

# TERRORISM-A CRITICAL STUDY UNDER INTERNATIONAL LAW

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## ABSTRACT

*The main purpose of this paper is to address few issues which are closely related to the concept of “terrorism” i.e. how the problem of terrorism is related to the fundamental human right of self determination and how can such a problem be resolved? The issue that runs parallel to this issue is the question of legitimacy of “terrorism” on ground of self defence. Both the issue reflects the proposition of innocent terrorism i.e. assertion of right to “self determination” and “self defence” as an excuse to “terrorism”. Having this as a background the researcher furnishes following questions which he attempts to answer in this paper.*

- 1. What the defences of terrorism are as recognized in International Law? Can we depart from such defence to maintain World peace and order as aimed by the International Community?*
- 2. In the backdrop of the existing problems associated with right to “Self determination” and state sovereignty, what are the probable solutions to achieve a desirable human rights situation?*
- 3. How can we prevent/ combat terrorism stemming from conflicts based on state sovereignty and right to self determination?*
- 4. How can we reconcile right to self determination with International world peace and security?*
- 5. Given the situation that states have a fundamental right to self determination and to self defense, is terrorism legitimate if it is perpetrated in self defense or in attempt to achieve self determination?*

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## I. INTRODUCTION

The quest for self-determination by the national and indigenous peoples has reshaped the political structure in many countries, over the world in last few decades. Few states and many regions within states have been formed as a result of movements based on such right of self determination. Over seventy territories dominated by ethnic groups have waged war and armed conflicts for self independence at some time since 1950s<sup>2</sup>. Two of these conflicts erupted since 2000 and were carried out by Albanians in Yugoslavia and Macedonia; both were results stemming from the situation of unrest and turbulence encountered by their ethnic tribes in Kosovo a few years earlier. Another conflict that was previously contained saw renewed hostilities since 2000: Igorots in the Philippines<sup>3</sup>. More than twenty two armed self determination conflicts are ongoing as of the beginning of 2003, including the Somalis in Eithiopia, Tripuras, Assamese, Kashmiris, Muslims and Scheduled tribes in India and many more. Hostilities intensified in past two years, most notably the breakdown in negotiations in the fightings in the Israeli-Palestinian conflicts. Despite instances of continued warfare, the last few years have seen a neutralizing shift in situation from warfare to serenity and reconciliation between previous conflicting nations through peaceful negotiations and settlement. In fact, more such conflicts of the past have been contained in the past two years than in other post World War II period. Nine major conflicts based on self determination were shelved in the year 2000-2002, which includes high profile conflicts involving Acehnese in Indonesia, Tamils in Sri Lanka, Tajiks in Afghanistan and Southerners and Nuba in Sudan. Another case was that of East Timor which obtained independence in the year 2002.<sup>4</sup>

An interesting point that one should notice in all the above discussed armed conflicts is the presence of a high degree of threat to life among people belonging to conflicting nations that frustrates the very purpose of conferring a right of self determination to nations and individuals by the international instruments. These conflicts

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2. Centre for International Development and Conflict Management, Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy; p 26-32 [Peace and Conflict, 2003]
  3. Karen Parker on History of Self Determination (1993)
  4. Centre for International Development and Conflict Management, Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy; p 26-32 [Peace and Conflict, 2003]

were perpetuated in the line of “terrorism” which was at times state sponsored and on few occasions non state sponsored. This draws our attention to the terror attacks in Kashmir which has its roots in implementation of the right of self determination of the people of Kashmir. There was and still is a situation of Bombing-per- day of violence which continues unabated killing millions of civilians than members of the combating groups. The struggle for self determination has galloped in a direction that is far away from civilized aspiration.

Another problem which is rather similar to this is the excuse of self defence which in most cases stems from the right to self determination or which runs parallel to situations grounded on self determination<sup>5</sup>. This is a case of Self Defense which is used as an excuse for “terrorism” in International Law. In the face of increasing threat of terrorism, states such as USA and Israel have resorted to retaliatory strikes against terrorist groups located in some sovereign states or as in an additional situation in case of USA, the attack was made in Sudan in anticipation to future attack by Sudan in USA. In international level though states contend that terrorist threats represent a legitimate justification for the use of force abroad, it can be argued that the use of force presents a greater threat to international order and security.

In this paper the researcher intends to discuss on the inexplicable link between terrorism and right to self determination on one hand and terrorism and self defense on the other hand without sidelining the problem of terrorism that crops up from the above pursuits of individuals or nations as the case may be and makes a further attempt to reconcile between right to “self determination” and “international peace and security” by suggesting few approaches as to how terrorism can be prevented in a nations pursuit to achieve the right to self determination.

## **2. SELF DETERMINATION AND TERRORISM**

### **2.1 UNDERSTANDING THE CONCEPT OF TERRORISM**

It is almost impossible to believe that a word like “terrorism”, which is usually so frequently used these days in various

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5. Defining Terrorism in International Law, Ben Saul, Oxford University Press; 1999, pp.77-80

contexts either casually or in political, colloquial or in legal discussions, does not have a universally acceptable definition. Terrorism may be distinguished as state sponsored or non state sponsored terrorism and even as national or international terrorism or in many cases as falling under the laws of war or armed conflict.<sup>6</sup> It is to be remembered before examining into the laws relating terrorism that terrorism has a hidden definition or a cluster of definition which might encompass a greater dimension of acts that are condemned in the international law. But to start with let us take a look at the simple elements of terrorism as defined by the Black's dictionary which defines "terrorism" as follows:-

"The use or threat of violence to intimidate or cause panic, esp. as means of affecting political conduct."<sup>7</sup>

Though with passage of time, different scholars have attempted to further define the term which can be clubbed into a standard definition consisting of the following elements:-

- The perpetration of violence by whatever means
- The targeting of innocent civilians;
- Any act committed with the intent to cause violence;
- With the purpose of causing fear, coercion or intimidating an enemy;
- In order to achieve some political, military, ethnic, ideological or religious goal;<sup>8</sup>

