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International Legal Regime: Analysis of Cases Relating to Global Terrorism

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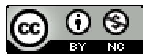
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ABSTRACT

This paper critically examines the international legal regime addressing global terrorism, with a focus on the judicial decisions that have shaped the scope and enforcement of anti-terrorism laws. It explores the obligations of states under international law to prevent and prosecute terrorism through various legal mechanisms, including domestic laws, treaties, and the exercise of universal jurisdiction. The analysis highlights the role of international courts, including the ICC, ICTY, ICTR, and hybrid tribunals, in addressing terrorism-related crimes. It also delves into the challenges faced by these legal forums, such as jurisdictional immunity and political interference, which hinder effective prosecution. Through a review of landmark cases, the paper demonstrates how terrorism has been defined and prosecuted under International Humanitarian Law (IHL) and International Criminal Law (ICL), providing a comprehensive understanding of how global legal structures work to combat terrorism while addressing the complexities of modern conflicts.

Keywords: Global Terrorism, International Criminal Law, Universal Jurisdiction, Anti-Terrorism Treaties.

INTRODUCTION

One of the main objectives behind the existing structure of anti-terrorism laws is to prevent and punish the perpetrators of acts of terrorism, and to that extent the member states have been under legal obligation to modify their domestic laws to fulfill the objectives of such treaties. In the existing international legal structure a State as a member of the international community of nations have multiple obligations to prevent and punish such individuals either because of treaty laws or at times by exercising universal jurisdiction. To this extent, they have become parties to various treaties, and in the case of not being so, also they are still under the obligation to deter from doing any act which will be in violation of international peace and security and any of the principles of jus cogens. In its efforts for preventing and punishing individuals, for committing

terrorist activities, nations are facilitated by structures like ICC, ICTY, ICTR, and hybrid tribunals, in addition to their own mechanisms

The purpose behind this work is twofold, firstly, to understand the scope of terrorism and extradition within the discipline of IHL and ICL, and, secondly to study the underlying challenges that these forums face while preventing and punishing individuals through cases, reported or unreported.

GLOBAL TERRORISM- FEATURES AND SCOPING – AN OVERVIEW

The term "terrorism" originated from the Reign of Terror (Regime de la Terreur) of 179394. Terrorism, it is believed, to have been there in one form or other, like Zealots of Judea, and Assassins in the 11th to 13th century with religion being a strong motivating factor behind terrorist activities (Wardlaw, 1989). Terrorism includes acts like assassination of great leaders; causing incredible violence, all in the name of defending for greater good. 21st century is considered as an era of globalized terrorism (Gupta, 2020). Individuals or groups of individuals before engaging into acts of terrorism have been extremists. It is widely known that extremism is a precursor to terrorism, where the former is a radical expression of one's political values, characterized by intolerance toward opposing interests and divergent opinions, while the latter are the ones who violently act out their extremist beliefs. Terrorism is widely believed to be politically motivated violence; mostly directed against soft targets with an intention to affect or terrorize a target audience (Schmid, 2011).

Terrorism is not new to human civilization, considering acts like 'Tyrannicide' [killing of tyrants], 'Crucifixion', and 'Regicide' [killing of kings] have taken place since antiquity (Ristuccia, 2016). Through the ages terrorism has also changed its method, which can be termed as new method of terrorism and it is distinguished from tradition method of terrorism, where the former is characterised by cell-based networks with minimal lines of command and control; desired acquisition of weapons of mass destruction; politically vague, religious motivations; asymmetrical methods that maximize casualties; and, skilful use of the internet and manipulation of the media. Defining terrorism has always garnered much interest but not without difficulty. Governments, individual agencies within the government, private agencies, and academic violence experts have developed definitions of terrorism, which lack of unanimity (Stampnitzky, 2013). Most definitions focus on political violence perpetrated by dissident groups, even though many governments have practiced terrorism as both domestic and foreign policy.

From the above discussion it is clear that, terrorism is a method which is violent and it can be practiced by an individual as well as organised groups, leading to different types of terrorism like State terrorism; dissident terrorism; religious terrorism; ethno-nationalist terrorism; ideology oriented terrorism; Narco-terrorism, each of them having their own peculiarities.

GLOBAL TERRORISM- ACTORS INVOLVED

With the passage of time terrorism has also crossed many a thresholds to become truly global. One of the causes behind is the multiple actors involved in the process following more than one agenda, cutting across continents. Acts of terrorism are committed by individuals but they are primarily executing the aspirations of groups like State, or non state actors in the name of materializing their political, religious, or business goals (Anfinson, 2021).

State terrorism is committed by governments and quasi- governmental agencies and personnel against perceived enemies, through terrorism as foreign policy and terrorism as domestic policy. State sponsored terrorism is usually a covert, secret policy that allows states to claim "deniability" and the modes of doing it is either by states patronizing or

giving assistance for terrorism like, international violence conducted on government orders, or committing international violence with government encouragement and support, respectively. In the latter half of 20th century, governments have used terrorism as an instrument of foreign policy, as states can't always deploy conventional armed forces to achieve strategic objectives. Terrorism as foreign policy is effectuated in the following manners, like by providing political, ideological or religious indoctrination via agents of the supporting state; providing financial support through its own independent resources; supplying terrorist organizations with weapons, military training; directly providing false documents, safe havens; by giving specific instructions for initiating terrorist attacks; and directly carrying out terrorist attacks using agencies from its own intelligence services and security forces.

