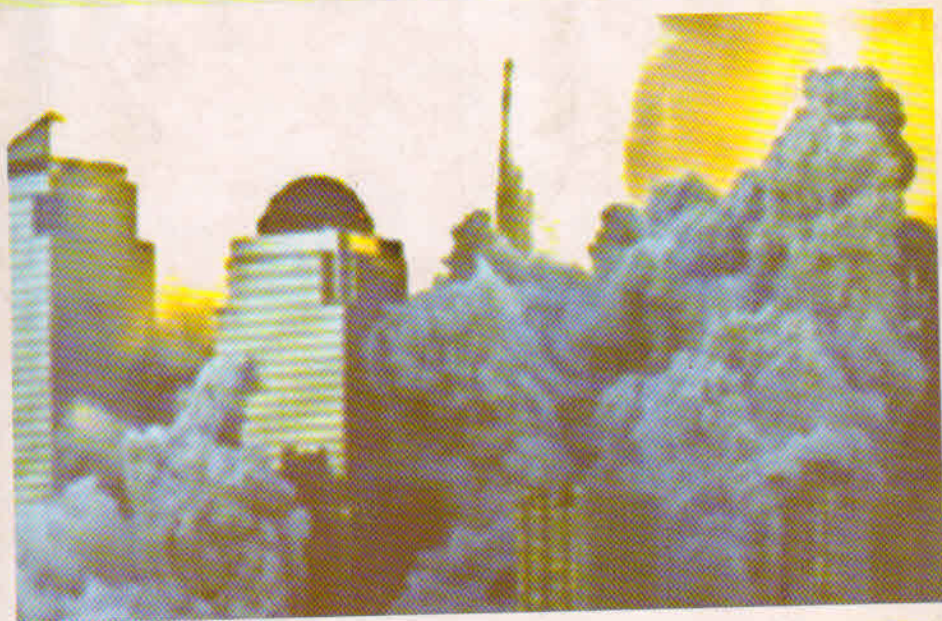


TERROURISM: USA & INDIA

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Chapter-13

TERRORISM AND INTERNATIONAL LAW: ROLE FOR INDIA AND THE UNITED STATES

T.S.N. Sastry

INTRODUCTION

Terrorism is not a new phenomenon in both domestic and international sphere. Since the dawn of civilization it has been used as a tool to achieve political ends. However, it has emerged as a global problem and a cause and concern of the international community only in the 20th century. More specifically it became a global problem since 1950's in spite of the efforts by various States and inter-governmental organizations. Today terrorism became a lethal weapon for various groups, individuals and States to use it indiscriminately to achieve their legal or illegal objects at any cost. In reality it is not fought to win a territory or to cause destabilization but to draw the attention of the whole world to them and to right an alleged wrong at the cost of peace and security of the international community and life and liberty of the individuals.

Of late, the activities of the terrorists have become aggressive and indiscriminate leading to bloodshed. On the one hand, especially in the post Cold War period, various groups, extremists, militant outfits, dissident and minority groups have been agitating for one reason or the other with violent means and methods. On the other hand, since Art. 2(4) of the Charter of the United Nations has prohibited the use of force by States in their relations with other States, several states started encouraging terrorists through proxy wars and supporting militant

outfits or fundamentalist groups in the name of religion. Today terrorism has assumed multi-dimensional proportion. With the encouragement of States, terrorists in the modern world became more ruthless and technically more efficient with the use of sophisticated weapons. Since the individual acts have no direct relationship with international law, the greater advantage which terrorists have and will continue to have is virtually unlimited range of their targets because the terrorists can attack any thing, anywhere, any time and in any fashion. Almost all the States on the globe became victims of terrorists in one way or the other.

