

AN ERGA OMNES DISPUTE IN THE UNITED NATIONS FOR DEFINING THE PAST ARMED CONFLICT OF SRI LANKA*

Birleşmiş Milletler İçerisinde Sri Lanka'da Geçmişte Yaşanan Silahlı Çatışmanın Hukuki Tanımı Konusundaki Erga Omnes Anlaşmazlık

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Abstract

The three-decade-long armed conflict ended in Sri Lanka, by the military defeat of the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. LTTE is defined as an international terrorist organization and banned in 32 countries. Terrorist acts of LTTE were under the category of crimes against humanity. After the end of the armed conflict in Sri Lanka, today there is a new conflict on Sri Lanka, in the United Nations, between the Human Rights Council and the Office of the High Commissioner for the Human Rights for defining the past armed conflict as combat terrorism or an internal war as well defining the LTTE as a terrorist organization or not.

Keywords: Liberation Tigers of Tamil Eelam, Sri Lanka, Terrorism, Combat Terrorism, Civil War.

Özet

Sri Lanka'da yaklaşık 30 yıl süren çatışma ortamı, 2009 yılının mayıs ayında Tamil Elam Kurtuluş Kaplanları'nın (LTTE) askeri mağlubiyetiyle sona ermiştir. LTTE, 32 ülkede terörist örgüt olarak kabul edilmiş ve yasaklanmıştır. LTTE, intihar bombacılığı eylemini kusursuzlaştırmış, intihar yeleğini geliştirmiş ve kadınların bu saldırılarda kullanılmasına öncelik etmiştir. Sri Lanka ve Hindistan Devlet Başbakan'larının öldürülmesinin akabinde, LTTE; yaklaşık 75.000 Müslüman zorunlu olarak sürgün ederek, etnik temizlik gerçekleştirmiş, mülklerine el koymuştur. Örgütün terör eylemleri insanlığa karşı işlenen suç kapsamında değerlendirilmiştir. Bugün ise Birleşmiş Milletler bünyesinde, LTTE'nin bir terör örgütü olup olmadığı İnsan Hakları Konseyi ile İnsan Hakları Yüksek Komiserliği arasında tartışılmaktadır.

Anahtar Kelimeler: Tamil Elam Kurtuluş Kaplanları, Sri Lanka, Terörizm, Terörizmle Savaş, İç Savaş.

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Introduction

On March 2014, by the resolution 25/1 of 9 April 2014, “*Promoting reconciliation, accountability and human rights in Sri Lanka*”, the Human Rights Council (HRC) of the United Nations (UN) requested the Office of the High Commissioner for Human Rights (OHCHR) in the operational article 10 (b) to organize a committee of inquiry on Sri Lanka as:

“Undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka, the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) during the period covered by the Lessons Learnt and Reconciliation Commission and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders”.

The Lessons Learnt and Reconciliation Commission (LLRC) was set up in 2010 by the President of Sri Lanka Mahinda Rajapaksa for an inquiry into and report on the facts and circumstances which led to the failure of the Ceasefire Agreement (CFA) on 21 February 2002 between Sri Lanka government and *the Liberation Tigers of Tamil Eelam* (LTTE). LLRC was responsible to inquire and report the sequence of events that followed CFA and thereafter up to end of the armed conflict on 19 May 2009 by the military defeat of the LTTE. Report of LLRC was finalized and presented to the President of Sri Lanka in November 2011. The past armed conflict in the report defined as terrorism.¹

A special investigation team established within OHCHR in Geneva Switzerland by the High Commissioner for Human Rights which began its work from 1 July 2014 and named as OHCHR Investigation on Sri Lanka (OISL). The High Commissioner for Human Rights also

¹ “Report of the Commission of Inquiry on Lessons Learnt and Reconciliation 2011”, *Embassy of Sri Lanka*, <http://slembassyusa.org/downloads/LLRC-REPORT.pdf>, (Date of Accession: 18.10.2017).

invited three experts, Mr. Martti Ahtisaari, former President of Finland, Dame Silvia Cartwright, former High Court Judge of New Zealand, and Ms. Asma Jahangir, former President of the Human Rights Commission of Pakistan, to play a supportive and advisory role to the investigation. The mandate was given to the investigation, however, covering a time period from February 2002 to November 2011 is much broader than the end of the conflict on 19 May 2009. (OISL report para.15)

In paragraph 9 of the HRC Resolution 25/1 “*Promoting reconciliation, accountability and human rights in Sri Lanka*” defined the situation of the past armed conflict as *combat terrorism*.

OISL finished and published his report on 16 September 2015 namely “*Report of the OHCHR Investigation on Sri Lanka A/HRC/30/CRP.2*.” In paragraph 1141 of the OISL report, the past armed conflict in Sri Lanka was defined as *an internal armed conflict*.

