

# “DEFINING TERRORISM: HITCHES, GLITCHES AND THE WAY OUT OF THE QUAGMIRE”

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## INTRODUCTION

Terrorism is an abomination of the new millennium. Though violent behaviour is not new, the present day 'terrorism' in its full incarnation has obtained a diverse character and hence poses extraordinary challenges to the civilized world. In its contemporary form it is not akin to the impression it used to give few decades back.<sup>1</sup> The tremendous development in the field of science and technology and the globalization of world economy has changed the *modus operandi* in which terrorists operate, leading to a shift from “traditional international terrorism of the late 20<sup>th</sup> century into a new form of transnational non-state warfare”.

The rise of the modern-age terrorism has led to equally sophisticated yet unproductive efforts to counter the same. These efforts are not only limited to anti-terror wars fought on battlefields but include the hard work done by the legislature, executive and the judiciary who have left no stones unturned in their efforts to provide for an effective anti-terrorism legal regime. The efforts to counter terrorism have led to proliferation of anti-terrorism laws. These include substantive and procedural laws which are both preventive and punitive in nature. For the effective operation of these laws it is extremely important that they are properly structured and free from ambiguities requiring the legislatures to define terrorism and its ancillary terms properly.

The aim of this article is to critically analyse the existing definitions of terrorism and to subsequently highlight the glitches that we face while we try to fit terrorism into a practically executable definition. This article does not add any new definition to an already long list.<sup>2</sup> Instead, it addresses some of the problems that legislators

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<sup>1</sup>The sophisticated manner in which the Taliban planned and executed the 9/11 attack and the technology used by the terrorists on 26/11 would not have been possible few decades back. These incidents have bought the issue of terrorism to the forefront and have taken the fight to a completely different level.

<sup>2</sup>ALEX P. SCHMID & A. JONGMAN, POLITICAL TERRORISM 3 (Transaction Publishers, 2005). As per a study conducted by the authors in 1988 there were 109 definitions of terrorism. This number has increased many folds now.

and lawyers encounter when they attempt to provide a definition.<sup>3</sup>Over the past few years, scholars have debated the necessity of having a standard definition of terrorism. On one hand, some argue that it is futile to do so as it does not serve any purpose. While as others believe that defining terrorism is an indispensable part of the fight against terrorism. Part I of this article discusses the evolution and merits of this debate. Part II sets out the current legal definitions of terrorism under international law, those provided by jurists and those provided within different jurisdictions like United Kingdom, United States and India.

The ideological and other problems that we face while defining terrorism are going to be the subject-matter of Part III of this article. This part will primarily deal with the issues that prevent us from arriving at common grounds while defining terrorism. Part IV concludes by outlining principles that may assist in future attempts to define terrorism or in recasting current legal definitions.

## 1. TERRORISM: DO WE REALLY NEED TO DEFINE IT?

“Twentieth Century is the age of Science”. This is how we usually used to begin our essays on ‘Science’ while we were in school. However, barely a few years into it, the twenty-first century is already clearly marked as the age of “terrorism”<sup>4</sup>. What puzzles the scholars is that even though terrorism has posed a threat for so long, we still do not know what terrorism is? How should we define it for legal purposes? Can it be done? And if so, then what should be the universally accepted standards which can be used to generalize the term ‘terrorism’ and provide a universally accepted definition of the same? Since the 9/11 attacks on U.S.A. there has been a tremendous increase in the literature on terrorism.<sup>5</sup> A good portion of this literature is dedicated to finding an internationally accepted definition of terrorism. However, so far all attempts have failed. The task of defining terrorism has vexed the international community for years.<sup>6</sup>

<sup>3</sup>See H HA Cooper, *Terrorism: The Problem of the Problem of Definition* in Ben Golder & George Williams, *What is terrorism? Problems of Legal Definition*, 27 (2) UNSW L. J. 270 (2004). [Hereinafter Golder & Williams]. Cooper states that ‘the problem of the definition of terrorism is more than semantic. It really is a cloak for a complexity of problems, psychological, political, legalistic, and practical’.

<sup>4</sup>Steven Best & Anthony J. Nocella, *Defining Terrorism*, 2 *Animal Lib. Phil’y & Pol’y J.* 1 (2004).

