

GIVING IMPUNITY FOR THE PERPETRATORS OF THE FINANCING OF TERRORISM IN SRI LANKA BY THE UNITED NATIONS HUMAN RIGHTS COUNCIL RESOLUTION 30/1*

Birleşmiş Milletler İnsan Hakları Konseyi'nin 30/1 Sayılı Kararı ile Sri Lanka'da Terörizmin Finansmanı Faillerinin Cezasız Kalması

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Abstract

By his resolution 30/1, the United Nations Human Rights Council in 2015, asked Sri Lanka, to include Commonwealth and other foreign judges, defense lawyers and authorized prosecutors and investigators in the judicial mechanism on allegations of violations and abuses of human rights and violations of international humanitarian law during the war on terrorism. However, the Human Rights Council did not ask for an international criminal investigation to the perpetrators of the financing terrorism in Sri Lanka which is an obligation by the UN Global Counter-Terrorism Strategy. In fact, the Human Rights Council by not asking an international criminal investigation for the finance of terrorism in Sri Lanka gave impunity for the perpetrators of the financing of terrorism.

Keywords: *Liberation Tigers of Tamil Eelam, Sri Lanka, Terrorism, Combat Terrorism, Impunity.*

Öz

Birleşmiş Milletler İnsan Hakları Konseyi'nin 2015 yılında ki ,30/1 sayılı kararı ile Sri Lanka'da yaşanan terror ile savaş sırasında yaşanan insan hakları ihlalleri ve ihlalleri ile ilgili iddialar hakkında ki yargı mekanizmasında Commonwealth ve diğer yabancı hakimler, savunma avukatları ve yetkili savcı ve araştırmacıları dahil edilmesini istemiştir. Ancak, İnsan Hakları Konseyi, BM Küresel Terörle Mücadele Stratejisi'nin bir yükümlülüğü olan Sri Lanka'daki terörünün finansmanı failleri için uluslararası bir ceza soruşturması istememiştir. İnsan Hakları Konseyi, Sri Lanka'daki terörizmin finansmanı için uluslararası bir soruşturma açmayı talep etmeyerek, Sri Lanka' da ki terörizmin finansmanının faillerinin cezasız kalmasını sebep olmuştur.

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

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Introduction

By the resolution 25/1 of 27 March 2014, “*Promoting reconciliation, accountability and human rights in Sri Lanka*”, the United Nations Human Rights Council (UNHRC) 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 to establish the facts and circumstances of serious violations and abuses of human rights and related crimes by both parties alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability.

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 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.

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, the Liberation Tigers of Tamil Eelam (LTTE) was defined as a non-state armed group (NSAG). In paragraph 154 of the OISL report, LTTE’s relation as a terrorist organization is mentioned as a point of view of some States but not as an OISL point of view. 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.”*

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 against the civilians and the non-combatants were not defined either as crimes against humanity nor acts of terrorism. OISL refrained to designate LTTE as a terrorist organization or a NSAG designated as terrorist or a NSAG designated as terrorist.

Even though, in paragraph 20 of the recommendations part of the OISL report, it is asked for an ad hoc hybrid court, integrating international judges, prosecutors, lawyers and investigators, mandated to try war crimes and crimes against humanity, including sexual crimes and crimes committed against children, with its own independent investigative and prosecuting organ, defence office, and witness and victims protection programme, justice for the victims of terrorism was not mentioned in the recommendations part, based on the United Nations Global Counter-Terrorism Strategy (UNGCTS) which is an obligation to be followed by the OHCHR.

By the operative paragraph 6 of the resolution 30/1 of the HRC on October 2015, “Promoting reconciliation, accountability and human rights in Sri Lanka”, based on the recommendations of the OISL report paragraph 20, HRC calls upon the importance of participation in a Sri Lankan judicial mechanism the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators, but not asked for an international investigation of the finance of LTTE which is in fact an obligation according to the UNGCTS.

HRC by the resolution 30/1 disregarded his own obligation of the justice for the victims of terrorism by the UNGCTS as well.