In paragraphs 168 and 661 of the OISL report, LTTE was defined as a *non-state armed group* (NSAG). Even if in OISL report, LTTE was put under the definition of a NSAG, in paragraph 49 of the OISL report, universally accepted acts of terrorism which were made by LTTE were written in detail as:

“The LTTE developed as a ruthless and formidable military organization, capable of holding large swathes of territory in the north and east, expelling Muslim and Sinhalese communities, and conducting assassinations and attacks on military and civilian targets in all parts of the island. One of the worst atrocities was the killing of several hundred police officers after they had surrendered to the LTTE in Batticaloa on 17 June 1990. The LTTE exerted significant influence and control over Tamil communities in the North and East, as well as in the large Tamil diasporas, including through forced recruitment and extortion.”

In paragraph 154 of the OISL report, LLTE's relation as a terrorist organization is mentioned as a point of view of some States but not as an OISL point of view.

“Following the 9/11 attacks in the United States of America, and the launch of the US-led “war on terror” the rhetoric of the international community began to change and a growing number of States listed LTTE as a terrorist organization.”

The footnote 68 for the paragraph 154, it is written that:

“OISL did not focus on the issues of illegal acquisition of military equipment, extortion or other such matters, which should be the subject of separate inquiries in the respective countries.”

Principal findings part of the of OISL report, LTTE was accused of different systematic war crimes as:

Unlawful killings in paragraph 1118,

Abduction and forced recruitment in paragraphs 1136,1137,1138,1139,

Recruitment of children and use in hostilities in paragraphs 1140, 1141,

Impact of hostilities on civilians and civilian objects in paragraphs 1157, 1158, 1159,

Control of movement in paragraphs 1161, 1162, 1163, 1164,

Denial of humanitarian assistance in paragraphs in 1167, 1168.

But these systematic war crimes were not defined either as a crime against humanity nor acts of terrorism. OISL refrained to designate LTTE as a terrorist organization or a NSAG designated as terrorist.

“OHCHR Investigation on Sri Lanka” web page of OHCHR, the past armed conflict situation in Sri Lanka was defined as an “*internal armed conflict*” and “*non-international armed conflict*” and LTTE was defined as a “*non-state armed group*.”²

The difference of legal definition of the past armed conflict in Sri Lanka by HRC and OISL created a legal dispute. The Permanent Court of Justice gave the definition of dispute in the Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, as:

“A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”

The International Court of Justice defined a legal dispute in the Interpretation of the Peace Treaties with Bulgaria, Hungary, and Romania. Advisory Opinion of 30 March 1950 defined dispute as:

*“A situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.”*³

The international crime of the prohibition against terrorism constitutes a peremptory norm of *jus cogens* binding on all states and creating an obligation of *erga omnes* character with the UN Security Council Resolution 1373 of 28 September 2001.

When OHRC gave a different definition on the past armed conflict in Sri Lanka other than *combat terrorism*, there exists an *erga omnes* dispute between HRC and OHCHR.

2 “OHCHR Investigation on Sri Lanka”, *United Nations Human Rights* <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>, (Date of Accession: 18.10.2017).

3 Christoph Schreuer, “What is a Legal Dispute?”, I. Buffard, et al, eds., *International Law between Universalism and Fragmentation*, Koninklijke Brill NV, Leiden 2008, p. 960.

The Legal Status of OHCHR

The OHCHR was created by the resolution 48/141 of General Assembly of the UN on 20 December 1993. By article 4 of the resolution 48/141, OHCHR is put under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights.

The HRC which was created by the resolution 60/251 UN General Assembly on 15 March 2006 in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly. The HRC is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention. Commission on Human Rights was replaced by HRC on 15 March 2006 and OHCHR is put under the direction and authority of HRC.

UN has a non-State entity with *international legal personality and responsibility to the international community as a whole* with the 1949 advisory opinion of the International Court of Justice (ICJ). To change any mandate of HRC, OHCHR should openly express his opinion that there exist serious breaches of the obligation under peremptory norms of general international law under the article 41 of “*the Draft Articles on the Responsibility of International Organizations*”, adopted by the International Law Commission, in 2011.

Definition of an Armed Conflict

Definition of an armed conflict for the purpose of the application of International Humanitarian Law (IHL) as spelled out by the International Criminal Tribunal for ex-Yugoslavia (ICTY) is as:

“An armed conflict exists whenever there is a resort to armed force between States or protracted armed

violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the Warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”⁴

Definition of Non-State Armed Group

No specific definition of NSAG has been adopted by either the U.N. Security Council or the UN General Assembly. NSAG defined by IHL article 1.1 Additional Protocol II, 1977 to defined NSAG as:

“Dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its [the High Contracting Party’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

The principle of *Ius in Bello*, the equal application of the laws of war concept regulates the use of force all parties to an armed conflict and all parties to the armed conflict are equal before the IHL and the International Human Rights Law (IHRL) in the non-international armed conflicts (NIACs). NSAGs’ which do not respect to rules of IHL, IHRL or general international customary laws are defined NSAG designated as a terrorist or just terrorist organization.