<sup>5</sup>If we type “terrorism” on Google Search Engine, it shows 124,000,000 results; See Cynthia Pittson, *Bibliography on terrorism and international law*, PACE LAW SCHOOL & INTERNATIONAL SOCIETY (May 14, 2012), <http://www.law.pace.edu/library/terrorism.pdf>; *Responses to Terrorism*, SOCIAL SCIENCE COLLECTION GUIDES TOPICAL BIBLIOGRAPHIES (May 14, 2012) <http://www.bl.uk/reshelp/findhelpsubject/socsci/topbib/respterror/terrorism.pdf>; James JF Forest, *Terrorism and Counterterrorism-An Annotated Bibliography*, (May 14, 2012) [http://teachingterror.org/bibliography/CTC\\_Bibliography\\_2004.pdf](http://teachingterror.org/bibliography/CTC_Bibliography_2004.pdf).

<sup>6</sup>Michael P Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?* 7 *ILSA J. Int’l & Comp. L.* 391 (2001).



The employment of terrorism is an age-old practice.<sup>7</sup> However, the term 'terrorism' was first used in English in 1528.<sup>8</sup> It was subsequently used in France to describe the political violence of the Jacobian Party.<sup>9</sup> However, due to geographical restriction of these events and the nature of their intensity, no one felt the need to define terrorism. The task of defining terrorism gathered pace some three and a half decades ago and Walter Laqueur of the Center for Strategic and International Studies concludes that after thirty years of hard labour there is still no generally agreed definition of terrorism.<sup>10</sup> Terrorism may well be the most important word in the political vocabulary these days, however, one could argue that little has changed since the time when one of its most prominent students concluded in 1984 that:

*Academic researchers from many fields have spilled almost as much ink as the actors of terrorism have spilled blood and yet have reached no consensus on what terrorism is.*<sup>11</sup>

The principal question one may ask is whether we need to define terrorism at all? Does defining terrorism serve any legal purpose or not? Some conclude that the academic definition is dispensable and that the attempts to reach a universal one are futile, while others provide theoretical and practical reasons to make a case for the opposite. Judge Richard Baxter, formerly of the International Court of Justice, writing in 1974, has questioned the utility of a legal definition, stating that the term 'is imprecise, ambiguous and serves no operative legal purpose'.<sup>12</sup> Even Laqueur's scepticism about the possibility of arriving at a universal definition is based on his conviction that terrorism escapes any definition and that any effort to capture it into stable, monophonic definition is bound to fail. It almost predisposes him to the following quote: "*The study of terrorism can manage with a minimum of theory*".<sup>13</sup> In an article written in 1986 entitled "Is Terrorism worth Defining?" the author concluded<sup>14</sup>:

<sup>7</sup>Laura K. Donohue, "*Terrorism and counterterrorism discourse, in global anti-terrorism law and policy*" in VICTOR V. RAMRAJ, MICHAEL HOR & KENT ROACH, GLOBAL ANTI-TERRORISM LAW AND POLICY 15-17 (Cambridge University Press, 2005).

<sup>8</sup>ALEX P. SCHMID, THE PROBLEMS OF DEFINING TERRORISM, ENCYCLOPAEDIA OF WORLD TERRORISM 12 (Martha Crenshaw and John Pimlott eds., 1997) [Hereinafter SCHMID 1997].

<sup>9</sup>*Ibid* at pp. 12-13.

<sup>10</sup>WALTER LAQUEUR, NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY 395 (Oxford University Press, 2003) [Hereinafter LAQUEUR 2003]

<sup>11</sup>See SCHMID 1997, *Supra* note 8, at 13.

<sup>12</sup>Richard R Baxter, 'A Sceptical Look at the Concept of Terrorism' Akron L. Rev. 380, 380 (1974). His scepticism is mirrored in the writings of Judge Rosalyn Higgins, the first female judge elected to the International Court of Justice:

Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.

<sup>13</sup>LAQUEUR 2003, *supra* note 10, at 3.

<sup>14</sup>G. Levitt, *Is 'Terrorism' Worth Defining?* 13 Ohio N. U. L. Review, 97, 98 (1986). [Hereinafter Levitt 1986].