The other crucial actor which has been involved in terrorism is the non-state actors, who have increasingly important in NIACs. It can be also labeled as dissident terrorism, with many shades like anti-state or being communal in nature. Such kind of terrorism also in most situations bears the common thread of political nature similar to state terrorism. Such non-state actors could be rebels; or warring against the state; or even engaged in communal terrorism, with slightly different characteristics. Rebels taking into terror tactics is often using or threatening to use political violence aiming for complete revolutionary change; or for effecting various changes in a particular political system, but not with the intention of abolishing it; using it against internal or external opposition (Fortna, 2015). The groups fighting against the state have the common goal to defeat the state and its institutions, while they might have a clear or vague vision of the new society, or a simple profit motive. The other kind of terrorism which in the recent times have shook the conscience of the international community is the wide-spread violence that is caused ethno nationalist communal terrorism, which at times have descended to become genocidal behavior, witnessing large scale violation of rules of warfare. Religious terrorism has also been on the rise since late and early of 20th and 21st century respectively, where religion is used as the predominant model for political violence. Such kind of terrorism can be either used as primary or secondary motive; at times states also sponsor religious terrorism (Brubaker, 2015).

Irrespective of the actors involved in acts of terrorism, it has gained a whole new perspective in the age of globalization and has led to globalization of political violence due to new information technologies and other technological developments. It is not an exaggeration to conclude that "international terrorism represents one of the defining elements of politics on the world stage today" (Chakraborty & Chakraborty, 2019, p. 43). In the new age even domestic conflicts have become international terrorism, for factors like selecting targets which have international interests and it garners global audience. One of the prime reasons for this is the changed structure and nature of the world system and of political relations since 1945, with an increasing interest in the affairs of the less developed states on behalf of stronger nations and UN, with a parallel growth of international arms trade. Ongoing warfare between formerly constituent republics now independent states has demonstrated how civil wars can become international wars simply by an abrupt change in political status of the belligerents; new states find themselves fighting serious insurrections without benefit of professional armies. In the present times military techniques necessarily involve the civilian population and the societal infrastructure in the destruction and it extends to violence into other arenas of social interaction: repression, terrorism, genocides, murder, rape, famine, deprivation, dispossession, and dislocation.

Overall warfare is considered political violence involving social groups, which is further, blurred the conceptual distinctions between the state and its various conflict arenas, whether those involve social identity groups or the world system or the state

itself. Therefore, practically all such acts which are categorized under terrorism are predominantly considered as political in nature, but not without contest. There is a wide gap between the way terrorism is perceived among the western nations and the developing nations, which is based on the historical differences that they share, where the former is a strong believer in democratic justice as a norm, while the latter has created a mix of ideology and warfare, to justify terrorism as a legitimate method of warfare, to fight causes like anti-colonialism, insurgencies, and other causes.

Therefore acts of terrorism are criminal offences and they under the present status of international law is dealt exclusively under sectoral treaties, which obliges members of such treaties to make such acts punishable under their domestic law (Di Filippo, 2020). But at the same time, such terrorist acts are in reality political violence as they are committed mostly with the idea of fulfilling respective political goals. The settings of such act also range from any singular act to consistent violence in a specified territory to any other territory, which would be symbolic, for the perpetrators. Such violence at times falls in violation of IHL as well as ICL.

TERRORISM UNDER INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

Terrorism has been dealt by every nation through their municipal laws as well as international law. Terrorism simply means committing offences of serious nature to fulfill political aspirations. Such offences can be committed both in times of peace as well as in armed conflict situations, and even in situations where the political movement goes on for decades (Fletcher, 2006). The basic idea behind criminalizing acts or methods of terrorism has been to bring perpetrators to justice, by adopting legal tools and increased co-operation among states. When terrorist acts are committed in peacetime, usually nations under the various international conventions exercise their jurisdiction over the individuals who have or suspected to commit such acts, with or without the support of any State support. However in the recent times the world has witnessed several NIACs carrying on for years together, where terror tactics have been employed by ordinary civilians as well as armed forces and dissident armed forces. Armed conflict situations are governed by international humanitarian laws and individuals are punished under ICL. The criminal justice system faces difficulties in its effort to counter terrorism, and they are handled based on legal tradition, its development, and complexities of the institution. It is here that the researchers wishes to assess how terrorism has been placed under both the disciplines and the implications thereto.

Even after repeated statements, by UNSC of considering terrorism as threat to peace and security, they still do not belong to the classification of “core international” crimes like genocide, WCs, and CAH, leaving them being dealt under the domestic laws which must conform to with various aspects of international law (Wellens, 2023). The legal structure as shaped by universal treaties, important UNSC resolutions to counter terrorism is founded on the belief that such individuals must be made to face trial before their governments, failing which any other agreeable nation may do the same after extradition.

FOUR GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS:

The branch of IHL comprises of sorting out lawful armed procedure from prohibited ones, shielding civilian population and control the weaponry used during war. Historically, law related to armed conflict only applied to sovereign states fighting each other and above all states did not want to legitimise rebels, terrorists, or other armed groups, until after the Spanish civil war (1936-1939 onwards). There is till date no definition of NIAC in public international law. The only relevant provisions governing

NIAC is regulated by common Article 3 of GC read with Art1 (1) of A P II, where latter reduces its range of application, like the requirement of territorial control and the exclusion of conflicts not involving governmental armed forces (Dinstein, 2021). The prohibitions laid down in humanitarian conventions into two categories: (l) rules which restrict methods and means of warfare and (2) rules for the protection of persons in the power of the adversary against arbitrary acts and violence. The IVth Geneva Convention is the only Geneva Convention of 1949 in which the term “terrorism” is explicitly used under Article 33 of fourth Geneva Convention supplementing Article 27. Article33 refers to situations where a person in the power of the enemy is in particular danger of becoming the victim of “measures of intimidation or of terrorism” while in detention or in an occupied territory.