The difference of legal definition of the past-armed conflict in Sri Lanka by HRC and OISL report created impunity to the members of LTTE whom should be subject to criminal investigation for individual indirect responsibility for the financing of terrorism under the UNGCTS in the world.

International Humanitarian Law and Terrorism

International Humanitarian Law (IHL) is the body of international law applicable when an armed violence reaches the level of an armed conflict, whether international or non-international. The IHL treaties are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, but there are a range of other IHL treaties aimed at reducing human sufferings in times of war, such as the 1997 Ottawa Convention on landmines. IHL sometimes also called the Law of Armed Conflict or the Law of War – does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered as “terrorist” if they were committed in peacetime.¹

Definition of the Acts of Terrorism in International Humanitarian Law

A crucial difference is that, in legal terms, armed conflict is a

¹ “The Applicability of IHL to Terrorism and Counterterrorism”, ICRC, <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>, (Date of Accession: 30.03.2018).

situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as “terrorist” is always unlawful. The ultimate aim of an armed conflict is to prevail over the enemy’s armed forces. For this reason, the parties to a conflict are permitted, or at least are not prohibited from, attacking each other’s military objectives or individuals not entitled to protection against direct attacks. Violence directed at those targets is not prohibited as a matter of IHL, regardless of whether it is inflicted by a State or a non-State party. Acts of violence directed against civilians and civilian objects are, by contrast, unlawful, as one of the main purposes of IHL is to spare them from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence.²

IHL does not provide a definition of terrorism but prohibits most acts committed in armed conflict that would commonly be considered “terrorist”. It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. This principle of “*distinction*” is the cornerstone of IHL. Many IHL rules specifically aimed at protecting civilians – such as the prohibition against deliberate or direct attacks against civilians and civilian objects, the prohibition against indiscriminate attacks or the prohibition against the use of “human shields” are derived from it. IHL also prohibits hostage taking. There is no legal significance in describing deliberate acts of violence against civilians or civilian objects in situations of armed conflict as ‘terrorist’ because such acts already constitute serious violations of IHL.

Moreover, IHL specifically prohibits “measures” of terrorism and “*acts of terrorism*.” 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

2 “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, ICRC, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>, (Date of Accession: 30.03.2018).

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: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” (see Article 51, paragraph 2, of Additional Protocol I; Article 13, paragraph 2, of Additional Protocol II). These provisions do not prohibit lawful attacks on military targets, which may spread fear among civilians, but they outlaw attacks that specifically aim to terrorize civilians; for example, conducting shelling or sniping campaigns against civilians in urban areas.³

As IHL applies only during armed conflict, it does not regulate terrorist acts committed in peacetime. Such acts are however subject to law, i.e. domestic and international law, in particular, human rights law. Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict must be addressed by means of domestic or international law enforcement agencies. States can take several measures to prevent or suppress terrorist acts, such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, financial investigations, the freezing of assets or diplomatic and economic pressure on States accused of aiding suspected terrorists.⁴

In the Article 2 of the Statue of the International Criminal Tribunal for the Former Yugoslavia defines grave breaches of the Geneva Conventions namely the following acts: (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) willfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful

3 “What Does IHL Say About Terrorism?”, *ICRC*, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>, (Date of Accession: 30.03.2018).

4 “International Humanitarian Law and Terrorism: Questions and Answers”, *ICRC*, <https://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>, (Date of Accession: 30.03.2018).

deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.⁵

Applicability of International Humanitarian Law in a Non-International-Armed Conflict

The applicability of IHL is triggered by the existence of an armed conflict, the determination of which depends solely on an assessment of the facts on the ground. This view, shared by the ICRC, is reflected in decisions of international judicial bodies, in military manuals, and is widely supported in the academic literature. Whether an armed conflict exists, and whether by extension IHL is applicable, is assessed based on the fulfillment of the criteria for armed conflict found in the relevant provisions of IHL, notably Articles 2 and 3 common to the 1949 Geneva Conventions.⁶