*"The evident conclusion is that a deductive legal definition is not really necessary. Indeed, it is not clear that such a definition would ever be beneficial. In the international context, given the intractable conceptual and political differences among states on this issue, it would be at best a watered-down, papered-over, exception-ridden orphan whose main practical result would provide a further basis for dispute and incentive at the United Nations."*

The honourable Supreme Court of India has also acknowledged the fact that it is neither possible nor desirable to give a proper definition of terrorism<sup>15</sup>:

*"Terrorism has not been defined under TADA nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when it's most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole."*<sup>16</sup>

Yet the real business can be spoiled, some authors claim, by the lack of a universally agreed definition. An objective definition of terrorism is not only possible: it is also indispensable to any serious attempt to combat terrorism. Ganor states that what constitutes terrorism is important, among other purposes, for 1) a development of common international strategies, 2) effective results of the international mobilization against terrorism, 3) enforcement of international agreements against terrorism, and 4) effective extradition procedures<sup>17</sup>. Similarly, Schmid also points to a positive role of a universal definition in coordinating the states' anti-terrorist strategies and considers the absence of a universal definition of terrorism as the main factor likely to encourage future terrorism.<sup>18</sup> In line of this argument, Jessica Stern of Harvard University also concedes that 'how we define terrorism profoundly influences how we respond to it'. Yet she adds another reason in favour of the definition- its relevance for theory and research:

*"The definition inevitably determines the kind of data we collect and analyse, which in turn influences our understanding of trends and our predictions about the future".*<sup>19</sup>

The eighth report of India's Second Administrative Reforms Commission titled "Combating Terrorism: Protecting by Righteousness" also points out towards the

<sup>15</sup>Mohd.Khalid v. State of West Bengal (2002) 7 S.C.C. 334.

<sup>16</sup>*Ibid.* at para 46.

<sup>17</sup>B. GANOR, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?* (May 5, 2012), <http://www.ict.org.il/ResearchPublications/tabid/64/Articlsid/432/Default.aspx>.

<sup>18</sup>"*Defining Terrorism*" (Institute for Safety, Security and Crisis Management Working Paper 4, 2008), (Accessed May 12, 2012), <http://www.filestube.com/46cEhbbmRTqIHziPteiBXM/No-End-To-War-Terrorism-In-The-Twenty-first-Century-by-Walter-Laqueur-5-Star-Book-Review.html>. [Hereinafter WP-4].

<sup>19</sup>JESSICA STERN, *THE ULTIMATE TERRORISTS* 12 (Harvard University Press, 1999).



importance of defining the word 'terrorism'. The report states:

*"There are two reasons why it is important to define the word 'terrorism'. Firstly, its definition is one way of understanding the problem. But more importantly, in the context of this Report, which deals with the governance aspects of combating terrorism, a workable or working definition would be required with a view to have special laws for tackling terrorism within the country and to get terrorists extradited from abroad."*<sup>20</sup>

The ultimate goal of law while defining substantive aspects of rights and duties is to maintain justice by facilitating human dignity and worth. This substantive content is followed by procedural arrangements for proper realization of those rights and duties. For effective operation of these laws, it is extremely important that the substantive content and the procedural arrangements are defined clearly and without any vagueness or ambiguity. Anything otherwise would jeopardize the efficacy of such laws. The necessity of ambiguity-free law is more vital for terrorism laws. It is not so only because they are being enacted to fight an evil, but also because ambiguous anti-terror laws will adversely affect the civil liberties of the citizens.<sup>21</sup>

Martin Scheinin, the United Nations special reporter on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has highlighted the risks of codifying vague and overly broad definitions of terrorism and related terms into law. He notes that in many countries, such overbroad definitions are used by government authorities "to stigmatize political, ethnic, regional or other movements they simply do not like," even though United Nations Security Council Resolution 1456 confirms that states must ensure that measures adopted to combat terrorism "comply with all their obligations under international law ... in particular international human rights, refugee and humanitarian law."<sup>22</sup> So, in order to avoid human rights violation, it is pertinent that terms like 'terrorist', 'terrorist acts', 'terrorist organisation' and other terrorism associated terminologies which incessantly appear in the text of such laws should be properly defined. Without understanding the exact meaning of the term, it is hardly possible to analyze what consequences there are to intra-national and international relations. Without a common agreement on the notion, there can hardly be any common steps

<sup>20</sup> *Combating Terrorism: Protecting by Righteousness*, 2<sup>nd</sup> Indian Administrative Reforms Commission, 8<sup>th</sup> Report (February 1, 2013) [http://darpg.nic.in/darpgwebsite/cms/Document/file/combating\\_terrorism8.pdf](http://darpg.nic.in/darpgwebsite/cms/Document/file/combating_terrorism8.pdf). [Hereinafter Commission 2008].

<sup>21</sup> This is reason for which TADA was left to lapse and POTA was repealed. The current AFSPA is also being criticised on similar lines.

<sup>22</sup> UN Commission on Human Rights, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin," <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/477/03/PDF/N0647703.pdf?OpenElement>. [Hereinafter Martin Report]. Last assessed on 05.06.2012.

to counter-terrorism, whether at the domestic or international level.

