerous than that of kinetic warfare there the parties are not beyond the ambit of IHL even if it is a conflict between a terrorist group and one or more states. This type of conflict is considered as NIAC.

The terrorist armed attack which amounts to a NIAC, there persons detained in counter terrorist attacks are entitled to protection under CA 3 of GCs, AP II, article 75 of AP I, domestic law and international human rights law.

The persons who are either members of Al-Qaeda or members of Afghan armed forces detained in Afghan war were not granted POW status and protection under the GC III, although USA acknowledged the attack on Al-Qaeda was an AC or war (Islam M. Saidul, 2018: 6). Later on the US changed its position and conceded that the rules of IHL are applied to the conflict with the Taliban because Afghanistan was a State and member of GCs and APs yet it denied applying the GCs to the member of Al-Qaeda because it is a non-state actor and not member of the GCs (Bush, 2007). The US concluded that CAs 3 and AP II would not be applied for the terrorist group because the conflict was an international nature and scope (Bush, 2007).

The GC is explicit regarding persons who are entitled to POW status, as article 4 of 3rd GC enumerates a “comprehensive list including militias, volunteer corps, organized resistance movements, persons who accompany the armed forces without actually being members thereof, members of crews of the merchant marine and civil aircraft,” who are entitled to get the POW status but if any doubt arises regarding any person on what will be his status, GC says then the competent tribunal will determine his/her status and until it is decided by the competent tribunal they will be treated as POW (Art. 5, GC III). The USA, without determining the status of the detainees by any competent court, decided that the detainees are not entitled to protection either under the GCs and AP I or the CA 3 and AP II.

The United Nations High Commissioner for Human Rights in January 2002 expressed its concern to the USA regarding the fate of the terrorist detainees by the USA and informed that the detainees are entitled to protection under international human rights law and IHL, especially under the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the GCs of 1949 (Zayas, 2002: 217). If in any time dispute arises regarding the determination of the status of a detainee then it will be determined by a competent tribunal (Art. 5 GC III).

The Executive Director of Human Rights Watch, Kenneth Roth stated that the USA after waging war against Afghanistan for terrorist attack by the Al-Qaeda, later on cannot say that laws of war do not apply in this armed conflict. Saying that the GCs do not apply to a war on terrorism is particularly dangerous, as it is all too easy to imagine this "exception" coming back to haunt US forces in future conflicts (Zayas, 2003).

On the other hand, in many cases the terrorists captured by the State, have been granted certain protection by the domestic or international court or tribunal. In Quirin case, the Quirin who was doing some dangerous acts in the USA was captured by the USA soldiers. The court mentions that the jus in bello makes a distinction between lawful and unlawful combatants and the terrorists are unlawful combatants who are not POW but get protection and fair trial under the law (Avril, 2002: 58-59). In Abdullah Al Mujahir (Jose Padilla) case where Mujahir as an agent of Al-Qaeda tried to detonate a radiological explosion in the USA but he was captured. After his arrest, the Deputy Attorney General of the USA L. Thomson stated that he was arrested under the IHL. It demonstrates that he was entitled to get the benefit of IHL as he was arrested under this law.

The Supreme Court of the USA adjudicated that Hamdan was entitled to get protection under CA 3 of GCs. The Supreme Court clearly noted that the conflict between the USA and the terrorist group AL-Qaeda is a conflict of non-international character so the detainees in this type of conflict are protected under CA 3 of GCs, AP II (Salim Ahmed Hamdan v Rumsfeld, 2006).

The above arguments and justifications reveal that the detainees in counterterrorism are not out of protection but they must get protection under CA 3, AP II, article 75 of the AP I and other international human rights law.

The Minimum Protection of the Detainees

The detainees either in IAC or NIAC is not beyond the ambit of protection of international law or IHL. The AC between non-state actor and State is a conflict of non-international nature where the detainees even if a member of terrorist group and frequent violator of law, are entitled to protection under IHL and other provisions of international law. Under the CA 3 the minimum protection must be ensured for the detainees of the AC which are: "persons not actively taking part in hostilities including civilians and hors de combat shall be treated humanely without any adverse distinction of race, creed, religion, faith, color, sex, birth or wealth." For the protection of those persons certain acts are prohibited in all circumstances, which are: "violence to life and person, like murder of all kinds, mutilations, cruel treatment and torture, outrages on personal dignity, in particular humiliating and degrading treatments, prejudgment killing and denial of judicial guarantees (CA. 3 of the GCs)." Another obligation on the parties is the wounded, sick and shipwrecked shall be collected and cared for.

The protection guaranteed by CA 3 has been extended by the AP II, 1977 as article 4 of the protocol declares "that the member of NIAC is entitled to get protection from the severe heinous offences like violence, murder, torture, mutilation and any form of collective and corporal punishment, taking of hostages, acts of terrorism, outrages on personal dignity, slavery and slave trade, pillage and importantly children shall be provided with care and aid" (Art. 4, AP II, 1977).

If any member of the NIAC is captured then they are entitled to enjoy some rights which are: timely treatment, providing with food and water, safeguard for health and hygiene and protection against climate and AC, allowing to receive relief, allowing to practice their religion, if they work, should be given benefit of working conditions and safeguards similar to local civilian population, separate barracks for women otherwise with family, allowing to send and receive letters, medical examinations (Art. 5, AP II, 1977).

If they are prosecuted before the court for violating the IHL or domestic law even in that case also they will get protections namely, no capital punishment for pregnant women, mothers with small children and persons under the age of 18, no ex post facto penalization, accused one shall be presumed innocent till proved otherwise, no one shall be compelled to be a witness against himself (Art. 6, AP II, 1977), and medical and religious person shall be always protected and medical duties shall be done according to ethics (Art. 9 & 10, AP II, 1977).

II. CONCLUSION:

The frequent counterterrorism operations without complying with the principles of international law has become a serious reasons of sufferings, big cause of human rights violations and even a way of threatening the life of the people. The study found that a victim state of any criminal act of an individual or a terrorist group

can lawfully attack the terrorist harboring state if it is sufficiently proved that the State had effective control and supervision over the group. Mere providing financial or other assistance or permitting to stay in the State or tolerating their illegal activities in the territory is not strong cause for attributing the responsibilities of the terrorist group or individual to a State. The study also found that the detainees of the counterterrorism are entitled to get protection under international law. The AC between terrorist group and States is a conflict of non-international character so the detainees of such type of conflict are not unlawful combatants and not beyond the protection under IHL. They get protection under CA 3 and AP II of 1977 and other customary international law.

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