Today terrorism is a cause of concern for every State. Because the activities and the targets of the modern era terrorism is civilians and the effort is to create fear in the minds of the people to achieve their objectives. Further, the nexus between terrorists, drug traffickers, paramilitary gangs and various other groups that have been taking place is a cause of concern for many States. Among the various terrorist activities and attacks, the most inhuman and barbaric attack to destabilize the national and global economy is the attack of September 11, 2001, against the World Trade Centre in New York and Pentagon in Washington D.C., USA is highly condemnable and the worst ever attack in the annals of international relations. Further the attack on the Indian Parliament on December 13, 2001 proves the point beyond any doubt that the merchants of death will not restrict themselves to hard and soft targets (i.e., hijacking and civilians etc.) but will aim at destabilizing the roots of foundations of a society. This follows their vicious attacks later on the American Consulate in Calcutta and the killing of the newspaper reporter of the US in Pakistan in 2002 seems to axe the democracies in the world and shake the confidence of the people of the world community in the work and measures initiated by the UN in promoting peace and security on the globe.

GENESIS AND CONCEPT OF TERRORISM

The word terrorism was coined in the guillotine days of the French Revolution, though the practice of it is much older.¹ The concept of terrorism dates back to the bloody assassinations of the ancient Greeks, Romans, Hindus and to barbaric customs such as suspending people over fires for not paying their taxes or heeding message of the rulers etc.² In the beginning it was used as a tool to attack or stop barbaric governance within a State. Accordingly the views of the writers

also differed with respect to the activities of the people in each period and their perceptions confined only to defend the rights of the people against the arbitrary governance of the monarchies.² However, the philosophical and ideological difference of various movements and the writers in the 18th and 19th centuries and the widespread patronization by States and various groups for wide spread reasons in the 20th century it became a global problem. The events of the Second World War, the tactics of Cold War politics, made it an enduring problem of the international community. Accordingly, the views about terrorism and types of it varies in the contemporary era.³ Among the various types of terrorism, today international terrorism coupled with religious extremism became an important cause of concern for the international community.⁴ In the contemporary era, terrorism has become a mode of political expression coupled with extremist views of some groups to settle their scores with a State or government to achieve their legal or illegal motives. Consequently, terrorism has accepted and tolerated to certain extent and become more organized and institutionalized in the present millennium.⁵

DEFINITION OF INTERNATIONAL TERRORISM

Although there is a wide spread agreement among all the States to combat terrorism internationally, no two nations can agree on who is a terrorist and what constitutes terrorism. Because of the difference of opinion that persists among nation-states to draw a clear cut line of demarcation between a terrorist and a freedom fighter making it difficult to arrive at a workable definition of terrorism.⁶

In spite of the disagreement that persists among the States to arrive at a legal or universally accepted definition of terrorism both domestic and international terrorism can be broadly specified as "criminal acts directed against a State and intended or calculated to create a State of terror in the minds of particular persons, or groups of persons, or the general public."⁷ According to the Adhoc Committee on Terrorism of the UN: "Any act of violence endangering or taking innocent human lives or jeopardizing their fundamental freedoms and affecting more than one State, such act being committed as a form of coercion to secure some specific end."⁸

Taking into consideration of the legal criteria for the distinction between terrorism and people's struggle for liberation, the Afro-Asian Legal Consulate Committee (AALCC) defined it as "violent act or acts or attempts of such acts, perpetrated by States or individuals against innocent civilians or nationals of States not involved in an on-going conflict, calculated to cause fear and panic to the general public, and intended to coerce a State or an institution to conform to a course of conduct dictated by political considerations of the perpetrators."⁹

According to the Draft document submitted by India to the UN on a Comprehensive Convention on International Terrorism in October 2000, "Any person by any means, unlawfully and intentionally, does an act intended to cause: (a) death or serious bodily injury to any person; or (b) serious damage to a state or government facility, a public transportation system or infrastructure facility with the intent to cause extensive destruction of such place, facility or system, or where such destruction results or is likely to result in a major economic loss; when the purpose of such act by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act; and, any person participate as an accomplice in an offence and organizes, directs or instigates others, aids abets, facilitates or counsels the commission of an offence; and or in any other way contributes through a group or an organization with a knowledge to commit criminal activity."¹⁰

Though there exist a number of definitions on terrorism in national and international perspectives, the few definitions specified above, certainly reflect the principal elements of international terrorism. Accordingly, international terrorism can be stated or defined as the acts of any individual or a group or an organization or a rogue state directed at a particular state, or an organization of international stature or the civilians of any state, or to attack one or more states at a time or at different intervals to induce fear into the minds of the people of the world or any act of violence containing international dimensions or consequences of it reflect on the relations of the national-states.