Definition of Terrorism

In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations,

⁴ “International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72”, *Prosecutor v. Duško Tadić a/k/a “DULE”, Appeals Chamber, 2 October 1995*, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, (Date of Accession: 18.10.2017).

resolutions and universal “sectoral” treaties relating to specific aspects of it define certain acts and core elements.

In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal “sectoral” treaties relating to specific aspects of it define certain acts and core elements.⁵

Thus, as early as 1937, by the League of Nations draft convention for “Prevention and Punishment of Terrorism” defined terrorism in article 1.2 as:

*“acts of terrorism means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of a particular person, or a group or the general public.”*⁶

In 1994, the General Assembly’s Declaration on Measures to Eliminate International Terrorism set out in its resolution 49/60, and in the operative article 3 stated that terrorism includes:

“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” and that such acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”

General Assembly resolution 54/109 of 9 December 1999, “*the International Convention for the Suppression of the Financing of Terrorism*” provides a generic description of terrorist acts for the purposes of the offense of financing of terrorism in the operative article 2.1 as:

5 Office of the United Nations High Commissioner for Human Rights, “Human Rights, Terrorism, and Counter-terrorism, Fact Sheet No. 32”, Geneva July 2008, p. 5.

6 “League of Nations Convention for Prevention and Punishment of Terrorism”, *World Digital Library*, <https://www.wdl.org/fr/item/11579/view/1/7/>, (Date of Accession: 18.10.2017).

“Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) 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.”

The Security Council, in its resolution 1566 of 8 October 2004, in the operative article 3 described terrorism as:

“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act.”

The General Assembly of UN by its resolution 51/210 of 16 January 1997 established an Ad Hoc Committee on terrorism. The Ad Hoc Committee is currently working towards the adoption of a comprehensive convention against terrorism, which would complement the existing sectoral anti-terrorism conventions. Its draft article 2 contains a definition of terrorism as:

“unlawfully and intentionally” causing, attempting or threatening to cause: “(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems..., resulting or likely to result in major economic loss, when the purpose of the conduct, 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 any act.”

In 2007, the UN Security Council established the Special Tribunal for Lebanon (STL) by his resolution 1757 of 30 May 2007. STL is the world’s first international court with jurisdiction over the crime of terrorism, to prosecute those responsible for the 2005 assassination of Lebanese Prime Minister Rafiq Hariri and twenty-two others.

The STL declared that the customary international law definition of terrorism consists of:

*“the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”*⁷

Individual Criminal Responsibility for the Acts of Terrorism

Any person may have the criminally responsible for any acts which consist of an offense against the law of nations. No one individual is

⁷ “Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration”, *Cumulative Charging*, <https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936>, (Date of Accession: 18.10.2017).

exempted or exonerated from this responsibility. There is no such rule as “*the King can do no wrong*” or “*the Emperor is above the law*” or “*Caesar’s wife is above suspicion*.”⁸

League of Nations draft convention 1937 for “*Prevention and Punishment of Terrorism*” in article 2.5, puts criminal responsibility for the individuals who are to “*the manufacture, obtaining possession or supplying of arms, ammunition, explosives, or harmful substances with a view to the commission in any country what’s over of an offense*.”⁹

International Convention for the Suppression of the Financing of Terrorism 1999, the term, “*indirectly*” is used for the responsible for the acts of terrorism. In the draft article 2 of the Ad Hoc Committee of General Assembly the terms “*unlawfully and intentionally*” causing is used. The STL definition of terrorism “*indirectly*” acts of terrorism are also put under criminal responsibility.

The STL, in establishing the *raison d’etre* of the tribunal to prosecute the crime of terrorism, recognized the customary international law prohibition of terrorism as an international crime imputing individual criminal responsibility.¹⁰

Any person who unlawfully and intentionally involved in any terrorist organization is under individual criminal responsibility for crimes of the terrorist organization.

8 Sucharitkul Sompong, “Terrorism as an International Crime: Questions of Responsibility and Complicity”, Publications Paper 1988, <http://digitalcommons.law.ggu.edu/pubs/528>, (Date of Accession: 18.10.2017).

9 “League of Nations Convention for Prevention and Punishment of Terrorism”, *World Digital Library*, <https://www.wdl.org/fr/item/11579/view/1/7/>, (Date of Accession: 18.10.2017).

10 “Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging”, *STL*, <https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936>, (Date of Accession: 18.10.2017).