The above can be considered as benchmarks before declaring an act as "terrorist" act. For the purpose of this paper, all the above elements are essential to understand the concept of terrorism where the last element forms a core issue to be discussed in subsequent chapters of this paper. This element indicates acts of violence that might be resorted by individuals of a state or a state in independent capacity in order to achieve any political or ideological goal of which right to form one's own government or to take part

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6. Christopher Blakesley, Terrorism, Drugs, International Law, and the Protection of Human Liberty; 1922, p.42

7. Black's Law Dictionary 1484 (7th edition) 1999

8. Ibid 2

in the political organisation of a state may find a reference. Therefore, a better understanding could be that it can be a method to achieve a political yet a fundamental right of self determination. According to many, even states response to civil disobedience has sometimes resulted into use of ‘force’. Similarly, peace time use of force by states in response to refusal to obey new state policy is considered an act of terrorism by many authors on human rights.<sup>9</sup> In any definition that we come across on “terrorism” one element common to all such definition would be the act of “violence” which demands attention. On the basis of this it can be concluded that though there is no universally accepted definition of “terrorism”, the necessary benchmark to determine such an act is “violence”. On this assumption act of terrorism should be accordingly construed and understood in international politics despite the presence of innumerable controversies associated with such an understanding of terrorism that exist in the present national and international law.

This paper does not go into details of definition of “terrorism” but only attempts to examine the legitimacy of terrorism in achieving the goal of self determination. The question that needs to be addressed is: whether terrorism can be a justification at all in international politics?

The researcher addresses this question in this paper while examining the problem of “terrorism” in the light of right to self determination and self defense and its associated problems in international criminal law.

## **2.2 UNDERSTANDING THE CONCEPT OF SELF DETERMINATION**

Self determination is a right conferred by the UN Charter upon every individual of nations to participate in the political structure of their nations and freely determine its political status and also pursue the nation’s economic, social and cultural development. This right was first authoritatively declared under Article 1(2) of the UN Charter which outlines the purpose and principle of the UN Charter which is – to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples

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9. M. Cherif Bassiouni, *International Terrorism; Multilateral Conventions (1937-2001)*

and to take other appropriate measures to strengthen universal peace. This public international right is well established with the status of *jus cogens*, allowing no exceptions in public international law<sup>10</sup>. *Jus cogens* norms are the highest rules of International Law and they must be strictly obeyed at all times. Both the International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States have ruled on cases in a way that supports the view that the principle of Self Determination also has a legal status of erga omnes.<sup>11</sup> The term means ‘flowing to all’. Accordingly, erga omnes obligations of a State are owed to the international community as a whole. It is pertinent to note here that when a principle attains the status of erga omnes the entire international community is under a mandatory duty to respect it in all circumstances in their relation with each other.

The right to self determination was invoked by non self governing territories and people under the control of occupying state forces. This right was referred by the International Court of Justice as a right held by people rather than a right held by government alone.<sup>12</sup> The two important United Nations studies on the right to self determination set out factors of a people that give rise to possession of right to self determination: a history of independence or self rule in an identifiable territory, a distinct culture and a will and capability to regain self governance.<sup>13</sup>

Regrettably, this notion of self determination is often misinterpreted by many and has been reduced to a weapon of political expression. This is evident from various situations where this principle is invoked, (This paper will examine many of such situations in particular to bring out the erroneous use of the principle) we must therefore, insist

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11. Used in an earlier case (Barcelona Traction, Light and Power Co.(Belgium v. Spain)1970 International Court Of Justice3,32) Also used in Nicaragua case where the language of the Nicaragua Case, 1986 reflective of both a jus cogens and erga omnes duty to respect the principle of self determination. The Inter American Commission on Human Rights, Organization of American States, Press Communiqué no. 13/93 (May 25, 1993)
  12. Western Sahara Case, 1975 International Court of Justice 12, 31.
  13. Gros Espiell, op.cit. and Critescu,op.cit. at Karen Parker. Where Critescu defines “people” as denoting a social entity possessing a clear identity and its own characteristics” and implying relationship to territory.

that the international community address those situations invoking the right to self-determination in the proper, legal way.

### **2.3 COMMAND OF DE-COLONIZATION**

History adduces evidence of the application of the right to self-determination primarily in the arena of decolonization as a right to be free from European colonialism. The collapse of the USSR and Yugoslavia, as well as persistent ethno-nationalist conflicts around the world, has provoked new thinking about the right of self-determination in political theory. The situations of decolonization as called by Karen Parker can be understood by categorizing it into “Perfect decolonization” and “Imperfect decolonization”. According to him, the principle of self-determination arises in the decolonization process because in a colonial regime the people of the area are not in control of their own governance. In such situations there is an alien sovereign exercising power illegitimately. Decolonization then became a remedy to address the legal need of the suppressed to remove such illegitimate power.

#### **Perfect Decolonization:**

In a perfect de-colonization process the colonial power leaves and restores full sovereignty to the people in the territory. In these situations, the people have their own State and have full control of their contemporary affairs, with a seat in the United Nations and possess all attributes of a State in the International Law. Some decolonization that took place after the UN Charter can be viewed as “perfect” which does not necessarily mean that all States that were former colonial States have a perfect current government of that such a government in these states entirely respect human rights. However, the issue of self-determination no longer persists in such countries.<sup>14</sup>

#### **Imperfect Decolonization**

Imperfect decolonization occurs when there is an absence of restoration of full governance to a people having a right

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14. Karen Parker on History of Self-Determination (1993)

15. Ibid

to self determination.<sup>15</sup> There are several types of imperfect decolonization like situations where separate states conquered by a colonial power were amalgamated into “unitary” state which is a forced amalgamation between two or more formerly separate states. In such cases people of the separate states have different languages, ethnicities, religious beliefs and cultures. At the cessation of the colonial regime, the colonial power brings all these states under a single pool of power group essentially entrapped into the new decolonized state. In another case, these different groups may decide to continue as unitary state, but with an agreement that if it does not work out, then the various component parts would go back to their pre colonial status of independent units. This was the case of the decolonization process in Burma where the new Constitution of Burma in the year 1947 was framed following the process of decolonization having the ‘opt-out’ clause with respect to many different people of the territory occupied by Great Britain who were brought under one “unitary” rule by Britain colonial regime, which says that they would have the right to declare their reluctance to continue under the unitary rule post decolonization process which would be after a period of ten years from such commencement of the Constitution. This was a scenario of hit and trial method which did not work for Burma because when component parts seek to opt-out; the dominant power refuses as in the case of Burman decolonization process. Similar case was with that of the Moluccas arising in the area of Netherlands East Indies where Netherlands, as Great Britain amalgamated many unrelated nations and placed them under the colonially- imposed “unitary” state system under one rule.