CHALLENGE TO INTERNATIONAL JUSTICE SYSTEM

Imagine Osama bin Laden following Slobodan Milosevic into the dock in The Hague to Answer for *crimes against humanity*.

The prospect might be logical but the reality is that society's fledgling system of international justice is not yet equipped to deal with the rise of global terrorism.

If the September 11 assaults on the United States jolted institutions across the world, they did not spare notions of international criminal law geared to dealing with conflicts in and among States.

Antonio Cassese, professor of law at Florence University and the first president of the international crimes tribunal for the ex-Yugoslavia, says the impact of the attacks on legal thinking has been "shattering."

"It is subverting some important legal categories, thereby imposing the need to rethink them, on the one hand, and to lay emphasis on general principles on the other", he wrote in the *European Journal of International Law*. A sharp debate has been raging for months over how to classify terrorist attacks, determine what are appropriate responses by victimized nations and bring a shadowy, elusive culprit to justice.

Although the effort to combat terrorism is embodied in several treaties and two UN resolutions adopted in the wake of September 11, there is no world tribunal currently empowered to try terrorist cases. Some say they could be brought before the International Criminal Court (ICC), which is expected to be operational in 2002. But the US and other officials have expressed reservations. They fear the proposed charge of *crimes against humanity* may not be well defined and the proceedings could politicize the court. In any case, many argue, national courts do the job more efficiently.

INTERNATIONAL LAW AND TERRORISM

It is true that international law is a soft law compared to that of state law. It is also true that international law does not address acts of individual terrorists or there is no concept of state terrorism, since a state cannot be punished.¹¹ However, various provisions of it certainly address the activities of the States that are implicated in terrorist activities. Further, under customary international law it is the responsibility of each state not to afford its territory for the use of terrorists and is obliged to prevent such acts directed against any other State or its diplomatic agents or nationals or property.

Considering the customary principles of international law and the provisions of the Charter of the UN especially Art. 2 (4) and the provisions of human rights Covenants and humanitarian norms, the international organization had adopted a number of conventions dealing with international terrorism from the days of the League of Nations.¹² Among the various conventions a majority of them deals with terrorism in the air. By and large all of them aim at promoting concrete measures to suppress and punish acts of terrorism which are inconsistent with the principles of international law.

The rules which are laid down by the conventions on various aspects can be classified such as: (1) the criminalization of unlawful seizure of aircraft and ships as well as physical attacks upon them; (2) the prevention and punishment of crimes against internationally protected persons; (3) the taking of hostages; (4) the use of certain substances or explosive devices for terrorist purposes; and (5) financing terrorism in any manner. Apart from the international conventions, various regional organizations like the European Union, Organization of American States, African Union and SAARC etc., also adopted their own independent conventions prohibiting terrorism by all means in their respective regions.

In order to counter terrorism and to halt the activities of certain "rogue-States" the United Nations also condemn terrorism indirectly. Thus the 1970 Declaration on Friendly Relations¹³ stipulates that "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife, territorial acts directed at the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." Further, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States¹⁴ adopted in 1970 in accordance with the principles of the Charter of the United Nations, The International Law Commission Draft Code of Offences against Peace and Security of Mankind¹⁵ the General Assembly's resolution on the Definition of Aggression¹⁶ in 1974, the Declaration on Strengthening of International Security of Mankind¹⁷ also condemn terrorism in all its forms.