Terrorist Acts as War Crime with the Limitation of the Armed Conflict

IHL only applies in times of armed conflict. It distinguishes conflicts between States from conflicts between NSAG or between NSAG and a state, a NIAC conflict.¹¹

The Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone include provisions that refer to a specific prohibition of terrorism in the context of armed conflict, as a special subcategory of war crimes governed by IHL. These two statutes do not, however, include a general crime of “terrorism”. In order for acts of terrorism to be considered as “war crimes,” they would necessarily have to take place within the context of armed conflict.¹²

The international criminal law provisions against terrorism have also been addressed in practice by international tribunals. In 2003, ICYT concluded that the crime of terror against the civilian population was constituted of elements common to other war crimes, in addition to further elements that it drew from the *International Convention for the Suppression of the Financing of Terrorism*.¹³

The principal sources of IHL are the four Geneva Conventions of 1949 and the two Additional Protocols to these Conventions, namely 1977 additional first Protocol and second Protocol to the Geneva conventions.

Article 3 of all four Geneva Conventions, often referred to as “Common Article 3”, as well as of the Second Additional Protocol contains minimum guarantees that apply to both international armed conflict as well as national armed conflict. In *Nicaragua v United States of America*, the International Court of Justice confirmed that Common Article 3 was applicable to the Contras (a NSAG). “*The conflict*

11 Sylvain Vite, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, *International Review of the Red Cross*, Volume: 91, No: 873, March 2009, p. 91.

12 “Frequently Asked Questions on International Law Aspects of Countering Terrorism”, *UN Office on Drugs and Crime Vienna*, New York 2009, p. 41.

13 “Human Rights, Terrorism, and Counter-terrorism”, *Office of the United Nations High Commissioner for Human Rights*, Fact Sheet No: 32, Geneva July 2008, p. 23.

*between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character."*¹⁴

Article 33 of the Fourth Geneva Convention states that “*collective penalties and likewise all measures of intimidation or of terrorism are prohibited.*” Article 4 of Additional Protocol II prohibits “*acts of terrorism against persons not or no longer taking part in hostilities*”. The main aim of these provisions is to emphasize that neither individuals nor the civilian population may be subjected to collective punishment, which, among other things, obviously terrorizes. Additional Protocols I and II also prohibit acts aimed at spreading terror among the civilian population.¹⁵

In addition to an express prohibition of all acts aimed at spreading terror among the civilian population (art. 51, para. 2, Protocol I; and art. 13, para. 2, Protocol II), IHL also prescribes the following acts, which could be considered as terrorist attacks:

Attacks on civilians and civilian objects (arts. 51, para. 2, and 52, Protocol I; and art. 13, Protocol II);

Indiscriminate attacks (art. 51, para. 4, Protocol I);

Attacks on places of worship (art. 53, Protocol I; and art. 16, Protocol II);

Attacks on works and installations containing dangerous forces (art. 56, Protocol I; and art. 15, Protocol II);

The taking of hostages (art. 75, Protocol I; art. 3 common to the four Conventions; and art. 4, para. 2b, Protocol II);

14 “Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)”, *ICJ*, <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>, (Date of Accession: 18.10.2017).

15 “International Humanitarian Law and Terrorism: Questions and Answers”, *International Committee of the Red Cross*, <https://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>, (Date of Accession: 18.10.2017).

Murder of persons not or no longer taking part in hostilities (art. 75, Protocol I; art. 3 commons to the four Conventions; and art. 4, para. 2a, Protocol II).¹⁶

Terrorist Acts as Crime against Humanity

“Crimes against humanity” are acts directed against the civilian population on a widespread or systematic basis, either in time of war or in peacetime. The statutes of the ICTR and ICTY maintain that certain acts committed under particular conditions constitute a crime against humanity. The acts are as follows: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts. The Rome Statute also includes the crime of apartheid and enforced disappearances of persons under article 7.

The ICC Statute requires that crimes against humanity should be in furtherance of a State or organizational policy to commit such an attack on a civilian population but does not require that the acts must be attributable to a State. Whether or not terrorist acts can amount to crimes against humanity will depend to a great degree on their scale. Sporadic or random acts are unlikely to be sufficiently widespread or systematic; however, a single act of great magnitude may in itself amount to a widespread attack amounting to a crime against humanity. Whether or not an attack is systematic may be assessed on the basis of evidence of a series of attacks or of an identifiable plan or policy behind the attack.¹⁷

Terrorism as a *Delicta Juris Gentium* Crime

Delicta juris gentium refers to crimes that shock the conscience of nations and address the criminal responsibility of individuals. Those individuals may be acting on behalf of a State or maybe non-State actors.

¹⁶ *Ibid*

¹⁷ Cman Kenny, “Prosecuting Crimes of International Concern: Islamic State at the ICC?”, *Utrecht Journal of International and European Law*, Volume: 33, No: 84, 2017, p. 133.