Yet another situation of decolonization is when one State forcibly annexes a former colonial people, but the affected people, the international community or both do not recognize this as a legal annexation. This might also be akin to a case of force annexation. The international community may have even mandated certain procedures by which the effected people are given their choice regarding self-

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16. Karen Parker on History of Self Determination (1993) through [www.kmsnews.org](http://www.kmsnews.org)



determination.<sup>16</sup>

There is yet another situation where a small component part of a colonially created “unitary” state agreed to continue under the unitary state but with no particular opt-out agreements signed.<sup>17</sup> Rather, there were either verbal or negotiated agreements about how rights of the smaller groups would be protected in the combined state. However, such groups lose their rights over a period of years by the dominance of the unitary state and may lose the ability to protect its rights by peaceful means. This was the very peculiar case of Kashmir crisis stemming from an imperfect decolonization process in which the United Nations also got involved. The UN’s intervention in the situation of Kashmir began in the year 1947-1948 during the decolonization process of the British Empire in South Asia where Pakistan and India became the leaders which reached an agreement with the British that the people of Kashmir would decide their own nature of governance and political allegiances. The then Prime Minister Pt. Jawaharlal Nehru had gone on record publicly saying that the disposition of Kashmir people will be up to them.<sup>18</sup> Owing to a great deal of furore in Kashmir due to outrageous revolts against the British imposed Maharaja in Kashmir, the UN addressed Kashmir violence in 1948. That year the Security Council established the United Nations Commission on India and Pakistan to act as the mediating influence and to undertake fact finding missions under article 34 of the Charter, which, in addition to the Security Council itself, adopted resolutions mandating that the final disposition of Kashmir was to be through a referendum carried under the auspices of the United Nations.<sup>19</sup>

India supported the steps taken by the Commission on the question of accession of the State of Jammu & Kashmir to

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17. Ibid

18. 3rd November 1947 radio broadcast, Mr. Nehru stated- “we have declared that the fate of Kashmir is ultimately to be decided by its people. The pledge we give not only to the people of Kashmir but to the world. We will not and cannot back out of it”. At Karen Parker- Statement on Definition of Self- Determination.

19. Security Council Resolution no. 39(1948), 47(1948), 80(1950), 91(1951) and 96(1951)

20. Resolution of the UN Commission for India and Pakistan, adopted on 5th January 1949.

India or Pakistan to be decided solely through the democratic methods of free and impartial plebiscite.<sup>20</sup> However, before such plebiscite could take place, the armed forces to India seized much of Kashmir under the pretext of coming to aid the British- Maharaja who was attempting to quash the Kashmir's revolt against him. The Maharaja, in collaboration with the Indian Military succeeded in repressing Kashmiri rebels in exchange for an Instrument of Accession giving Kashmir to India. Since then India has maintained control over Kashmir and refers to Kashmir as an integral part of India. India supports this view in part because it manages elections taking place in Kashmir. However, the Security Council does not accept this view stating that such dominant and unilateral power does not constitute free exercise of the will of Kashmiri people and only a plebiscite carried under the auspices of UN shall be valid.<sup>21</sup> In this context States Rapporteur Gros Espiell exclaimed: "A group of people under colonial and alien dominion is unable to express its will freely in a consultation, plebiscite or referendum organized exclusively by the colonial and alien power."<sup>22</sup>

Regretfully, there was no plebiscite that took place and by mid 1950s the Cold War deepened and the alliances in the region fell under sphere of influence in Cold War. Today we find that the disposition of Kashmir had not been legally decided. We have failed utterly in the realization of the right to self determination of the Kashmiri people. Numerous brutal violence took place in J&K in which 5-7 lakh of Indian troops were present in the area carrying out military actions against the Kashmiri civilians and Kashmiri military forces which involved grave breach of human rights violence under the provisions regarding armed conflict under the Geneva Convention and the general laws and customs of war. Rape, disappearances, summary execution, torture and disappearances related to the conflict are nearly every- day

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21. Security Council Resolution no 122 of 24 January 1957. India had claimed that the Kashmiri people accepted secession to India because a Kashmiri Constituent Assembly approved it in 1956. However, the assembly was chosen by India and does not meet requirements of a Plebiscite as expressed in SC resolution 122.

22. Ibid

23. Lawrence Lifschultz: "Death of Kashmir: Perils of Self Determination"; economic and Political Weekly, Vol 37(August, 2002)pp. 3225-34 through [www.jstore.org](http://www.jstore.org)

event in Indian- occupied Kashmir.<sup>23</sup>

The area of Kashmir had a long history of self governance pre dating the colonial period which could also be seen in part during the British colonial period and therefore this factor forms importance in its claim for self determination and retaining such claim.

Also the mass violence in Punjab post decolonization attracts incorporation of some form of self determination in that region.

From the above scenario of conflict and unrest it can be concluded that such conflicts may be a result of amalgamation of mutually reinforcing domestic and international factors. The principle right of self determination springs from dominance by a unitary government upon the minority groups within such its territory which might be formed by a distinct race or language or one's own culture. In the light of such situation, the international community must understand the need of the post Cold War era and reconsider the doctrine of self- determination. To the present day people still suffer from the consequences of neo-colonial domination. Most of us aware of the situations outlined as in Kashmir or in Punjab or even in Sri Lanka or Tibet which brings the right to self determination in the fore front. These were situations where despite of the guarantee of the right to self determination under the UN charter and its express provision under the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights, such has yet not been realised. In such countries, there are armed conflicts where many of the states involved in attempting to militarily obliterate the peoples with the valid self determination claims, try to reduce such conflicts into "terrorism". The groups fighting for right to self determination fall into the peril of being called as terrorists. Some may call them as "freedom fighters" whereas some may call them "terrorists". This indeed forms the central subject of discourse in a part of this paper where the researcher tries to draw a connection between "self determinations" and "terrorism" specific question to address is- Whether self determination forms a defence for terrorism? Along

with examining their related problems with the most crucial being the mass violation of human rights in national and international arena. The researcher starts with the initial step by analyzing the problem of self determination in international politics thereby seeking to draw some policy conclusions in the light of various theories of self determination.