End of a Non-International Armed Conflict

The implication of the insistence of the ICTY in Tadić case that IHL applies “*in the case of internal conflicts, until a peaceful settlement is achieved*”. This makes perfect sense from the standpoint of an international criminal tribunal, which wants to stabilize its jurisdiction and bring to account as many perpetrators of war crimes as possible. Thus, for instance, with respect to the NIAC between Serbia and the Kosovo Liberation Army in 1998, the first ICTY Trial Chamber judgment in the Haradinaj case found that “*since according to the Tadić test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period, and a NIAC.*” For an example of a NIAC ending through the complete defeat of an adversary, we need only look at the Sri Lanka conflict.⁷

5 “Updated Statute of the International Criminal Tribunal for the Former Yugoslavia”, ICTY, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, (Date of Accession: 30.03.2018).

6 “The Applicability of IHL to Terrorism and Counterterrorism”, ICRC, <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>, (Date of Accession: 30.03.2018).

7 Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, 2014, Vol: 96, No: 893, p. 180.

The Geographic Reach of International Humanitarian Law Applicability

IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of its territorial scope of applicability by specifying certain acts as prohibited “*at any time and in any place whatsoever.*” International jurisprudence has, in this vein, explicitly confirmed “there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.”⁸

Rights of the Victims of Terrorism

The “*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,*” approved by the General Assembly in November 1985,⁹ constitutes the “*soft law*”¹⁰ basis for the international standards concerning the treatment of victims, and is “*designed to assist governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power.*”¹¹ This Declaration recommends measures to be taken at the national, regional and international levels to secure access to justice and fair treatment and to ensure restitution, compensation, and social assistance for victims of crime. It further outlines the main steps to prevent victimization linked to abuse of power and to provide remedies for the victims of such offenses.¹²

8 “*The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Judgment*”, Case No: IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002, para. 57, www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf, (Date of Accession: 30.03.2018).

9 “*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*”, *United Nations General Assembly*, No: A/RES/40/34, <http://www.un.org/documents/ga/res/40/a40r034.htm>, (Date of Accession: 30.03.2018).

10 The expression is used in international law to identify instruments that contain provisions of a non-binding legal nature, with the character of recommendations.

11 United Nations General Assembly, *op. cit.*

12 United Nations Office on Drugs and Crime, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, New York 2011, p. 4.

The Economic and Social Council of the United Nations (ECOSOC) has adopted two resolutions to encourage the implementation of the Declaration.¹³ These resolutions provide guidance to countries on necessary measures to ensure full compliance with the Declaration, such as the review of legislation, training for criminal justice officials, the establishment of victims' assistance services, research activities, and exchange of information. In order to support ECOSOC's resolutions, United Nations Office for Drug Control and Crime Prevention (UNODC) has published a guide¹⁴ for policymakers on implementing the Basic Principles for Victims.¹⁵

The General Assembly of UN approved in December 2005 "*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*".¹⁶

The UNGCTS adopted in September 2006, 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.

Support for victims of acts of terrorism is specifically highlighted under Pillars I and IV. The dehumanization of victims of acts of terrorism is covered in Pillar I. It encourages the Member

13 ECOSOC resolution 1989/57 of 24 May 1989 and ECOSOC resolution 1998/21 of 28 July 1998, including Annexed Plan of Action, for the implementation of the Declaration of Basic Principles of Justice.

14 "Guide for Policy-makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999)", *United Nations Office for Drug Control and Crime Prevention*, https://www.unodc.org/pdf/criminal_justice/UNODC_Guide_for_Policy_Makers_Victims_of_Crime_and_Abuse_of_Power.pdf, (Date of Accession: 30.03.2018).

15 United Nations Office for Drug Control and Crime Prevention, *op. cit.*, p. 5.

16 United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Repatriation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law*, No: A/RES/60/147.