The term “terrorism” as used by the Fourth Convention seems, however, to have a narrower meaning than in present-day language. Wilful killing, torture or inhuman treatments, the taking of hostages or “extensive destruction (...) of property” are grave breaches of the Fourth Geneva Convention: such acts are WCs (Gasser, 2002). These general rules are supplemented by special prohibitions; for instance, the taking of hostages is prohibited (Art. 34) and Article 75 of Protocol I which prohibits violence against all persons who are in the power of the adverse party and who are not already protected by some other rules. Article 67 relates to the military courts before which the Occupying Power may bring accused persons under the terms of the preceding Article and it makes express mention of the rule that the penalty is to be proportionate to the offence. It is considered an addition to Article 33 since penalties which were out of proportion to the offence would undoubtedly constitute a form of terrorism.

With reference to the first category, Article 51, par. 2, of Protocol I is particularly noteworthy. Article 51 (2) lays down that attacking civilians individually or collectively are prohibited-a clear and categorical prohibition probably covering most terrorist acts. Bearing the fact that any military operation or indeed any threat of military measures is bound to have a terrorizing effect on unprotected civilians, what remains prohibited, however, is the *intentional use of terror as a means of warfare*. Paragraph 2 of article 51, gives substance to the principle of general immunity formulated in the preceding paragraph by explicitly prohibiting attacks directed against the civilians (Beer, 2020). ‘Attack’ must be read in the light of Art 49, paragraph, 1. Article 51 (2), to the understanding of the Conference differentiates between acts intended to spread terror with a view to intimidate the enemy soldiers and persuade them to surrender; or to simply terrorising civilians without offering considerable armed advantage, while the latter is prohibited. Article 51 is further supported by article 52of protocol II, which lays down the general principle of immunity of civilian objects; defines civilian objects by means of a negative method, which is already used in Art 50 to define the civilian population. Attacks against other objects for the purpose of spreading terror among civilians are prohibited by Article 56 of Protocol I which prohibits attacks against works or installations containing dangerous forces (such as dams, dykes and nuclear plants) or Article 53 which protects objects of cultural and religious significance.

Importance attached by Diplomatic Conference to this article is corroborated by the fact that violation of several of its provisions is qualified as a grave breach in the light of Article 85 *(Repression of breaches of this Protocol),* paragraph 3, which meet the criteria of being grave breach, like intentionally attacking civilians, which causes death or grave damage to health. Thus in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result. It can thus be concluded that in an international armed conflict terrorist acts are prohibited without exception or reservation. Both under the provisions of the GC and those of the Statute of Rome, the State which has jurisdiction over the

person concerned has priority over the powers of the international Tribunal under Article 1 and 17 of the Rome Statute, to try such individual for grave breaches or WCs.

Since 1949 and 1977 respectively, Article 3 common to the four GC and AP II have set the basic standards intended to limit violence and suffering in NIAC. Customary law confirms and supplements the fundamental Article 3 and the fifteen articles of Protocol II (Focarelli, 2010). Article 3 of the four GC leaves no latitude for terrorist acts against people in custody of the adverse side to the war. Art 4, Protocol II reaffirms aforementioned prohibitions and in various respects extends and improves the system of protection with an express ban on terrorist acts in par. 2, (d). Protocol II is distinguishable to the common Article 3 in the sense that the former has introduced provisions designed to protect civilians by influencing the very conduct of hostilities. Article 13 Para (2), is identical to the prohibition of terrorist acts in international conflicts enunciated in Article 51, par. 2, of Protocol I. It expressly prohibits terrorist acts against the civilian population i.e. the prohibition of course applies to both sides, that is to governmental and dissident armed forces. It can be firmly said that the law applicable in NIACs makes no distinction between various categories of persons (combatants, civilian population, etc.). It can be conclusively be said that under no circumstances can terrorism be justified in NIACs, due to express reference to Martens clause under the fourth preambular paragraph of Protocol II; that acts of terrorism perpetrated during NIAC may indeed be equated with grave breaches as defined by the 1949 GC; liability for committing such egregious crimes in non-international crimes are considered as international crimes irrespective of being state or non-state actors as conclusively decided by the ICTY.

Therefore it can be conclusively said that the entire body of IHL along with CIL prohibit terrorist attacks in international or non international armed conflicts and such violations entail the obligation of States to bring the alleged offender to justice before their own courts, the courts of another State party or an ICC.

ICTY; ICTR; HYBRID TRIBUNALS; AND ICC STATUTE:

International law in the last century has been actively dealing with violations of IHL in all kinds of armed conflict as seen above. The focus has been gradually on the individuals committing these acts than making the State solely liable for committing such grave breaches. In the post UN era, the countries have understood the importance of the need to establish transitional justice system in conflict affected countries. After any armed conflict what is left is a much compromised national justice capacity and it requires lot of time and effort to re-establish an effective judicial system which confirms to the basic principles of rule of law. To fulfil these objectives, the countries have been in the past few decades been focussing on creating several forms of tribunals prosecuting crimes committed in war affected societies. They have been able to deliver hope and justice, and thereby supplemented ICL jurisprudence. These institutions deal with myriad factors like lack of political resolve to transform, independence of judiciary, technical ability, fiscal assets, reliance on Government, institutional value for rights & freedom and, harmony.

Effects of grave breaches and acts of terrorism are dealt by either judicial or other systems with varying points of global participation and trying people, making reparation, truth-seeking commissions, etc. The report from the secretary general of Security Council states that the efforts put in the UN has to be within the four corners of IHR, IHL, ICL and IRL, while doing so it bound by certain normative standards like disallowing death sentencing, UN- authorized amity accords must not assure amnesties for committing international crimes. UN in its last ten years established and helped in establishing extraordinary crime tribunals with the objectives, like punish the perpetrators of crime violating IHR, IHL, thereby, ending and averting its return, secure justice for sufferers,

create documentation, encourage nationwide settlement, re re-establishment of amity (Ellis, 2006). All institutions have made significant contributions in developing ICL jurisprudence by bringing intelligibility on issue of considering rape as WC and a CAH, the essentials of genocide, torture, individuals criminal liability, command responsibility, and suitable prison term.