Resolution 1373 of Security Council imposed obligations for domestic legislation in its operative articles to prevent and suppress the financing of terrorist acts, criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. Most importantly, in the operative article 2 (e) Security Council obliges all states that:

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

UN Security Council resolution 1373 both brings punishment and preventive obligations to the member states against terrorism and address terrorism as a *delicta juris gentium* crime.

In the operative article 3 of the UN Security Council resolution of 1566, not only condemns terrorism in all its forms but urges states to combat terrorism with the concept of *delicta juris gentium* as:

“Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls

upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;”

UN Security Council resolution 1456, by its operative article 1 brings an urgent obligation to prevent and suppress all active and passive support to terrorism. In the operative article 6, combat terrorism defined as an obligation by all means as a *delicta juris gentium* crime:

“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.”

Terrorism and International Human Rights Law

IHRL is based on primarily on the right to live. The ICJ has formally confirmed that HRL also applies in situations of all armed conflict situations, whether these have an international or non-international character such as:

“1996 Nuclear Weapons Advisory Opinion, as well as its Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, The ICJ also confirmed that international human rights law is applicable in situations of armed conflict in a case concerning Armed Activities in the Territory of the Congo (Congo v Uganda), Judgment of 9 December 2005.”¹⁸

The main purpose of IHL is to codify and regulate armed conflicts and limit their negative impacts on victims, civilian or those who have laid down their arms. It does not cover all violations of international

¹⁸ Annyssa Bellal, “Armed Non-State Actors and the Human Rights Council”, *Geneva-Academy*, <https://www.geneva-academy.ch/our-projects/our-projects/un-human-rights-mechanisms/detail/4-armed-non-state-actors-and-the-human-rights-council>, (Date of Accession: 19.10.2017).

law that occur in these situations, such as violations of freedom of expression or gender discrimination. More generally, unlike IHRL, IHL does not regulate the everyday lives of people in situations of NIAC.¹⁹

IHRL are accepted universal values and legal guarantees that protect individuals and groups against actions and omissions even in the times of armed conflict with fundamental freedoms. The full enjoyment of human rights involves respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, in other words, they belong inherently to all human beings, and are interdependent and indivisible. IHL is reflected in a number of core international human rights treaties and in customary international law.²⁰

Derogation from certain human rights set out in international human rights treaties is prohibited, even in a state of emergency. Article 4 (2) of the International Covenant on Civil and Political Rights (ICCPR) identifies as non-derogable the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude, freedom from imprisonment for failure to fulfill a contract, freedom from retrospective penalties, the right to be recognized as a person before the law, and freedom of thought, conscience and religion. In its general comment N° 29, the Human Rights Committee has also emphasized that the Covenant's provisions relating to procedural safeguards can never be made subject to measures that would circumvent the protection of these non-derogable rights.²¹

Report of OHCHR the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/19/69 at paragraph 106 affirmed that:

19 "International Humanitarian Law and the challenges of contemporary armed conflicts in 2015", ICRC, <https://casebook.icrc.org/case-study/icrc-international-humanitarian-law-and-challenges-contemporary-armed-conflicts-2015>, (Date of Accession: 19.10.2017).

20 Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism, and Counter-terrorism Fact Sheet*, No. 32, Geneva July 2008, p. 3.

21 The UN Refugee Agency, "International Covenant on Civil and Political Rights", <http://www.refworld.org/docid/453883fd1f.html>, (Date of Accession: 19.10.2017).

“At a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances – can never be justified.”

Terrorism and International Criminal Law

From the perspective of international criminal law and its basic and non-derogable principles, the core requirements are clear: the principle of legality, *nullum crimen sine lege*, has to be satisfied, there is no crime without law.²²

The Appeals Chamber of STL concluded that “a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged.”²³

Both IHL and the ICL already cover acts of terrorism during times of armed conflict. They are indisputably banned in international or non-international contexts by provisions which “*reflect, or at least have turned into customary law.*” As for the question of criminalization of terrorism problem in an armed conflict, ICTY accepted attacks on civilians and other protected persons in the course of an armed conflict, which aims at spreading terror, may amount to war crimes as indicated by international jurisprudence or statutes of some international courts.²⁴

Ending of Impunity for Gross violations of Human Rights in the World

In the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”, submitted to the UN Commission on Human Rights on 8 February 2005 defined impunity as:

22 M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, New York 2003, p. 6.

23 STL, *ob cit.*

24 “Judgement, Galić (IT-98-29-T), Trial Chamber, 5 December 2003”, ICTY, <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>, (Date of Accession: 19.10.2017).

“the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and making reparations to their victims.”²⁵

The General Assembly by the Resolution 67/1 of 24 September 2012 *“the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels”*, in paragraph 22, ensure that:

“impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law”

In paragraph 26 of the resolution 67/1 member states reiterate that:

“strong and unequivocal condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security; we reaffirm that all measures used in the fight against terrorism must be in compliance with the obligations of States under international law, including the Charter of the United Nations, in particular, the purposes and principles thereof, and relevant conventions

25 Diane Orentlicher, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity”, *UN Document*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>, (Date of Accession: 21.10.2017).

and protocols, in particular, human rights law, refugee law, and humanitarian law.”