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.¹⁷

UNGCTS has laid the foundation for the United Nation's work on victims of terrorism. Victims of terrorism issues are addressed under Pillar I and Pillar IV of the Strategy. These strive to “*promote international solidarity in support of victims*”, stress “*the need to promote and protect the rights of victims of terrorism*” and seek to address the “*dehumanization of victims of terrorism*” by promoting “*solidarity for victims of terrorism and assistance for victims and their families and facilitate the normalization of their lives.*”¹⁸

United Nations Global Counter-Terrorism Strategy

The Security Council and the General Assembly have been the two principal UN organs creating institutions with mandates affecting virtually all Member States to address diverse aspects of global terrorism. The Security Council has been seized with the emerging terrorist problem for many years, adopting numerous resolutions that urge States to implement sanctions regimes and counter-terrorism measures in a manner consistent with the rule of law and in conformity with international human rights, refugee and humanitarian law. It had started building counter-terrorism architecture in response to Al-Qaeda's simultaneous attacks on two American embassies in 1998 by creating the Analytical Support and Sanctions Monitoring Team to report to a Sanctions Committee of the Council in 1999. After 9/11, the Security Council reacted forcefully and adopted a sweeping and extraordinary resolution, 1373, to require the Member States to take a multitude of steps to protect themselves against terrorist acts and to report to a new Counter-Terrorism Committee. In 2004, it became apparent that independent expert staff was needed to support the work of

¹⁷ United Nations Office on Drugs and Crime, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, New York 2011, p. 10.

¹⁸ “Victims of Terrorism Support Portal”, *United Nations* <https://www.un.org/victimsofterrorism/en/about>, (Date of Accession: 30.03.2018).

that Committee, leading to the creation of the Counter-Terrorism Committee Executive Directorate (CTED) in 2004. Also, in that year, the Security Council took an additional step by adopting resolution 1540 to create a Committee of the Council and a Group of Experts to prevent weapons of mass destruction from getting in the hands of non-state actors.

Three Security Council bodies were given mandates to help Member States implement the provisions of these resolutions (1267, 1373 and 1540). The Monitoring Team evaluates terrorist threats and assesses compliance with sanctions against named organizations and individuals. CTED assesses the capacities of Member States to respond to terrorist threats, makes recommendations to address shortfalls and monitors regional and global terrorist trends and emerging issues. Finally, the 1540 Committee Group of Experts works with the Member States to curb the proliferation of nuclear, chemical, and biological weapons by non-state actors.¹⁹

The UNGCTS intended as an “all-encompassing counter-terrorism instrument,” this resolution called for a wide range of activities (many of which were repeated from Security Council resolutions) as part of a larger strategy to combat terrorism. To ensure a systemic and cohesive UN effort to help Member States implement the Global Strategy, the Secretary-General, established the Counter-Terrorism Implementation Task Force (CTITF), currently composed of 38 entities from within and outside the UN system, which engage in multilateral counter-terrorism efforts and which coalesce around 12 counter-terrorism thematic Working Groups. These Working Groups reflect trends in terrorism as well as UN programmatic responses, and they bring stronger cohesion to international counter-terrorism activities implementing the Strategy. The CTITF and its Working Groups are supported by the CTITF Office, which also supports the UN Counter-Terrorism Centre (UNCCT), created in 2011 with extra-budgetary funds from

19 Hassan O. Baage-Dr. Howard Stoffer, “Strengthening the United Nations’ Strategic Approach to Countering Terrorism”, *ICCT*, <https://icct.nl/publication/strengthening-the-united-nations-strategic-approach-to-countering-terrorism/>, (Date of Accession: 30.03.2018).

multiple Member State sources to provide additional counter-terrorism programming and capacity-building support to the Member States seeking to implement the Global Strategy.²⁰

The UN Office of Counter-Terrorism was established through the adoption of General Assembly resolution 71/291 on 15 June 2017. As suggested by Secretary-General in his report (A/71/858) on *the Capability of the UN to Assist Member States in implementing the UNGCTS*, the Counter-Terrorism Implementation Task Force and the UN Counter-Terrorism Centre, initially established in the Department of Political Affairs were moved into a new Office of Counter-Terrorism headed by an Under-Secretary-General.