The UN has often addressed international terrorism, which has led to the adoption of several sectoral treaties on terrorism. Following the September 11th terrorist attacks, the Security Council added its voice to the ongoing concerns regarding terrorism, noting, amongst other things, that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the UN and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the UN" (Singer, 2015, p. 53). Under terror related treaties adopted by UN, the ratifying members have to prosecute the individuals through their municipal law. Under ICL breaches of CIL might give rise to person's criminal culpability. Crime has to be precisely described, within the agreements bestowing jurisdiction to the criminal tribunals, where the individual will be tried (Munim, 2022). CIL also has so far defined terror related violence as WC. It has already been made apparent in the earlier portions that acts of terrorism have become effective way of fighting in both national and international stage. In the light of the established norms under international law, the researchers wishes to examine how an act of terrorism is placed under the several ICL statutes.

It is important to understand at this point that acts of terrorism have always been prevalent in any kind of armed conflict, but what has been changing, is the attitude of the nations towards it. In an ideal situation it would please any victim country if the perpetrators of terrorism are punished by the municipal laws of the nations. But unfortunately, when the State directly or indirectly connive in such terrorist attacks, then the victim nations often either seek international law intervention by creating international crime tribunals or simply widen the ambit of their domestic laws to bring international terrorists to justice (Worugji & Ugbe, 2016). Even international organizations also tread the same path, for e.g. through the Security Council Resolution 1368, it claimed that attacks by terrorists, even if not perpetrated by State, could still be determined as threat to global amity and safety giving rise to right to individual or joint self-defence. NATO, too labelled 9/11 attack as "armed attack". The ambiguity in the then resolutions allowed U.S.A to detain several individuals as 'enemy combatants' by denying them status of POW, who could be held indefinitely. However, it is amply clear now that IHL still guarantees basic rights even for terrorists who can't be categorised distinctly under any form mentioned in GCs or in Addl Protocols.

There can be more than one forum to try perpetrators of international terrorism basing on the kind of jurisdiction the countries want to exercise. Terrorist acts as committed by non-state actors are not expressly covered under the branch of IHL, thereby leaving few options before the victim states, like either going to the ICC; forming criminal tribunals by security council resolution on the lines of ICTY and ICTY; or form hybrid tribunals in the State. However in all the circumstances the primary requirement is of an enabling law (Worugji & Ugbe, 2013). Both ICTY and ICC don't include terrorism in the subject matter of its jurisdiction. However both ICTR and the SCSL contain terrorism as offence within their jurisdiction. This brings us to the larger question as to the possibility of trying individuals for committing acts of terrorism by exploring the relation between terrorism and ICL.

There happens to be an exhaustive discourse while drafting ICC Statute to link it to genocide, CAH, WCs, and aggression as crimes within jurisdiction of ICC. Some of the reasons for not elevating it to the rank of "international crime" are the lack of consensus as to a precise definition or possible exceptions; and prosecuting terrorism before the

ICC risks politicizing that court. As UN mechanisms for peace and justice, the ICC and other international and hybrid criminal tribunals constitute instruments for the protection of human rights, which are frequently violated on a massive scale when the "most serious crimes of concern to the international community as a whole" are committed (Pérez-Léon-Acevedo, 2022). The offences within jurisdiction of ICC reflect instances when the disparate states of the world became a society cohesive enough to express a consensus as to the values protected by those prohibitions. After World War II, the States considered to be an apt time to create a supranational organization to respond to the state committed or condoned atrocities that were deemed to affect all of humanity and to go beyond any one state's power to adequately punish and redress. The ICC has jurisdiction over three categories of crimes: genocide, CAH, and WCs. ICC statute codifies, in a sense, international customary law with respect to CAH and WCs, while genocide was established through international convention. Other crimes satisfy these criteria yet are not included in the ICC's jurisdiction, which appears to be limited by the further criteria of "extreme gravity" and "touching the international community as a whole" (Ronen¸2011, p. 32).

To prosecute terrorism under ICC jurisdiction would require developing a consensus definition. However application of such a definition lacks foresee ability given the abundance of preceding, competing definitions as entrenched in national counter-terrorism regimes, as well as the political concerns which too often motivate the designation of individuals as terrorists. Because the international crimes currently within the Court's jurisdiction originate in international law, there is less discrepancy between the ICC and national definitions; application of these norms is therefore sufficiently foreseeable. However the fact remains that in the last ten years countries are in much more consensus in identifying the basic elements of crime of terrorism, in the light of increasing number of signatories to the terrorist financing convention post 2001 attack and Security Council resolution. Interestingly, the Terrorist Financing Convention even includes terrorist attacks which may be committed during armed conflict situation, which is a significant departure from the other terrorism related conventions. In fact the Report of the Preparatory Committee on the Establishment of an ICC considered including "crimes of terrorism" within the jurisdiction of the court. One of the possible reasons for not including it into final draft could be to lessen the burden on the court and restrict its jurisdiction only to the most severe crimes. However the fear of overburdening the court seems unfounded given the adoption of the complementarity principle[407], requiring ICC to defer matter to state jurisdictions. Other reason forwarded for not including was the existence of a separate treaty structure, by which ratifying nations have already agreed on prosecute or extradite principle. But so were the other crimes being handled under different structures like Geneva Convention, Genocide Convention and others. There is still the fear that including crimes of terror would politicize the forum. However the fact remains that even when the U.S.A and many other super-powers have not become parties to the Rome Convention, but still the western and European powers are accused of politicizing the forum.