## **2.4 WHAT IS THE PROBLEM OF SELF-DETERMINATION IN THE INTERNATIONAL POLITICS?**

The right of self determination as envisaged in the UN Charter is based on democratic and liberal values. However, the interpretation was given by the international community in a very restrictive construction which meant little more than right to be free from colonisation. It actually meant to be understood as a right to take part in political structure of the government of a nation<sup>24</sup>. The UN conception of the right to self determination was closely associated with the world wide movements against colonialism and racism. This was initially referred as a principle of the UN Charter which was later on transformed as a right by the UN General Assembly Resolution granting independence to the colonial Countries and Peoples with the breakdown of the USSR and former Yugoslavia. It was therefore interpreted to be limited to emancipation from the European imperial rule and right not to be subjected to racial domination as in South Africa or an alien occupation as the situation in Palestine.<sup>25</sup> The right of self determination of peoples was linked to granting of independence to colonies with a view to convert them into nation-states.

S.Hoffman stated: “Justice itself requires that the right to national self determination be granted: for there is no more certain injustice than alien rule imposed against on people”<sup>26</sup>

The very fact of this right being envisaged in UN Charter (in

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24. The Right to Self Determination in International politics: Michael Freeman, Review of International studies, Vol 25, No3, pp. 356, Cambridge University Press.

25. A. Cassese, ‘Self Determination in the Era of Decolonization’, Occasional Papers in International Affairs, No.9, 1964, p.87.

26. Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics (Syracuse,NY: Syracuse University Press, 1981), p.34, citing Immanuel Kant.

the very first Article) and both the International Covenants i.e. the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights makes this a very essential right for human existence, though according to few this might contain an unclear interpretation. According to Hector Gros Espiell “The effective exercise of a people’s right to self determination is an essential condition for gaining existence of the other human rights and freedoms.”<sup>27</sup> Few assert that this right is the most important among all other human rights.<sup>28</sup> However, as emphasized by U. Thant, the concept of self determination was not properly understood. He suggested that what was less certain is what is that was not understood. Until recently, there was an understanding among the UN elites that it should not be literally understood as right of peoples to self determination as the literal definition was not intended by the makers of the UN Charter.<sup>29</sup> At the same time one should bear in mind that UN applied inconsistent application for self determination, as in case of right of the Tibetans to self determination was not recognized though they were eligible for such recognition except that their alien rulers were not European. Yugoslavia however clearly brought out the flaws in the conception of self determination. The first Western reaction was to reaffirm the territorial integrity of the Yugoslavia state which implied people of Yugoslavia had their right to their own governance. This was followed by Germany who led the European Union into the recognition of Slovenia, Croatia and Bosnia. The recognition of former Yugoslavia Republic of Macedonia was held by the Greek objections, even though Marcedonia was deemed to have met EU criteria, whereas Croatia has not.<sup>30</sup> Here the point not to be missed out is that the very restrictive interpretation of right to self determination recognizing the principle of territorial integrity and extreme caution in interpretation of

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27. Gros wrote on *The Right of Self Determination: Implementation of United Nations Resolutions* (New York: UN, 1980), para.59

28. E. Aveybury, ‘A Positive Legal Duty: The Liberation of the People of East Timor’, in D. Clark and R. Williamson(eds), *Self Determination: International Perspective* (Basingstoke1922), p. 221

29. Emerson on Right to Self Dtermination

30. *The Right to Self Determination in International politics: Michael Freeman*, Review of *International studies*, Vol 25, No3, pp. 359, Cambridge University Press.

the former right no doubt justified by the values of peace and international order, nevertheless, the priority given to territorial integrity over self determination by the United Nations, left ethnic and national minorities vulnerable to various threats in the newly recognized states where serious violation of human rights through practice of 'ethnic cleansing' and general massive persecution seems to take place giving rise to serious local and international ethno-nationalist conflicts out of which 'terrorism' becomes very common.

Therefore, it is now felt that clear conception of self determination be understood among all the nations through the international instruments which incites peace and harmony among nations and by suppressing havoc and unrest within nations. This can be achieved when one understands the various theories of self determination in the international level.

There are six theories of self determination as contemplated by Michael Freeman which are based on liberal- democratic values because as Freeman maintains that the liberal principles of human rights and the democratic idea of popular sovereignty are foundations of official ideology of the international community. Following are the theories as suggested by Freeman.

**Liberal theory-** Classical liberal theory is more concerned with the protection of the rights of individuals where government of a nation is under an obligation to guarantee protection and in occasion of failure of such guarantee, individuals have the right to resist and secede, the sole reason being the fact that the theory is premised on the rights of individuals where national self determination is a weapon to protect the fundamental rights of individuals.<sup>31</sup>

**Democratic theory-** Liberal theory is grounded on individual values like individual autonomy whereas democratic theory is based on democratic power where power is located in the people rather than in elite. It limits the power of the government whether they are democratic or not and on the

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31. Michael Freeman, Theories of self determination.

other hand democratic theory places power in the people whether they are liberal or not. Former lays focus on individuals and later on the people where the popular will does not necessarily respect individual rights.

**Communitarian theory-** This theory argues that people are born in their nation and it forms part of their identity.<sup>32</sup> According to this theory, if there is a right to self determination, it must be a communal right where political power should also be entrusted upon racial or ethnic groups residing within a state. This is primarily to protect their culture within the territory they reside in.