The Office of Counter-Terrorism has five main functions: (a) provide leadership on the General Assembly counter-terrorism mandates entrusted to the Secretary-General from across the United Nations system; (b) enhance coordination and coherence across the 38 Counter-Terrorism Implementation Task Force entities to ensure the balanced implementation of the four pillars of the; UNGCTS (c) strengthen the delivery of United Nations counter-terrorism capacity-building assistance to Member States; (d) improve visibility, advocacy and resource mobilization for United Nations counter-terrorism efforts; and (e) ensure that due priority is given to counterterrorism across the United Nations system and that the important work on preventing violent extremism is firmly rooted in the Strategy.²¹

Finance of Terrorism and United Nations Global Counter-Terrorism Strategy

Terrorist financing involves the solicitation, collection or provision of funds with the intention that they may be used to support terrorist acts or organizations. Funds may stem from both legal

²⁰ *Ibid.*

²¹ *United Nations Office of Counter-Terrorism*, <http://www.un.org/en/counterterrorism/>, (Date of Accession: 30.03.2018).

and illicit sources.²²

International efforts to curb money-laundering and the financing of terrorism are the reflection of a strategy aimed at, on the one hand, attacking the economic power of criminal or terrorist organizations and individuals in order to weaken them by preventing their benefiting from, or making use of, illicit proceeds and, on the other hand, at forestalling the nefarious effects of the criminal economy and of terrorism on the legal economy. The 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is the first international legal instrument to embody the money-laundering aspect of this new strategy and is also the first international convention which criminalizes money-laundering.²³

When the criminalization of terrorism financing was first addressed in an international instrument through the International Convention for the Suppression of the Financing of Terrorism in 1999, drafters were faced with the challenge of establishing a regime that would criminalize the funding of an act that had not been previously defined in a comprehensive manner. Making the financing of terrorism a legal offense separate from the actual terrorism act itself gives authorities much greater powers to prevent terrorism.²⁴ Although the 1999 International Convention

22 "Anti-Money laundering/Combating the Financing of Terrorism", *IMF* <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm>, (Date of Accession: 30.03.2018). The European Union gives a definition in Article 1 of the Third Directive on money laundering and terrorist financing (ML/TF). It defines terrorist financing as "the provision or collection of funds, by any means, directly or indirectly, 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 any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism", [http://essay.utwente.nl/66704/1/Bachelor%20Thesis%20Inca%20Bloemkolk%20\(s0145807\).pdf](http://essay.utwente.nl/66704/1/Bachelor%20Thesis%20Inca%20Bloemkolk%20(s0145807).pdf), (Date of Accession: 30.03.2018).

23 "UN Instruments and Other Relevant International Standards on Money-Laundering and Terrorist Financing", *United Nations Office on Drugs and Crime*, <https://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html>, (Date of Accession: 30.03.2018).

24 "Tackling the Financing of Terrorism", *United Nations Counter-Terrorism Implementation Task Force*, http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf, (Date of Accession: 30.03.2018).

for the Suppression of Terrorist Financing was in place, placing counter terrorist financing at the head of the UN's approach to tackling terrorism, it was only ratified by four countries.²⁵

UN Security Council Resolution 1373 of 21 September 2001 amounted to an obligation to apply the operative parts of the UN International Convention for the Suppression of the Financing of Terrorism. Under Resolution 1373, which reproduces the terms of the 1999 Terrorist Financing Convention, terrorism financing is defined as “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.”²⁶ Resolution 1373 also provided for the setting up of the Counter-Terrorism Committee(CTC) to monitor the implementation of the Resolution by the states. In April 2002, the International Convention for the Suppression of the Financing of Terrorism became effective, giving the measures contained in Resolution 1373 a permanent existence. By the end of June 2006, the Convention had 154 signatories highlighting the increased political will to counter terrorist financing. This formed the key legal framework in combatting terrorist financing, requiring signatories to adopt domestic legislation to criminalise and punish terrorist financing, licence or register all money transmitting services, detect and control the physical cross-border transportation of currency and negotiable instruments, and develop and implement internal controls to prevent financial institutions from being used to transfer funds to terrorists.²⁷

25 Olivia Bosch-Peter van Ham, *Global Non-proliferation and Counter-Terrorism: The Impact of UNSCR 1540*, Baltimore Royal Institute of International Affairs, Brooking Institution Press, Washington 2007, p. 30.