According to most African observers, the indictment of Sudan's Head of State Omar by ICC on WCs is a politically motivated one as the west has been targeting the government in Sudan since the 1990s (Mehler, et al., 2010). Whereas the Rwandan president Mr. Pail Kagame, who is considered to be a regional ally of the west, has not been targeted despite mounting evidence of human rights violations against him (Drew, et al., 2021). African leaders have accused Western leaders of double standards and of adopting a colonial attitude towards the continent. There are other prominent African leaders like the recently elected Kenyan president and vice-president, who also face indictment charges by the ICC, but their trial has already been postponed thrice, and they

consider the charges to be politically motivated. The African Union has been seeking all the cases against the continents leaders to be dropped, while counter charging that it is George W. Bush and Tony Blair who should be facing an international WCs tribunal for the war in Iraq. ICC can exercise its jurisdiction over natural persons. Therefore actions against a nation for being involved in acts of terrorism would come under ICJs jurisdiction.

Over the last decade there has been lot of discussion on the scope of crime of terrorism, and it is true that under ICL a certain offence can be described in different ways, like "crimes against humanity" (Onok, 2019, p. 665). Similar approach has been undertaken in case of defining crime of terrorism. In ICTR Statute, SCSL, and Extraordinary African Chambers there is only one reference of "acts of terrorism" in the light of the inclusive nature of several offences under Art 3 of GC and the Addl Protocols. Whereas in Statute of STL, its existence being primarily inspired by the desire to punish individuals, accountable for the crime which took life of their Prime Minister Rafiq Hariri with others. The STL doesn't define the elements of "acts of terrorism", but refers to the LCrC for its definition and to guide in prosecution and punishment of such individuals. Compared to the abovementioned legal frameworks as developed by the UN, there is no reference to either acts or crimes of terrorism in Law on the Establishment of the ECCC for prosecuting offences as committed during rule of Democratic Kampuchea or in Iraq Statute of the Special, Tribunal for Human Rights (Kenny, 2017). It is apparent that international society have till date tried its best to avoid "acts of terrorism" in majority of the documents and when it has incorporated, it is to be interpreted either in reference to the municipal law of the country or has left its interpretation upto the Chambers.

So far now it is settled that terrorism is mostly beyond the jurisdiction of international criminal tribunals and it can't be interpreted to be incorporated within the existing crimes, as expressly precluded under Article 22 (2) of ICC Statute. There has been quite some deliberation about the advantage and disadvantage of incorporating acts of terrorism as separate offence in the ICC Statute. However given the fact that even ICC has not been beyond criticism, by allegations of influenced by politics of favouritism. The researchers holds that acts of terror are adequately dealt in majority of the municipal laws and over the last few decades nations have attempted to enforce the core principle of ADAJ which is so fundamental for the success of seeking prosecution of individuals. Moreover the ICC, being mandated to comply with the rule of complementarity, would find it very difficult to replace the municipal structure, given the challenges like high cost and comparatively the great amount of time it would require to process it. It must also be noted that all the universal as well as the regional terrorism related conventions have the support of majority of the countries cutting across their political differences. Moreover the ICC Statute is not so widely supported by countries like India, China, U.S.A, and others.

LANDMARK CASES- ANALYSIS

The legal development related to terrorism, and other violations of law related to armed conflict under international law with special emphasis to universal treaty laws, ICL, and municipal law has been further strengthened with the numerous judicial decisions, delivered by judicial bodies of international, national, and hybrid nature. These judicial decisions have brought to the fore the emerging issues and challenges to the law related to extradition in relation to the above-mentioned crimes. Among all the cases there are some landmark decisions which have garnered more interest as it involved issues like universal jurisdiction; questions of attainment of status of CIL; impunity and exile arrangements; immunity of the head of states, and others. The researchers here wishes to refer to some of the land mark decisions of the following forums and bring forth the

challenges in prosecuting individuals, which will be dealt under another chapter, solely dedicated to the challenges. The judicial decisions would be discussed to showcase its contribution in establishing certain legal principles. The researchers would like to limit to only few decisions, considering the constraint of time and nature of the work.

Post Second World War, the Allied powers established Tokyo and Nuremburg tribunals for punishing individuals who have acted in violation of humanitarian principles and international law principles. One of the salient features of the Nuremburg charter was that even persons acting in the capacity of the Head of the State were not spared from being individually responsible for the violations as laid out (Randelzhofer & Tomuschat, 2023). The IMTFE Charter contained similar provision as in the Nuremburg charter. In 1946, General Douglas, of Allied Force's 1945-1952 occupation of Japan, made a decision not to indict, prosecute, or call Japanese Emperor Hirohito as a witness at the IMTFE following World War II (Crowe, 2004). The decision not to indict Hirohito sprang from a multiplicity of factors: political need formed by internal Japanese pressures, General MacArthur's desire for a smooth transition in postwar Japan, a bitter anti-Japanese racism that existed during World War II, and the research of social scientists. Whereas subsequently nations have formed consensus to form forums through the UN; at times taking their interpretational disputes to the international court of justice; and at times in their domestic courts. The summarization of the following cases before the said forums remain significant to establish the emerging norm of finding individuals criminally responsible committing offences violating of customary laws of war, and treaty crimes, irrespective of their official capacity while committing those crimes.

INTERNATIONAL COURT OF JUSTICE

Over the last sixty decades the ICJ had to deliver a few judgments which have discussed the laws and principles related to extradition in reference to head of states, minister in state, individuals allegedly committing offences as defined in treaties. A. Lockerbie (Matheson, 2004):

> On 10 September 2003, after more than ten years of proceedings before the ICJ, the disputes between Libya and both U.K and U.S.A concerning the extradition of two Libyan citizens were removed from the Court's List following the Parties' withdrawal from the proceedings. This case showcases the interplay of nation's obligations under treaty and the way the international organizations acted upon the slightest delay. It explores how Security Council can at times act arbitrarily favoring some nations in the name of upholding justice.