Action to combat impunity is one of the main principles relating to the promotion of truth, justice, reparation, and guarantees of non-recurrence to reach transitional justice by UN.

Principle “Aut Dedere Aut Judicare” and Terrorism

Certain crimes are so serious that, when a suspect of such a crime is found on the territory of a State and that State is obliged either to extradite the suspect to a State claiming jurisdiction to prosecute or to submit the person for prosecution in their national courts. This is known as the principle of “extradite or prosecute” or “*aut dedere aut judicare*”. It is a type of universal jurisdiction designed to combat impunity for serious criminal offenses including terrorist offenses.

The “*aut dedere aut judicare*” (either extradite or punish, “Jurisdiction with regard to crimes committed outside national territory”) principle of international responsibility is related to breach of an *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. The statements of the ICJ in this regard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court interpreted the object and purpose of the Convention against Torture as giving rise to *obligations erga omnes partes*, whereby each State Party had a common interest in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party.²⁶

In its resolution 1373, the Security Council decides that all States shall “deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens.”

²⁶ “Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment”, *ICJ Reports 2012*, p. 422, <http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-BI.pdf>, (Date of Accession: 19.10.2017).

UN Global Counter-Terrorism Strategy

The General Assembly Resolution by its resolution 60/288 of September 2006 was adopted The UN Global Counter-Terrorism Strategy as a form of a resolution and an annexed Plan of Action.

The UN Global Counter-Terrorism Strategy is a comprehensive instrument intended to enhance coordination of national, regional and international efforts to counter terrorism. The Strategy takes a holistic approach addressing four pillars: I) Measures to address the conditions conducive to the spread of terrorism; II) Measures to prevent and combat terrorism; III) Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard; and IV) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.²⁷

Victim Based Approach to Combat Terrorism

General Assembly by its resolution 40/34 of 29 November 1985, "*the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*" in the first paragraph, the term "victims" is defined as:

"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power." This definition comprises all situations where people are victimized as a result of criminal offenses committed by terrorist organizations and individuals."

27 "UN Global Counter-Terrorism Strategy", UN, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>, (Date of Accession: 19.10.2017).

General Assembly by its resolution 60/147 of 21 March 2006, “*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*”, define the victim as:

“Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

Support for victims of acts of terrorism is specifically highlighted under Pillars I and IV of the UN Global Counter-Terrorism Strategy. The concept in the Global Counter-Terrorism Strategy based on to encourages the Member States to consider putting in place national systems of assistance that would promote the needs of victims of acts of terrorism and their families and facilitate the normalization of their lives. Pillar IV stresses the need to promote and protect the rights of victims of acts of terrorism. Support for victims of acts of terrorism is no longer simply a matter of good conscience and human solidarity, but also an inherent part of a global counter-terrorism policy. This includes enhancing the role and visibility of victims in the criminal justice response to terrorism as part of the larger United Nations effort to support victims of acts of terrorism.²⁸

In September 2008, United Nations Secretary-General Ban Ki-moon convened a Symposium on *Supporting Victims of Terrorism*. The Symposium brought together for the first time victims, experts, and

28 “The Criminal Justice Response to Support Victims of Acts of Terrorism”, New York 2011, *UN Office on Drugs and Crime*, p. 10, http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf, (Date of Accession: 19.10.2017).

representatives of Member States, regional organizations, civil society and the media at the global level. The purpose of the Symposium was to give a face and a voice to victims of acts of terrorism, to provide a forum for discussing concrete steps to assist victims in coping with their experiences, and to share best practices.

The Symposium resulted in a report which set out eight recommendations by participants on how to improve support to victims of acts of terrorism: Provide a virtual networking, communication and information hub for victims of acts of terrorism, government officials, experts, service providers and civil society, strengthen legal instruments at both international and national levels, providing victims of acts of terrorism with legal status and protecting their rights, establish easily accessible health services that can provide victims with comprehensive support over the short, medium and long-term, create an international rapid response team for victims' support, provide financial support to victims, Improve the capacity of the UN to assist survivors and families of staff killed or injured in terrorist attacks against it, engage in a global awareness campaign supporting victims of acts of terrorism, improve media coverage of victims of acts of terrorism.²⁹

Transnational Crime and International Terrorism

The transnational criminal law is used to describe criminal acts that go beyond national borders and violate the laws of many different states and impact on other countries.³⁰ Paragraph 4 of the UN Security Council resolution 1373, noted with concern that:

“the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials. That and other political statements

29 “The Criminal Justice Response to Support Victims of Acts of Terrorism”, New York 2011, *UN Office on Drugs and Crime*, p. 11, http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf, (Date of Accession: 19.10.2017).