**Realist theory-** By realist theory, Freeman means something similar to theories that are normally called 'realist' in academic order of international relations where he refers two properties: first, they endorse concept of national right of self determination that could be permitted by the power holders and secondly, accordingly priority is given to stability to existing state status. Here, he also clarifies that the concept of self determination should balance between territorial integrity and aspirations of aggrieved people or nations and that there should be international organizations to settle self determination disputes in accordance with the rule of law and not by rule of force.<sup>33</sup>

**Cosmopolitan theory-** Miller in his book on nationality, contrasts nationality with cosmopolitanism which he treats as shallow culture eclecticism.<sup>34</sup> His theory of self determination in itself has a cosmopolitan dimension, since it treats the right to self determination as a universal right. Freeman maintains that the basic principle of cosmopolitan theory can be found in Article 1 of the Universal Declaration of Human Rights which states: All human beings are born free and equal in

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32. Raz, *The Morality of Freedom*, pp-207-9 at *The Right to Self Determination in International politics*: Michael Freeman, *Review of International studies*, Vol 25, No3, pp. 363, Cambridge University Press.

33. *ibid*

34. Miller, *On Nationality*, p 186.

35. M.C. Nussbaum and A. Sen (eds), *The Quality of Life* (Oxford: Clarendon Press, 1993); O'Neill, 'Justice and Boundaries', in C. Brown(ed), *Political Restructuring in Europe: Ethical Perspectives* (London Routledge, 1994), Gewirth, *The Community of Rights*.

dignity and rights. From this it can be inferred that human beings national identity and state borders is irrelevant for their entitlement to their necessary conditions of good life.<sup>35</sup> Therefore, according to this theory self determination is conferred on all individuals.

**Cosmopolitan Realism theory-** As observed by Freeman, it is a combination of Cosmopolitan and Realist theory where he refuses to accept that cosmopolitan is utopian and maintains that cosmopolitan is realistic. This is primarily not a theory but a balance between former and the later theory.

Analysing the theories of self determination it can be more or less suggested that self determination cannot be understood as an absolute right as rights protects interest and since interests conflict, rights can also conflict. Therefore it should be understood that such a right should strike a balance with peace and order.

## **2.5 SOVEREIGNTY vs. SELF DETERMINATION (WHEN EXERCISE OF THE RIGHT TO SELF DETERMINATION TRIGGERS TERRORISM)**

Since 1948, over 65,000 people have been killed as a result of the government of Sri Lanka's attempt to preserve its territorial integrity and secure its sovereignty against the Tamil rebels attempt to exercise the right of self determination and establish a self governing region within Sri Lanka. Similarly, in Sudan, nearly two million people have been killed during the war of secession. Yet again, in Bosnia, 25,000 civilians were killed and over 2 million displaced in the course of campaign of genocide carried by Serbia in response to Bosnia's declaration of independence from the former Yugoslavia.<sup>36</sup> The period from 1957- 2002 there were more than 75 instances of conflict in the form of 'terrorism' based on self determination or state sovereignty.<sup>37</sup> By 2002,

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36. Paul R. Williams and Francesca Jannotti Pecci; "Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination" *Stanford Journal of International Law* (2004) pp. 5-8

37. Centre for International Development and Conflict Management, *Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy*; p 26-32 [Peace and Conflict, 2003]

38. *ibid*



only 12 of them have been resolved through military victory. The remainder were either contained with the assistance of international peacekeeping bodies or still ongoing.<sup>38</sup>

One of the most important characteristics of these conflicts is that they frequently give rise to terrorism. Over one third of the Specially Designated Global Terrorists identified by the United States Department of Treasury are associated with self determination movements.<sup>39</sup> Of the increasing concern is the Globalisation of Terrorism arising from sovereignty based conflicts in terms of measures, weapons and cooperation. To take an example conflicts in Sri Lanka incited by the Tamil rebels though limited to the territories of Sri Lanka, they have their dubious accomplishments of suicide bombing that widely replicated in other conflicts.<sup>40</sup> Also the chronic status of Israel/ Palestine conflict fostered proliferation of dangerous Islamic groups who resort to terrorism as a means of political expression.<sup>41</sup> Therefore such sovereignty self determination based conflict often involves the commission of massive human rights violation. For instance reports indicate that Indonesian forces seeking to suppress separatist forces in the province of Aceh have killed over five thousand civilians.<sup>42</sup>

The intensity of the sovereign based conflicts and their tendency to increase worldwide terror and the lack of effective norms to combat such conflicts have given rise to a need for a new approach to resolving such conflicts by bridging the gap between state sovereignty and self determination . Such an approach can be called as “Earned Sovereignty” as rightly pointed by Paul R. Williams and Francesca Jannotti.<sup>43</sup> In seven recent peace agreements concerning sovereignty based conflicts, the parties relied on

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39. [www.treas.gov/office2004](http://www.treas.gov/office2004) on Office of Foreign Assets Control, U.S.Department of the Treasury, Specially Designated and Blocked Persons.

40. Thomas L. Friedman, Lessons from Sri Lanka, N.Y. Times, August 7, 2003, p-17.

41. ‘Self Determination, International Law and Survival on Planet Earth’, Arizona Journal of International & Comparative Law, Spring, 1994, p-2-4

42. Human Rights Watch, Indonesia: The War in Aceh (2001) available at [www.hrw.org/reports/2001/aceh](http://www.hrw.org/reports/2001/aceh).

43. Paul R. Williams and Francesca Jannotti Pecci;”Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination” Stanford Journal of International Law (2004)

this approach. Such an approach is a recent approach which has been aided in its development by accelerated efforts by international organizations and powerful states to undertake global conflicts management including willingness to aid states in conflict resolution and undertake institution building in affected areas.<sup>44</sup>

The concept of Earned Sovereignty as developed recently demands progressive devolution of sovereign power from the state to a sub state entity under international supervision. This concept naturally develops peace while addressing the issue of final political status of the sub state entity. As an emerging conflict resolution approach, earned sovereignty can be described by three characteristics viz. Shared sovereignty, institution building and determination of final status.<sup>45</sup>

Initial state practice was confined to either sovereignty first approach or self determination first approach where either was given upper hand undermining the other whereas in recent times this new approach of a compromised state is mostly followed by states under the supervision of the international organisations to restore peace and international order within and among nation states. In order to refine the understanding of this new mechanism it's pertinent to fragment its elements and examine how it works at different levels as contemplated by Paul Williams and Jannotti.