26 Dr. Bérénice Boutin, “Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters?”, *ICCT*, <https://icct.nl/publication/countering-the-financing-of-terrorism-gone-wrong-prosecuting-the-parents-of-foreign-terrorist-fighters/>, (Date of Accession: 30.03.2018).

27 Matthew Robert Shillito, “Countering Terrorist Financing via Non-Profit Organisations: Assessing why few States Comply with the International Recommendations”, *Nonprofit Policy Forum*, Vol: 6, No: 3, p. 330.

The UNGCTS in Section II, paragraph 10 asked member states: *“to encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them;”* and in Section III, paragraph 8 asked members states: *“To encourage the International Monetary Fund, the World Bank, the UN Office on Drugs and Crime and the International Criminal Police Organization to enhance cooperation with States to help them to comply fully with international norms and obligations to combat money-laundering and the financing of terrorism.”*²⁸

Individual Criminal Responsibility for the Finance of Terrorism

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

UN Security Council Resolution 1373 in the operative paragraph of the Article 1 (b) individual criminal responsibility is defined as; *“Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with*

²⁸ “Countering the Financing of Terrorism”, *United Nations Office of Counter-Terrorism*, <https://www.un.org/counterterrorism/ctif/en/countering-financing-terrorism>, (Date of Accession: 30.03.2018).

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; Knowledge is defined as: A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events”.

In the operative paragraph 4, Security Council identifies the connection between international terrorism and transnational organized crime as “ *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, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;*”

Ending of Impunity for the Perpetrators of Financing Terrorism

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: “ *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.*”²⁹

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*

²⁹ 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: 30.03.2018).

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 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 including the perpetrators of financing terrorism.

International Organizations

Traditionally, states were seen as the only subjects of international law. As the Permanent Court of International Justice (PCIJ) affirmed in the Lotus case¹⁶ in 1927; *“International law governs the relations between independent States [...] in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”*³⁰

30 “The Case of SS Lotus Permanent Court of Justice Series A”, *Publications of The Permanent Court Of International Justice*, No: 9, 1927, p. 18, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf, (Date of Accession: 30.03.2018).

International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions (“*principle of specialty*”).³¹

In its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt the Court stated: “*International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.*”³²

By a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization officially communicated to the Registrar a decision taken by the World Health Assembly to submit to the Court the following question, set forth in resolution WHA46.40 adopted on 14 May 1993; “*In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution ?*”³³

The Court found that although according to its Constitution the WHO is authorized to deal with the health effects of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court in the present case related not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects.

31 “United Nations International Law Commission Draft Articles on the Responsibility of International Organizations With Commentaries 2011”, *ILC*, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf, (Date of Accession: 30.03.2018).

32 “Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion of 20 December 1980”, *International Court of Justice*, p. 89-90, <http://www.icj-cij.org/files/case-related/65/065-19801220-ADV-01-00-EN.pdf>, (Date of Accession: 30.03.2018).

33 “Legality of the Use by a State of Nuclear Weapons in Armed Conflict”, *ICJ*, <http://www.icj-cij.org/en/case/93>, (Date of Accession: 30.03.2018).