30 “European Journal of International Law”, *Neil Boister, Transnational Criminal Law*, Volume: 14, No: 5, 2003, p. 954.

referred to the possibility that alliance and various types of complicity and collaboration existed or might be formed between terrorist groups and conventional criminal organizations.”

UN *Convention against Transnational Organized Crime*, adopted by the General Assembly in its resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. The Convention is supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to *Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*; the *Protocol against the Smuggling of Migrants by Land, Sea and Air*; and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*.

UN Office on Drugs and Crime report *Criminal Justice Responses to Terrorism* indicate that:

“Many of the proven methods and strategies for combating organized crime are also relevant to the fight against terrorism. That makes sense for the following reasons: the intent and purposes of terrorist groups are criminal in nature, terrorist acts are crimes; terrorist groups frequently engage in criminal activities that are not in themselves “terrorist” in nature but that are nevertheless essential to the success of their enterprises; and the methods that the two types of groups—terrorists and organized criminal groups—use to intimidate people and to obstruct justice are often indistinguishable from each other.”³¹

LTTE as an International Terrorist Organization

The Federal Bureau of Investigation (FBI) of USA in its 10 January 2008 report said that the LTTE is one of the most dangerous and deadly

31 “Handbook on Criminal Justice Responses to Terrorism”, *UN Office on Drugs and Crime*, New York 2009, p. 29.

extremist outfits in the world and the world should be concerned about the outfit as they had “*inspired*” networks worldwide, including the *al-Qaeda* in Iraq. There had been reports that the LTTE raised money through drug running, particularly heroin from Southeast and Southwest Asia. The LTTE was in a particularly advantageous position to traffic narcotics due to the highly efficient international network it had developed to smuggle munitions around the world. Many of these arms routes passed either directly through or very close to major drug producing and transit centers, including Burma, Thailand, Cambodia, southern China, Afghanistan, and Pakistan.³²

LTTE also acquired U.S Stinger-class missiles from the terrorist organization PKK in 1996 and used these weapons to shoot down a Sri Lankan civilian Lionair jet in 1996 killing 55 persons.³³

Before its defeat in 2009, LLTE were reported to hijack ships and boats of all sizes, and kidnapping and killing of crew members is a common practice. For instance, MV Sik Yang, a 2,818-ton Malaysian-flag cargo ship, was reported missing. The ship sailed from Tuticorin, India on 25 May 1999 with a cargo of bagged salt and was due on 31 May at the Malaysian port of Malacca. The fate of the ship’s crew of 15 is unknown. A report of 30 June 1999 confirmed that the vessel had been hijacked by the LTTE.³⁴

The LTTE established a presence in Eritrea, which is known to be a major shipment point in the informal arms market. It is suspected that the LTTE has interactions with Al Qaeda affiliated groups in the Eritrean Network. A US Senate Foreign Relations Committee report in December 2006 claims that the Eritrean government directly supports the LTTE. The LTTE also maintains relationships with the Moro Islamic Liberation Front (MILF) and Aby Sayyaf in the Philippines in activities related to funding transfers and training operations.³⁵

32 “Liberation Tigers of Tamil Eelam (LTTE)”, *South Asia Intelligence Review*, <http://www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/Ltte.htm>, (Date of Accession: 19.10.2017).

33 Colin P. Clarke, *Terrorism, Inc: The Financing of Terrorism, Insurgency, and Irregular Warfare*, Praeger Security International, Santa Barbara 2015, p. 52.

34 Peter Lehr, *Violence at Sea: Piracy in the Age of Global Terrorism*, Routledge, Oxford 2006, p. 26.

35 Jayasekara, Shanaka. “Tamil Tiger Links with Islamist Terrorist Groups”, *International Institute for Counter-Terrorism*, <http://www.ict.org.il/Articles/tabid/66/Articlsid/277/Default.asp&xgt;>, (Date of Accession: 19.10.2017).

Since the end of the war, a total of 13 LTTE supporters, several of which had allegedly planned attacks against U.S. and Israeli diplomatic facilities in India, were arrested in Malaysia in 2014. The LTTE used its international contacts and the large Tamil diaspora in North America, Europe, and Asia to procure weapons, communications, funding, and other needed supplies. The group employed charities as fronts to collect and divert funds for its activities. LTTE's financial network of support continued to operate throughout 2014.³⁶

Jus Cogens, Erga Omnes Norms, and Terrorism

The doctrine of *jus cogens* was the first time codified by Article 53 of the Vienna Convention on the Law of Treaties of 1969 as a category of peremptory norms “*accepted and recognized by the international community of States as a whole... from which no derogation is permitted.*” The implications for recognizing certain international crimes as part of *jus cogens* consequently carries the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universal jurisdiction over such crimes, irrespective of the venue, the actor, the category of the victim or the context of their occurrence.³⁷

The UN Security Council had concluded in the resolutions 1373 that “*terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and any acts of terrorism are criminal and unjustifiable.*”

In this sense, just as with other norms belonging to the category of *jus cogens* like slavery, war crimes, crimes against humanity, aggression, genocide, systematic racial discrimination, and torture, the prohibition against terrorism arises as a protection of human dignity. By virtue of this quality of the norm, the prohibition against terrorism in international law satisfies the formal sources indicated in Article 53 of the Vienna Convention.