**Initial stage of Shared sovereignty-** Whereby state and sub state entity may both exercise some sovereign authority and functions over a defined territory. Sometimes international institutions may also exercise sovereign authority in addition or in place of the parent state. This is primarily to monitor parties exercise parties' exercise of authority and functions.

**Institution building-** The second core element is institution building where the substate entity, frequently, with the assistance of international community, undertakes to construct new institutions of self government or modify

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44. Samuel H. Barnes, Contribution of Democracy to Post Conflict Societies, 95 AM. J. International Law.86 (2001)

45. Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination, Paul R. Williams and Francesca Jannotti, p- 8

the existence political status in collaboration with the international institutions for exercising sovereign authority in harmony with the parent state.

**Determination of final status-** The eventual determination of the final status of the sub state entity and its relationship with the parent state is the final core element of the concept of earned sovereignty where the status will be determined by complete referendum. In other words it may be settled by way of an agreement between the parent state and the sub state through international mediation. This was attempted in case of Kashmir issue as already discussed. Invariably, the determination of final status is to be determined by the international community in the form of recognition.

But it has to be understood here that before determining final status of the sub state the latter has to undergo through certain optional tests like conditional sovereignty, phased sovereignty or the constrained sovereignty where international community determines the final status after supervising the practice and behaviour of such entity within the territory of the parent state for a considerable period of time.

Such Earned Sovereignty mechanism was practised by several international practices. For instance, in the issue of East Timor, UN Security Council Resolution 1272 provided for the creation of the UN Administration of East Timor after conflict resumed as a consequence of East Timor's rejection of Indonesia's proposal for autonomy within Indonesia<sup>46</sup>. This resolution provided authority for a two and a half year period of shared sovereignty between the UN and East Timor during which East Timor was able to construct the institutions necessary for independent self government and after acquiring certain benchmark East Timor was recognized as an independent and was admitted to the UN.

Another situation which demands importance in this regard is that of independence of Kosovo where UN Security Council

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46. SC Resolution 1272, UN Doc.S/Res/1272 (1999); East Timor Popular Consultation, May 5, 1999. UN SCOR, 53<sup>rd</sup> session.

47. The interim agreement for peace and self government in Kosovo, ch.2, art I, para2, available at Rambouillet Agreement.

Resolution 1244 with reference to Rambouillet Agreement, provided for the interim United Nations administration of Kosovo with security provided by a NATO- led force.<sup>47</sup> During this period the UN exercised authority over Kosovo requiring it to build institutions that will allow for autonomous governance for Kosovo. Gradually, as these institutions became capable to exercise their own authority, the UN entrusted sovereign authority and functions to Kosovo.

Thus this approach of Earned Sovereignty emerged as an answer to the conflicts based on sovereignty and self determination in order to resolve such long lived conflicts. As self determination movements became increasingly interlaced with global terrorist networks and as local conflicts destructed regional stability, as in the case of Kashmir, such an approach needs to be resorted to which provides a larger tool kits for resolving such conflicts. Moreover, with the emergence of a greater international human rights norm the governments compelled by public opinion is now less willing to take recourse to force to resolve such conflicts which frequently leads to greater prevention of massive human rights violations. The approach of earned sovereignty as developed in recent state practice seeks to bridge the 'sovereignty first' and 'self determination' first approaches and makes an unending effort to minimize the friction between states. In specific, earned sovereignty seeks to permit the legitimate realization of people's right to self-determination in a manner which protects the interests of the parent state and can be accomplished in a way which minimizes local and regional instability. Also, this approach may offer solutions to broader range of conflict situations beyond the regular practice of seccessation or break-up of states. Also, in this context it is pertinent to note here that the situation of Iraq is little different from other cases as Iraq as a sovereign nation has a final status which is not in question but the frequent security intervention of US military reflects an undeniable constrain on the sovereignty of Iraq but with the gradual refining and modification of the present approach of earned sovereignty we can expect a harmonised status in Iraq.

In part we have examined the various problems associated

with the right to self determination in particular, as to how this right results in threat to terrorism which frequently amounts to massive destruction of persons and property endangering world peace and stability though such right has been recognized as one of the fundamental human rights in the UN Charter and following two International Covenants. The problem lies in the interpretation of the provision and also to some extent with the demand for power by each sub territories. This also finds its roots in discrimination within nations on grounds of race, culture, language, religion and in most cases on political autonomy as in the case of serious mass extermination of life of ethnic group of the Tutsis in Rwanda which led to genocide in Rwanda or in Sudan on grounds of race. Such violations stem mostly from this cardinal right to self determination like the one in Northern Ireland, been largely internal matters although they never exist without external ties and effects. Others like the Sudan, Tamil rebellion in Sri Lanka where Tamils form a minority there along with the Sinhalese, facing racial and linguistic discrimination from the Sri Lankan government giving them an incite to rebel against the government. The sanguinary history of self-determination conflicts might by itself create for humanitarians a reasoned basis for discouraging secessionist claims as the problem starts when the sub states decide to secede from the parent state while the latter refusing to accede with such claim in order to maintain territorial integrity in the nation. Such a situation definitely could be cured by the approach of Earned Sovereignty to a greater extent. Another recourse that we can think about is that of humanitarian intervention in such armed conflicts as we can analyse in the following part of the paper.