Following the explosion of a bomb in the PanAm Flight above Scotland, on 21.12.1988, which killed all present in the flight, as well as 11 inhabitants from the town of Lockerbie, the Lord Advocate of Scotland and a Grand Jury of the US respectively accused two Libyan citizens, Abdelbaset Ali Mohmed Al Megrahi and Ali AminKhalifaFhimah, of this bombing. Consequently, the UK and US Governments requested Libya to extradite the accused so that they could be prosecuted in Scotland or in the US. The UN Security Council adopted three resolutions (Resolutions 731, 748 in 1992 and Resolution 883 in 1993), in order to contribute to the clearance of international terrorism. Before the ICJ, Libya claimed that it had not signed any extradition treaty with the UK and the US, and that, subsequently and in conformity with the 1971 Montreal Convention (Articles 5 and 7), which necessitates State to launch its own jurisdiction over suspected offenders present there, and on the event of their non-extradition, only Libyan authorities had jurisdiction to try their own citizens. In its application Libya pointed out that the alleged acts constituted an offence with the meaning of Article 1 of the Montreal Convention, which allowed the ICJ to exercise jurisdiction to hear disputes between Libya and the

respondent States about its interpretation and implementation of its provisions. It declared having jurisdiction on basis of Article 14, paragraph 1 of the Montreal Convention, to hear the disputes between Libya and the respondent States. It further declared the claims admissible (Patel, 2014).

After withdrawing from the cases, Libya agreed that the two accused, be tried by five Scottish Judges sitting in a neutral Court, in the Netherlands. Abdelbaset Ali Mohmed Al Megrahi was found guilty on 31 January 2001was serving his sentence in Greenock Prison, near Glasgow, where he continued to profess his innocence, till he was freed from Scottish jail in 2009 on compassionate grounds because of cancer, to die on 20th May at his home in Tripoli. While the other accused was found not guilty and released.

Arrest Warrant of 11 April 2000

In April, 2000, an arrest warrant in absenti was issued by an investigating judge of Brussels against Mr. Abdulaye Yerodia Ndombasi, indicting him as perpetrator of crimes comprising grave breaches under GC and Addl Protocols, CAH as distributed internationally through Inter-pol. The offences for which Mr. Yerodia was indicted were liable to be punished in Belgium as per Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the international GC of 12 August 1949 and of Protocols I and I1 of 8 June 1977 Additional:

> Thereto", changes to which were made by the subsequent Law of 19 February 1999 "concerning the Punishment of Serious Violations of IHL". Once the proceeding started, Mr. Yerodia stopped holding the office in the capacity of MoFA, and subsequently ceased to hold any ministerial office (Chakraborty & Chakraborty, 2019, p. 132).

Congo confronted the legality of arrest warrants on two grounds, i.e, Belgium's assertion to apply universal jurisdiction and, violation of immunities as enjoyed by MoFA, Congo then in office. The Court observed that international law firmly establishes that persons occupying the office as the Head of State, and MoFA, have the benefit of immunity from jurisdiction in other countries, in both civil and criminal matters. ICJ relied on VCDR of 18 April 1961 and the NYCSM of 8 December 1969. They proved to be useful guidance on the said issues, but were not specifically mentioning the immunities so enjoyed by MoFA. The court concluded that as per CIL, immunity so given upon the MoFA is given to make sure efficient carrying out of their role on the sending states behalf. It observed no difference between functions carried out by MoFA in "official" capacity and the ones claimed to be carried out in "private capacity", even the acts so performed before the person assumed office as MoFA. After carefully examining State practices, municipal laws, judicial decisions of higher courts from U.K and France; the set of laws about immunity or criminal culpability of individuals holding official capacity, as included in the laws establishing criminal courts of international nature, for e.g., IMTN, Art. 7; IMTFE. Art. 6; ICTY Art. 7 (2); ICTR, Art.6 (2); ICC, Art. 27). It was not able to find any rule showing otherwise under CIL, that immunity is available to an incumbent MoFA, when suspected of committing international crimes like WC and CAH. Obligation to prosecute or extradite under various treaties does not affect immunities under CIL.

The court observed that immunities granted under international law to serving or previous MoFA do not represent a bar to criminal prosecution in certain circumstances, like, when they are prosecuted in their own country; when the sending state chooses to relinquish immunity, where the concerned individual does not have the benefit of immunities as bestowed by international law in other country after ceasing to hold the office of MoFA, and when the individual is subject to criminal trial before criminal courts of international al nature, having such jurisdiction. Hence, the Court concluded that the warrant, did constitute a violation of duty of Belgium towards Congo, having failed to

value the immunity as enjoyed by the incumbent MoFA of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law. C. Belgium v. Senegal (Bankas, 2022, p. 22):

> In the case the individual who was being sought for trial was an overthrown Head of the State of Republic of Chad. It was contended that during his coming to power in 1982 was through revolution and in the next eight years of his rule he is known to have used violent means. His violent term as president led to many refugees and they in more than one jurisdiction had initiated proceedings to bring him to justice, from Senegal, where his request for political asylum was granted. This case is significant as he was charged for committing crimes against humanity, WCs, genocide, and crimes of torture, involving both IHL as well CAT. An international arrest warrant in absentia was issued by the Belgian investigating judge on 19th September 2005. Following which the Interpol also issued a red corner notice on his name. Following the arrest warrant, the Dakar court of Appeal, ruled that Mr. Habré must "be given jurisdictional immunity", which "is intended to survive the cessation of his duties as President of the Republic"; and hence it could not "adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State". Thereafter it was referred to African Union, which found it to be within its competence and asked Senegal to prosecute Mr. Habre, while guaranteeing him fair trial. Thereafter Belgium initiated its extradition proceedings against Mr. Habre following the provisions of CAT.