From 1972 onwards the General Assembly sought the co-operation of international community against terrorism as a separate item of agenda to deal with sternly. However, the politics of cold war hampered further steps by UN in effectively combating terrorism which

in turn led to several organizations and states to involve and support international terrorism freely. Later in the 1990's the Security Council and the General Assembly unequivocally condemned terrorism and adopted score of resolutions urging the states to extend their whole hearted support in tackling the international menace.

After the attack on the US on September 11, 2001, the Security Council condemned the attack and regarded it as a threat to international peace and security and urged the international community to redouble their efforts to prevent and suppress any further terrorist activities sternly. The General Assembly also condemned the barbaric acts of terrorists and called for international co-operation to bring justice.

Apart from these activities of the UN since long international humanitarian law clearly prohibits international terrorism. Starting from the Lieber Code of Conduct for Armies in the Fields of 1863, till the Geneva Conventions of 1944 and the Additional Protocols of 1997 and the Statute of the International Criminal Tribunals of Former Yugoslavia (ICTY) 1993, and, the 1994 International Criminal Tribunal for Rwanda (ICTR) and the 1998 Rome Statute of International Criminal Court, clearly specify that terrorism in any manner constitutes as a crime against humanity and forms part of international criminal law.

By now, if the states are serious and would have extended their co-operation and acted together to curb the menace of terrorism without pick and choose policy of punishing some states and leaving others or the terrorist groups of their choice all the instruments could have constituted certainly as valuable legal principles in eradicating the plaguing menace. The States should alone take the responsibility for their games with international political system and cannot blame law that it could not provide durable solutions. In fact it is the negligent attitude of the states finally reflected in the various resolutions and conventions adopted by the UN that national liberation movements can not be construed as terrorist groups, since their activities are part of a legitimate measures for self-defense against colonialism, even if their acts are beyond the jurisdictional limits of international law and organizations. As long as the divergence of opinion that persists among the players of international community about terrorists and their activities leading to one man's terrorist being perceived by another as a freedom fighter, the confusion is bound to be there with respect to the exactness of the definition and the acts of terrorists. For these

factors, one can not blame that international law and organizations are soft compared to that of the municipal system of administrative organs and law. The need of the hour is that the States should come forward to help international legal system and to find out ways and means in eradicating terrorism and the activities of terrorists without any inking towards one-upmanship. In this endeavor, India and the USA being the largest democracies and vital global players should take the lead to save the world from the brutal face of terrorism.

ROLE FOR INDIA AND THE US

From the very beginning, India has given high priority to the conclusion of effective international legal arrangements to combat terrorism. Being a peace loving country, India has signed almost all the conventions dealing with terrorism. In fact compared to the United States, India has been a long standing sufferer of terrorism. It has lost thousands of lives of its citizens, property worth crores of rupees and forced to pursue aggressive policies such as nuclear arms acquisition to counter the headache of its persistent threatening neighbor Pakistan involved in cross-border terrorism since its independence in 1947.

In its efforts to eradicate terrorism and to help the UN in strengthening its hands, in the year 2000, India introduced a Draft Convention on International Terrorism in the UN for its adoption. The definition of terrorism defined in the Indian Text under Art. 2 is comprehensive in its scope and it covers "any means" used in the commission of a terrorist offence. It is welcoming to note that along with some of the European States, the USA also extended its strong support to the draft convention and recommended serious measures. However, at the same time both have a difference of opinion with regard to certain areas like the IAEA Convention on terrorism etc., which they should avoid.