## **2.6 HUMANITARIAN INTERVENTION IN SELF DETERMINATION STRUGGLE**

National self determination claims draw their moral force in part from the qualified human right to association and in part from cultural rights within a national territory. Such claims are generally made by groups forming minority community facing oppression from the government of the sovereign territory in which they are a part. Such groups tend to draw pointed boundaries between themselves and the rest of the

world thereby leading a life free from oppression. In such a struggle it is desirable that international community should support non consensual secession only as a last resort to protect the human rights of an oppressed community. By the term self determination in this context it means both a full blown secessionist struggle and a case where groups seek extensive forms of autonomy within an existing state. This kind of situations call for intervention from international organization of other peace loving countries assisting in such attempt towards achieving autonomy through peaceful measures thereby justifying legitimate means to achieve legitimate ends. In this context, 'intervention' refers to direct or indirect projection of influence, across the frontiers of recognized states. Such may include dramatic action, calculated omission such as the refusal to extradite or rather a neutral stand and in extreme case of large scale violence, resort to military intervention which should be followed by extreme amount of caution and only in rarest of rare cases where no other remedies resolves problems. Such an instance of intervention was of India's invasion of East Pakistan in 1971 as a response to a massive campaign of rape and murder carried out in Pakistan's eastern half by armed force directed by ethnically distinct elite in the country's western half. It should be remembered that the UN Charter condemns such use of force and therefore such intervention was held illegal by many as it is true that use of force disturbs the territorial integrity of nations.

The question which arises in this case is- Can secession be prevented by Humanitarian Intervention?

In most cases of self determination, sub state entities yearn to secede from the parent territory to escape oppression. Under such circumstances it is essential for the international organisations to examine the veracity and the urgency of such secession. If a situation can be solved without jeopardizing the territorial integrity of a nation state through amicable settlement between the sub state/ group and the parent government such an approach should be resorted to through the medium of earned sovereignty approach and in case where secession is inevitable under given situations (as such depends upon circumstances of an individual case)

it is the obligation of the international community or under its authority, other peace loving nation state to intervene in such national matters in such a way where such intervention does not jeopardize the peace and integrity of the disturbing nation. In such case humanitarian intervention responds to the issue of conflicts specifically armed conflicts based on the right to self determination. Humanitarian intervention is an extraordinary means for the defense and promotion of human rights and so it should remain. By their nature, struggles to transform blood community into sovereign states primarily to sustain the sense of community resist such anticipation, particularly in a world already divided into sovereign states each of them increasingly occupied by plurality of communities. In such a world, respect for sovereignty, where the state reasonably accommodates the interests of diverse peoples, is the optimal norm for maintaining areas where human rights of individuals lives in which bridges the gap between communities and further fosters the harmony between various communities.<sup>48</sup> Therefore, the question of secession has to be carefully examined and should be allowed only where a dire necessity arises but in such case it should also be assured that such step of secession does not endanger internal peace and order.

The second question that needs to be addressed is- Given that states have fundamental right to self determination, is terrorism legitimate if it is perpetrated in an attempt to achieve such right to self determination?

In our pursuit to prevent terrorism while recognizing and protecting the right to self-determination it is essential to realize that our ends should justify the means. That is to say that no state can take recourse to terrorist act as a means to achieve the final goal of the right to self determination. The means to achieve such a goal should be therefore legal and terrorist act in the form of using military force cannot be an answer to achieve the goal of the right to self determination. One of the biggest disadvantages in the arena of International Criminal Law is that lack of a universally accepted definition

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48. "The Ethics of Intervention", Human Rights Quarterly, Tom J. Farer, The Johns Hopkins University Press, vol 25, p. 406

of "Terrorism" which condemns such a phenomena as a crime in international law. Though few enjoys the fruits of such lacuna, the question here arise is- Is there an international legal advantage in not defining terrorism? The advantage is that such a situation encourages the denial of the non justification of terrorism. In national law a definition of "terrorism" is certainly required to prevent acts of terrorism from being judged by a national penal court as non-terrorist crimes. The protection of human rights is then better assured by national penal courts. It also avoids misuse of political rights by states hit by terrorist acts. It brings back the old legal principle of the middle ages i.e. "*nullum crimen sine lege*" and "*nullum poena sine lege praevia*" which means there should be no crime without law and no penalty without criminal law first. But the flip side is that most of the cases of rights exercised under the name of self determination take recourse to acts of terrorism by various groups in quest of power. In most cases the activists give such acts a name of political offence though in such cases they use armed force and escapes punitive measures, therefore it is desirable to have a universal definition of terrorism in the international and the national level to prevent such act from being committed by political, racial, ethnic or any religious group.

The UN member states should also take effective control of the respect of international human rights in order to combat terrorism. Terrorist groups should respect international human rights as well. This would further the political, religious and ideological purposes which they expect the states that are object to terrorism, to respect. As long as terrorist cannot claim successfully the right to self determination, human rights are the only public international legal right that can be claimed by these terrorists. By respecting international human rights, terrorist groups can stop the international, legal and often military defences which states are obliged to realize in order to stop criminal acts of terrorism and in order to realize their own human rights objectives. A two part definition of terrorism is then advisable in public international law because it better shows the international difference between the international legal reasons for



combating terrorism and human right of terrorists in the world that have to be maintained for terrorists during the international combat of terrorism. But it is also essential to realise that the very hurdle to overcome in an attempt to arrive at a universally accepted definition is the necessity to resolve the underlying paradox. The phenomena of terrorism stems from various conflicting political beliefs. When states have a fundamental right to self determination, terrorism become legal for them. Therefore, it is also the obligation of the UN instrumentalities to re frame a precise definition of self determination keeping in mind the aftermath of attempts to realize such right considering the present scenario in mind which does not make way to develop terrorism and such an attempt can be considered another way to prevent terrorism.

Therefore, terrorism cannot be considered legitimate rather it is the duty of the international organisation in collaboration with all the State parties to make countless efforts to combat terrorism and this could be accomplished by taking an initial step which could be to frame a universally accepted definition for “terrorism” thereby declaring such an act a crime per se in the arena of International Criminal Law and thus per se illegal.

### **3. TERRORISM AND SELF DEFENSE**

The link between terrorism and self-defense is premised on a single question i.e. given the states have a fundamental right to self defense, is terrorism legitimate if it is committed in self defence?