The UN Committee against Torture found that Senegal to be acting in violation of Article 5(2), and Art 7 (1) of CAT. In 2007 by legislative reforms municipal laws were amended to be in conformity with Art 5 (2), CAT. ICJ observed that such delays in changing the municipal laws to be in violation of Art 6(2), and Art 7(1), of CAT (Mahmood, 2017). While clarifying Art 7 (1) ICJ observed that in a choice between surrendering or prosecuting, extradition is a choice given by the governing treaty, while prosecuting the individual will be fulfillment of international obligation, violating which would invite state responsibility. It further stated that even though Senegal was not required to initiate prosecution for offences done prior to 26.6.1987, the treaty does not preclude it from doing so. It went ahead in suggesting that as per Art 27 of VCLT, which is also considered to comprise customary law, Senegal would be in position to justify its breach of Arts 5 & 7 of CAT. It interpreted Art 7 (1) as not indicating any particular time frame for implementing on its obligation, but suggested that it should be done within a reasonable time. Therefore Senegal was found to have breached and continuing to be so of its duty under Art 7 (1) of the treaty. Latest update on this matter has been the establishment of EAC in 2013 in the courts of Senegal, to prosecute the "person or persons" most responsible for international crimes committed in Chad between 1982 and 1990 (Mahmood, 2017).

INTERNATIONAL CRIMINAL TRIBUNALS

While IHL saw considerable doctrinal development in the half century preceding the Nuremberg trials, as nations codified many laws of war in treaties, many powers embraced the concepts of crimes against humanity and command responsibility, and many nations rejected the notion of head-of-state immunity, enforcement lagged far behind the doctrinal development. Post Second World War the world witnessed the formation of Nuremburg and Tokyo tribunals which among many things attached credibility in fundamental international law principles, especially in the customs of laws of war. All these forums by their constitutive documents have crystallized certain

fundamental principles of ICL, like official capacity can't be pleaded as defense to avoid prosecution; amnesty agreements cant obstruct the judicial process; concept of gender crimes; international criminalization of internal atrocities; interpreting the existing humanitarian law in the light of the modern nature of conflicts, which has been formally invoked into later drafted ICL statutes; bringing clarity on areas of law which are not expressly dealt under any international law; ushering in an era of accountability for the gravest crimes committed by individuals. Their judgments have filled the gaps in international procedural and evidentiary law left by the Nuremberg decisions, and their success serves as an example for national prosecutions of those who commit atrocities. Due to constraints of space and time the researchers will refer to only few cases across various tribunals, which have addressed very distinct issues.

CHARLES TAYLOR IMMUNITY DECISION

On September 2013, a UN backed special court rejected an appeal filed by Mr. Charles Taylor, against WC convictions (Linton, 2017). The Prosecutor charged Taylor with eleven separate international law breaches as provided in SCSL:(1) acts of terrorism in violation of Art 3 of GC and AP II (i.e., "WCs"); (2) five counts of crimes against humanity, including murder, rape, sexual slavery, other inhumane acts, and enslavement; (3) violence to life (Count 3) and cruel treatment (Count 7); and (4) outrages upon personal dignity, conscription of children below 15 years, and pillaging (Linton, 2017). On May 31, 2004, the Appeals Chamber of SCSL while denying his appeal on May 31, 2004, the Appeals Chamber of the SCSL. It relied on practice before international judicial bodies for heads of state and other government officials as indication by governing laws of ICTY, ICTR, and ICC. Trial chamber convicted Charles Ghankay Taylor for aiding and abetting the commission of the offences as under Art 6(1) of Statute during the Indictment period, like acts of terrorism, a violation of Art 3 of GC and of second AP following Art 3(d) of the Statute. The Trial Chamber observed that acts of terrorism contains a materially distinct element from the WCs. An essential element of acts of terror is the intent to spread fear, which distinguishes the offence from the other charged WCs, which do not have this requirement.

While discussing the elements of crime required for the acts of terrorism under Art 3 (d) of the Statute, Chamber laid down essentials of acts of terrorism in addition to breaches of common Art 3 must be proved beyond reasonable doubt. The elements are actual acts or threat of committing violence targeting person or property, wilfully with primary aim to spread terror among persons. Evidence of such terrorization may be used to establish other elements of the crime, and prosecution has to prove that spreading terror was specifically intended, i.e. it had to be the primary purpose, not the only purpose. The intention could be inferred from, *inter alia*, "nature, manner, time and duration" of acts or threats, and may also be inferred from the actual infliction of terror and the indiscriminate nature of the attacks. It dispelled defences' argument that as per *Milosevic* Trial Judgement an act or threat can be considered as "terrorism" only where it results in "death or serious injury to body or health within the civilian population or to individual civilians". Countering the defence submission the court referred to the appellate authority resolving this issue, as in *Milosevic* case, the ICTY found that the Trial Chamber had "misinterpreted the *Galić* jurisprudence, and concurred with the understanding that actual infliction of death or grave injury to body was not an essential element of the offence of terror, but the fact that the victims have faced serious consequences as a result of the acts or threats, which might include death/ grave injury to body. Trial chamber also declined to accept the CIL regarding crime of terrorism, as laid down by the Appeals Chamber of the STL, saying that its ruling referred to terrorism in peacetime, while the former was dealing with WC related to "acts of terrorism". Trial

Chamber therefore upheld that the additional elements referred to in the above paragraphs do not form part of the WC of “acts of terrorism”.