In fact in the last two years, especially after the Pokhran Tests the US started realising that India is an important player in the 21st century in shaping global politics. Hence it started sending signals that US wants to forget the hate and love relationship with India and ready to embrace it as a friend. Broadly speaking the USA is looking for India for two specific reasons. One is to unstable sheikdoms in West Asia and Pakistan, second, a shorter sea route to military bases in Japan. This is the time that India should use the situation, especially after the

terrorist attacks on the US, India should use the opportunity to wipe out terrorism in the country especially in Jammu and Kashmir and internationally as a persistent advocator of peace and security. In fact after attacks on the US, however big economically or militarily, it is clearly exposed that America also needs the support of various States in wiping out terrorism, and, it cannot fight it unilaterally. After the Afghanistan War, it is time that US has to work hard in wiping out terrorism and to curb especially the fundamentalist view point of *Jehad* and has to curb Pakistan with an iron hand and help India in restoring its dignity and self-determination in the eye of international law without any mincing of words. If it softens its stand towards Pakistan because of its joining hands with the allies in the war against terrorism, then there is no meaning that it wants the support of India in wiping out terrorism on the globe. If it wants India as a task master along with, it should first of all strengthen and support India's cause and concern in wiping out the problem in its own land rather than expecting help from India for its own purposes. Any differences should be settled peacefully, rather than deviating or departing its relationship with India. Being the largest democracies, having a common concern to wipe out terrorism, they should work together in adopting a comprehensive convention on terrorism and protect each other whenever it is required without any other considerations on whatever may be the issue.

Being the largest democracies and major players of the contemporary world scenario have an onerous task on their shoulders to find out ways and means to curb the menace of terrorism within the established norms of international law and human rights. Apart from various suggestions aired already the following steps need meritorious consideration in which both India and the USA could work together to achieve a terror free world.

1. Identifying the key elements such as definition, methods and means of terrorist activities and to work hard to convince other states in arriving at a comprehensive definition and to adopt a workable international convention.
2. All proposed measures and means to incorporate in a multilateral convention should be within the purview of International Law and Human Rights and Humanitarian norms and in accordance with the provisions of the Charter of the United Nations.

3. The Draft Convention already submitted by India to the UN has to be discussed and supported by the US without any deviations and propose any modifications that are necessary in strengthening the hands of United Nations.
4. Though it may be an extreme step both India and the US should join together to convince other States in fixing the responsibility on the States which aid and assist terrorism in any fashion and work together to fix appropriate measures for the breach of the provisions of the proposed convention which may include fixing compensation payable by such states or even resort to other punitive actions prescribed under international law to be implemented under the auspices of the United Nations.
5. Both should come together in extending their support and ratify the Statute of the International Criminal Court and assist it whole-heartedly in bridging the gaps that exist in the statute.
6. Both should take the lead in convincing other states to exclude the clause of political offences in various treaties to have an effective prosecution and punishment of terrorists.
7. Both having the concern for a terror free world and in the philosophy of promotion of peace and security in the world and having huge military capabilities should take steps to constitute an international police force under the UN auspices consisting of forces of all the States to detect the terrorist activities of various states and groups and to catch terrorists at the international level in handing over them either to the UN or to the International Criminal Court.

CONCLUSION

As discussed above, to end terrorism and to achieve the goals of peace and security through international law, it is left to states especially big players like India and the US to work out durable solutions under the various existing treaties, conventions, and declarations. Whenever, a state is attacked by terrorist organizations, each time a single state or group of states joining together in the name of alliance and declaring a war against such state to wipe out terrorism as in the case of Afghan war, it is better to evolve methods to fix responsibility

upon the rogue-states for their wrongful acts always. In fact, since the *Jehadi* fundamental forces attacked the US, it could muster the support of various states to declare a holy war against terrorism to wipe out *Taliban* and his supporters, but it may not be possible for all the states and even for the US to wage isolated wars on terrorism all the time.

It is high time that both the US and India should join together not only as victims of terrorist groups but as the partners of the global regime should evolve an integrated approach to deal with the sensitive issue very seriously and strengthen the corridors of international law by evolving an effective international criminal law. It is the duty of all the nation-states to extend their support to India and the US in making the world free from the menace of terrorism through durable mechanism which should justify in the eye of international legal system. Further, it is the moral duty of the comity of nations to oversee the various concrete manifestations, in its diverse applications, and in many degrees of intensity with which men in different places and conditions have abided by the legal system. This means they have to express their faith and belief in international law and extend their solidarity to it in eradicating the evil that is called "Terrorism."

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