36 “Country Reports on Terrorism 2014”, *United States Department of State*, Publication Bureau of Counterterrorism, p. 365-366, <https://www.state.gov/j/ct/rls/crt/2014/>, (Date of Accession: 19.10.2017).

37 Thomas Weatherall, “The Status of the Prohibition of Terrorism in International Law: Recent Developments”, *Georgetown Journal of International Law*, Volume: 46, No: 2, 2015, p. 615.

The implications for recognizing certain international crimes as part of *jus cogens* consequently carries the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universal jurisdiction over such crimes, irrespective of the venue, the actor, the category of the victim or the context of their occurrence. Furthermore, it could be argued that the obligation *erga omnes* is placed upon the states.³⁸

The concept of *erga omnes* represents a common legal interest in the performance of certain obligations as indicated before the ILC in 1996, “it was clear that there were *jus cogens* rules which, though not themselves *erga omnes*, had *erga omnes* effects,” and notwithstanding this distinction, obligations *erga omnes* are “virtually coextensive” with peremptory norms. The performance of such obligations owed to the international community arising from *jus cogens* is articulated to require States to prevent and punish violations of peremptory norms such as terrorism.³⁹

Conclusion

The concept of UN Global Counter-Terrorism was based on the principle that *combat terrorism* is a *jus cogens* norm. *Jus cogens* rules which, though not themselves *erga omnes*, had *erga omnes* effects, and notwithstanding this distinction, obligations *erga omnes* are obligations owed to the international community arising from *jus cogens* is articulated to require States to prevent and punish terrorism. By virtue of this quality of the norm, the prohibition against terrorism in international law satisfies the formal sources indicated in Article 53 of the Vienna Convention.

The UN Security Council had concluded in the resolutions 1373 that “*terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and any acts of terrorism are criminal and unjustifiable.*” The prohibition against terrorism arises

38 M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Ardsley, New York 2003, p. 63.

39 Weatherall, *op cit*, p. 619.

as a protection of human dignity. Any person who unlawfully and intentionally involved in any terrorist organization is under individual criminal responsibility for crimes of the terrorist organization. The individual criminal responsibility includes any person, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out by the terrorist organization by the General Assembly resolution 1999 “*the International Convention for the Suppression of the Financing of Terrorism*”.

UN Security Council resolution 1373 also address terrorism as a *delicta juris gentium* crime. When there is a *delicta juris gentium* crime, the principle *aut dedere aut judicare* on international responsibility related to combat terrorism comes in force. Support for victims of acts of terrorism is specifically highlighted under Pillars I and IV of the UN Global Counter-Terrorism Strategy.

OHCHR is under the direction and authority of HRC. OHCHR has an obligation to make opposition to any mandate given to him by HRC if, in the mandate, there exists a breach of a peremptory norm of international law. The obligation to make opposition is codified by the article 41 of “*the Draft Articles on the Responsibility of International Organizations*”. Unfortunately, OHCHR and OISL changed the definition of the past armed conflict in Sri Lanka from *combat terrorism* to *internal war* without any legal explanation.

When an armed conflict is defined as an *internal war*, the conflict was limited to the territory and the period of the armed conflict.

Combat terrorism means to prevent and punish acts of terrorism. HRC mandate to OHCHR for Sri Lanka with the wording *combat terrorism* means to prevent and punish acts of terrorism, not limited to the period of the active fighting in the territory of Sri Lanka. HRC in resolution 25/1, indicated UN Global Counter-Terrorism Strategy by defining *combat terrorism* in his mandate to OHCHR.

OISL should have prepared the report on the principals of UN

Global Counter-Terrorism Strategy as an obligation. The footnote 68 for the paragraph 154 of OISL report, in fact, well described what should be written within the UN Global Counter-Terrorism Strategy in the Conclusions and Recommendations part as:

“OISL did not focus on the issues of illegal acquisition of military equipment, extortion or other such matters, which should be the subject of separate inquiries in the respective countries.”

OISL report as well OHCHR web page by defining LTTE as a non-state armed group and past armed conflict as an *internal war* should be treated as an internationally wrongful act of OHCHR. The report, in fact, gives an illegal amnesty to international terrorism. As *combat terrorism* has an *erga omnes* obligation to the international community as a whole, any state or any individual has a right to make opposition to the OISL report.

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