The entire debate on terrorism and self defence is rounded on the above question which needs to be addressed scrupulously. Such a situation can be better understood in the light of the instance that broke out in Nairobi and Dar Salaam when two bombs ripped out the American Embassy there, thereby killing 224 people and injuring more than 5000 civilians<sup>49</sup>. Based on information furnished by the National Security Council, United States of America identified Osama bin Laden as the mastermind behind the said attack and following the previous bombing, on August 20, 1998, the USA launched cruise missiles into two countries viz. Sudan

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49. “Defending against terrorism: Legal Analysis”; Leah M. Campbell; Tulane Law Review, February 2000,p. 5

50. Ibid.

and Afghanistan causing severe damages to both the countries.<sup>50</sup> In the given situation it can be clearly stated that the unilateral use of force by USA is a complete violation of conventional and customary international law as enumerated in the UN Charter as such action is against the territorial integrity of a nation (this being one of the cardinal principle of the UN Charter). This situation focuses on the legality of the USA's action under international law concepts of permissible uses of force.

It is pertinent to note here that the sole justification for use of force against any nation as recognized by the International law is "self defense", considering the general rule of prohibition of the use of force in international law. And also that only on fulfilment of two elements of self defense can the excuse of self defense be permissible viz. Necessity and Proportionality. In the above situation we need to understand the crucial interlace between terrorism and self defense i.e. there might be situations where certain acts of terrorism incites a nation (attacked by terrorist acts) to retaliate back through authoritative use of force. In such situation the question presented by the threat of terrorism in general, and the actions of the USA in particular, is whether concept of self defense has been expanded to include anticipatory and retaliatory attacks against non state actors in a neutral state and the actor state in their own territory respectively?

It is necessary to realise in this regard is the problem of terrorism which also includes the consequences that is associated with such acts. As a matter of public International Law, terrorism presents several problems: the identification of terrorist is often difficult; the legal system fails to deter terrorist operations; and the complicated cross border nature of terrorist network makes it difficult to effectively diminish the threat.<sup>51</sup> In face of these problems, states targeted by terrorists have essentially two options- they may capture the terrorists and prosecute them under the domestic law if the terrorist is residing in the local territory and if located outside the state borders, retaliatory strikes may be initiated in neutral territory. Therefore, in the above situation the retaliatory action taken by USA against Afghanistan can be to some extent justifiable under the convention and customary international law but the serious question from the point of human rights logic is

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51. "Defending against terrorism: Legal Analysis"; Leah M. Campbell; Tulane Law Review, February 2000,p. 5

that- Can such act solve the problem of USA? Can USA restore back the lost peace and solidarity by initiating a retaliatory strike against Afghanistan or Sudan?

The answer would be a bold and categorical 'No' because such a resort have never restored and can never restore peace between two conflicting nations. Therefore, in the above case, though force is warranted on the "just war" doctrine, the underlying goal of the UN Charter of "International Peace and Security" gets diluted by frequent use of force by nations relying on the subsequent guarantee of Article 51 of the UN Charter.<sup>52</sup> Also if one desires to rely on the said Article it would be advisable to concentrate more on the language of the article in entirety without leaving the impediment made by the role of Security Council which has a better capacity to restore peace in such situation of terrorist attacks by making good the loss already caused.

Keeping these aspects in mind it can be very well argued that the retaliatory attacks made by the USA against Afghanistan and Sudan are not justifiable on following grounds:

The elements of self defense viz. Necessity and Proportionality has not been fulfilled. The reason being that a situation of necessity arises only when there is failure to resolve disputes through peaceful means. In the above case no such attempt was made by either of the parties therefore, such reprisal actions violate the basic principles of the UN Charter. Secondly, the retaliatory actions taken against Afghanistan was not proportional to the damage caused by the latter's attack on the former. Also it is very important to observe that the attack against Sudan who was a non state actor was only in apprehension of later attack by Sudan on USA which makes such attacks by USA labelled as terrorist attacks on Sudan. Therefore; such acts are always condemnable under the International law.

It is important to realize that 'self-defense' is a right given to states and individuals and not might. Therefore, in the name of self defense no state shall be given the liberty to make retaliatory strikes at other states. This will further propel the fear of terrorism at a larger scale than combating terrorism. Therefore, recognized

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52. Nothing in the present charter shall impair the inherent right of individual self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

codes of conduct should be resolved by states in order to safeguard state sovereignty rather than terrorist and retaliatory attacks. Hence, regardless of the future efforts at combating terrorism, the USA's bombing of two sovereign nations was a prima facie violation of international law and with this it can be concluded that the terrorism cannot in any case be considered legitimate even if committed in self defence. Therefore, in order to maintain integrity of the international "Rule of Law" in the world, the United States must endeavour to remain within legal bounds

#### **4. CONCLUSION**

From the analysis made in the paper it is clear that "terrorism" is inexplicably intertwined with the concept of "self determination" and "self defense" which are internationally recognized as human rights of individuals and states collectively. However, "terrorism" is condemned internationally on reason of causing massive destruction to life of a large number of population and property thereby threatening international peace and security.

The question raised in the beginning of this paper as to the legitimacy of "terrorism" if committed in pursuit of the right to self determination and self defense, is already answered in negative whereby the reasons are meticulously explained by the researcher. The problem of terrorism stemming from conflicts based on self determination and self defense is unending which can be expected to get resolve only by framing a universally accepted definition by the international instruments and thereby constituting it as a crime under the Statute of International Criminal Court (i.e. the Rome Statute) as it is the only universal criminal law statute recognized, which shall there by remove the paradoxical nature of the concept. Judges should also understand the sensitive nature of prioritizing two conflicting rights of equal importance against armed attack in order to create climate for safe shelter. In this regard it is entirely accurate to concede that there is no justification for terrorism and not defensive to argue that terrorism needs to be viewed from a political context weighing the 'motive' of the actors and the sociological context under which the actors act. Such consideration is very much essential to differentiate the various causes for terrorism. This is applicable to both state sponsored terrorism and non state sponsored terrorism. Such an approach would legitimise acts of terrorists by claiming that ends

justify the means though such an approach is not acceptable by the principle of the Rule of Law. All these factors will be helpful to construe a universal definition of terrorism under the International Criminal Law by subsuming all the factors including the elements of 'actus reus' and the 'mens rea' though in this case motive plays an insignificant role, and there by eradicating the confusion that exists in the quarters of International Criminal Law.

In the light of the above analysis it is appropriate to accept the concept of "Earned Sovereignty" and non force "Humanitarian Intervention" as the only solution available to prevent and combat terrorism nationally and internationally.