The Court further pointed out that international organizations did not, like States, possess a general competence, but were governed by the “*principle of speciality*”, that is to say, they were invested by the States which created them with powers, the limits of which were a function of the common interests whose promotion those States entrusted to them. Besides, the WHO was an international organization of a particular kind “specialized agency” forming part of a system based on the Charter of the United Nations, which was designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The Court, therefore, concluded that the responsibilities of the WHO was necessarily restricted to the sphere of “public health” and could not encroach on the responsibilities of other parts of the United Nations system. There was no doubt that questions concerning the use of force, the regulation of armaments and disarmament were within the competence of the United Nations and lay outside that of the specialized agencies. The Court accordingly found that the request for an advisory opinion submitted by the WHO did not relate to a question arising “*within the scope of the activities*” of that organization.³⁴

The mandate of Human Rights Council

The HRC Council is the principal intergovernmental body within the UN system responsible for strengthening the promotion and protection of human rights around the globe, and for addressing and taking action on human rights violations around the globe. Established by the UN General Assembly resolution 60/251 15 March 2006 in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly.³⁵

In the operative paragraphs of the mandate of HRC, in Article 2, it is specified that “*the Council shall be responsible for promoting*

³⁴ *Ibid.*

³⁵ “What is the Human Rights Council?”, *OHCHR*, http://www.ohchr.org/Documents/HRBodies/HRCouncil/HRC_booklet_En.pdf, (Date of Accession: 30.03.2018).

universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”; in Article 3, gives responsibility for the decisions of the HRC within the UN system as “the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;”, and in the Article 4, principles of the HRC is codified as “the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.”

The mandate of Office of the High Commissioner for Human Rights

OHCHR is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the UN and in international human rights laws and treaties. OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights and subsequent human rights instruments, the Vienna Declaration and Programme of Action the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the UN in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by UN agencies.³⁶

³⁶ “United Nations Human Rights Office of the High Commissioner Mandate”, *OHCHR*, <http://www.ohchr.org/EN/AboutUs/Pages/Mandate.aspx>, (Date of Accession: 30.03.2018).

The CTITF consists of 38 international entities and OHCHR is one of them for the implementation of the United Nations Global Counter-Terrorism Strategy.³⁷

Conclusion

The HRC Council is the principal intergovernmental body for human rights within the UN system, established by the General Assembly on the *principle of specialty*.

HRC is responsible for strengthening the promotion and protection of human rights around the globe, and for addressing and taking action on human rights violations around the globe. In the mandate of HRC, in Article 2, it is specified that “*the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner*”; in Article 3, gives responsibility for the decisions of the HRC within the UN system as “*the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.*”

HRC’s resolution 30/1 in 2015 was based on the legal ground of IHL that is Geneva Conventions but not on the legal ground of the UNGCTS as HRC is bound by under the mandate of General Assembly of UN. IHL is limited with time and the territory of the state in the armed conflict. By using the IHL, HRC limited himself only by the territory of Sri Lanka, the UNGCTS, does not limited with the territory of any state where a non-international armed conflict under the definition of combat terrorism takes place. The territory for the implementation of the UNGCTS is all the world.

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 system including legal punishment of the perpetrators of financing terrorism on victims based approach.

37 “Implementation Task Force”, *United Nations Office of the Counter-Terrorism*, <https://www.un.org/counterterrorism/ctitf/en/structure>, (Date of Accession: 30.03.2018).

Terrorism financing is defined as *“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.”*

International Convention for the Suppression of the Financing of Terrorism 1999, the term, “indirectly” is used for the individual criminal responsibility for the acts of terrorism.

The UNGCTS in Section II, paragraph 10 asked member states: *“to encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them;”* and in Section III, paragraph 8 asked members states: *“To encourage the International Monetary Fund, the World Bank, the United Nations Office on Drugs and Crime and the International Criminal Police Organization to enhance cooperation with States to help them to comply fully with international norms and obligations to combat money-laundering and the financing of terrorism.”* Implementation of the UNGCTS is an obligation to not only member states but mainly to the UN body system members, especially by the HRC.

HRC should have taken decision according to the UNGCTS not on IHL and should ask in his resolution for an international criminal investigation for the perpetrators for the financing of terrorism in Sri Lanka in the world as an obligation.

The resolution of HRC 30/1 can only be defined as the internationally wrongful act by not asking an international investigation for the perpetrators of financing terrorism which is the breach of the responsibility of implementing the UNGCTS.

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