MANY FORUMS AND COMMON AND EMERGING PRINCIPLES

The UN created forums, have through decisions given rise to three modes of criminal liability, i.e., *direct responsibility; Joint Criminal Enterprise;* and *Indirect Command Responsibility*. A person is directly responsible when he or she has participated in planning, instigating, ordering, committing, aiding and abetting in plan, preparation, or carrying out of a offence, as defined in the said statutes. The doctrine of “joint criminal enterprise” has been inferred from the statutes by the international criminal courts. It is known to have emerged from the Prosecutor v. Tadic, while reviewing Article 7(1) of ICTY Statute and came to the conclusion that responsibility for crimes ensuing from group criminality can attach to all those members of the group who shared the common purpose of the group to commit the crimes and had in some way actively furthered the crime (Uhlířová, 2012). In addition to common purpose, the Tadic decision also inferred two other categories of cases in which the doctrine of joint criminal enterprise applies, like “concentration camp” cases, where the accused can be found guilty if he or she was aware of the system of repression and intended to further the common design to mistreat the inmates and cases which involved acts falling outside the ambit of common purpose but where the crime resulted as a “natural and foreseeable consequence of the effecting of that common purpose.” All 3 types of JCE have been used in the following decisions and many more, like Milosevic trial, Mpambara case, Ka-remera case and Taylor case. The third doctrine which has come into existence is the *indirect command responsibility* which require three elements: existence of superior-subordinate relationship of effective control; the existence of the requisite means rea, commander had to know or must have a way to know his subordinates’ crimes; and commander failing to implement necessary steps to stop or penalize the offenses.

In Celibici case the Trial Chambers judgment is the first elucidation of the concept of command responsibility by an international judicial body since the cases decided in the wake of the Second World War. It emphasizes that the doctrine of command responsibility encompasses not only military commanders, but also civilians holding positions of authority and not only persons in de jure positions but also those in such position de facto.

INTERLOCUTORY DECISION ON THE APPLICABLE LAW: TERRORISM, CONSPIRACY, HOMICIDE, PERPETRATION, CUMULATIVE CHARGING

The Appeals Chamber of the STL, on request of the Pre-trial Chamber addressed certain fundamental questions on interpretation of the Statute; understanding the ambit of terrorist activities as per Lebanese municipal laws and Lebanon’s obligations under international law, for the latter’s functioning. The Pre-trial chamber addressed four questions related to terrorism. The appeals chamber first interpreted Art 2 to understand that Tribunal to be limited by the provisions of LCrC only (Sadat, 2002). But, the appeals chamber also noted that the Tribunal may refer to relevant international law as tool for interpreting relevant provisions of the LCrC. The chamber thereafter undertakes a careful study of the elements of the terrorism as per LCrC, treaties as are obligatory upon Lebanon, CIL as well. The chamber then refers to several judicial decisions and the legal provisions to have a complete grasp over the essentials of terrorism as a crime, to conclude that there is more thrust on the means (for instance, rifles or handguns) of carrying out the crime which may not cause any harm or even to others, who might become victim of such terrorist attack, without being the prime target, for e.g. passerby, onlooker, etc..

CONCLUSION

The law related to terrorism has been enriched by numerous judicial decisions, delivered by judicial bodies of international, national, and hybrid nature. The researchers has referred to some of the land mark decisions of the following forums and brought forth the challenges in prosecuting individuals. The summarization of the cases helps in establishing the emerging norm of finding individuals criminally responsible committing breaches of jus in bello, and as treaty crimes, irrespective of their official capacity while committing those crimes.

Over the last six decades the ICJ has rendered its judgment on matters related to extradition touching upon several issues like state immunity, the power of the Security Council, and other issues. The Lockerbie case showcases the interplay of nation's obligations under treaty and the way the international organizations acted upon the slightest delay; while highlighting how Security Council can at times act arbitrarily favouring some nations in the name of upholding justice. In the Congo v. Belgium case, the court while relying on the VCDR and other international instruments and as per CIL held that diplomats & consular officers, serving officials in a state, have immunity in respect of civil as well as criminal matters in receiving states. Researchers believes that there is serious lack of cohesion with respect to immunity being granted to incumbent ministers and other in criminal matters, in both disciplines of public international law in general and ICL. This lack of consistency is further widened by the fact that the ICC Statute bars any such immunity, but still has not been able to lay its hands on the indicted sitting Deputy President of the Republic of Kenya and others, the Republic of Kenya, till date because of alleged politicization of the forum as well as the stand of other nations as not to facilitate their transition. The jurisprudence as developed by the ILC is also consistent with the arguments as forwarded by the ICJ in the said case. The Belgium v. Senegal case is another landmark decision which has amply showed the amount of unwillingness to prosecute former head of states for grave breaches by clinging on to the arguments of jurisdictional immunity which survives even after the individual ceases to hold the office of President, and also delaying its treaty obligations, which the court found wrong and asked Senegal to carry out its obligations in true spirits.

All these forums have by their constitutive documents crystallized certain fundamental principles of ICL, like official capacity can't be pleaded as defense to avoid prosecution; amnesty agreements cant obstruct the judicial process; concept of gender crimes; international criminalization of internal atrocities; interpreting the existing humanitarian law in the light of the modern nature of conflicts, which has been formally invoked into later drafted ICL statutes; bringing clarity on areas of law which are not expressly dealt under any international law; ushering in an era of accountability for the gravest crimes committed by individuals. These structures have found Charles Ghankay Taylor for aiding and abetting the commission of the crimes like acts of terrorism, a violation of Art 3 of GCs & AP II. These international criminal tribunals have laid down the elements of terrorism under the humanitarian law structure, like actual threat, not to be an essential indicator for terror related crimes, although evidence of such terrorization may be used to establish other elements of the crime; the prosecutor's office must prove that dissemination of fear has to be of prime purpose not only purpose; intent can be inferred from the actual infliction of terror and the indiscriminate nature of the attacks; have effectively maintained a distinction between terrorist attacks done peace time and war situations, and thereby not accepting the CIL with respect to terror offences, as laid down by the Appeals Chamber of the Special Tribunal for Lebanon. These forums have through decisions given rise to three modes of criminal liability, i.e., *direct responsibility; Indirect Command Responsibility* and *Joint Criminal Enterprise*.

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