## 2. DEFINING THE UNDEFINABLE: THE ATTEMPTS AND OUTCOMES

### 2.1: UNDER INTERNATIONAL LAW

The definition of terrorism has emerged as a central focus of power politics and propaganda around the globe. One commentator dates 'the first organized international legal attempt to grapple with the problem of defining terrorism' to the International Conferences for the Unification of Penal Law, a series of events convened in various European capitals throughout the 1920s and 1930s.<sup>23</sup> Since then lawyers, academics, national legislatures, regional organisations and international bodies have produced a bewildering array of definitions. One 1988 study identified a total of 109 different definitions,<sup>24</sup> and the number is much higher today. Despite decades of effort, with even greater focus after September 11, attempts to develop a generally accepted legal definition of terrorism have failed.

To date there is no universally accepted definition of terrorism in the context of international law.<sup>25</sup> States have tried unsuccessfully to agree upon a definition of terrorism in international law since at least 1937.<sup>26</sup> After the September 2001 attacks, a United Nations (UN) Security Council Resolution noted that states shall "prevent and suppress the financing of terrorist acts" and take the "necessary steps to prevent the commission of terrorist acts", but it did not define the term "terrorist acts"<sup>27</sup> - and this has led many to argue that this failure to define "terrorist acts" has stalled the agreement in the United Nations on a Comprehensive Convention on International Terrorism.<sup>28</sup>

An analysis of the major international legal documents on terrorism will show that "terrorism" per se has not been defined. The definitions in these documents are inclusive definitions which provide or define certain situations that *may*<sup>29</sup> amount to terrorism. In 1930, during the League of Nation period, a definition of the term

<sup>23</sup>See Levitt 1986, *supra* note 14, at 97.

<sup>24</sup>See SCHMID 1997, *supra* note 8, at 5.

<sup>25</sup>Sami Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World* 29 HASTINGS INT'L & COMP. L. REV. 215 (2006). [Hereinafter SAMI].

<sup>26</sup>Golder, Ben & George Williams. *What is Terrorism? Problems of Legal Definition*, 27 UNSW. L. J. 270 (2004).

<sup>27</sup>UNSC, UN Doc S/Res/1373 of 28 September 2001.

<sup>28</sup>"Talking about Terrorism - Risks and Choices for Human Rights Organisations" International Council on Human Rights Policy, Versoix, Switzerland, 2008 at p. 19. (June 5, 2012) [http://www.ichrp.org/files/reports/35/129\\_report\\_en.pdf](http://www.ichrp.org/files/reports/35/129_report_en.pdf).

<sup>29</sup>The reason for using 'may' is that most of these Conventions do not expressly provide that such acts are terrorist acts but due to the nature of such acts, one may bring them within the category of "terrorist act".



was proposed at the Third Conference for the Unification of Penal Law at Brussels.<sup>30</sup> This proposed definition<sup>31</sup> is important for one reason: it addressed both state and non-state terrorism. In its 1937 Convention for the Prevention and Punishment of Terrorism,<sup>32</sup> the League of Nations defined acts of terrorism as "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."<sup>33</sup> This is perceived to be the first international effort to define terrorism.<sup>34</sup> The 1937 Convention, which avoided the issue of terrorism by state actors, was ratified by only one country<sup>35</sup> and signed by another 25 countries.<sup>36</sup> So this Convention never came into force, and was soon voided by World War II.

After the Second World War, as was the case during the League of Nations era, efforts to address the definition of international terrorism were scattered and in reaction to particular events.<sup>37</sup> Prior to 9/11, there were a total of thirteen international conventions related to terrorism in particular contexts<sup>38</sup> – safety of civil aviation<sup>39</sup>, maritime issues<sup>40</sup>, internationally protected persons<sup>41</sup>, plastic explosives<sup>42</sup>,

<sup>30</sup>M.K. Nawaz & Gurdip Singh, *Legal Control of International Terrorism*, 17 INDIAN J. INT'L L. 66 (1977).

<sup>31</sup>"The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas"

<sup>32</sup>The League of Nations Convention for the Prevention and Punishment of Terrorism, League of Nations Doc. C.546M (I).M.383(I).1937.V (1937).

<sup>33</sup>*Ibid.* Art. 1.

<sup>34</sup>Ben Saul, "The Legal response of the League of Nations to Terrorism", 4 J. INT'L CRIM. JUST.78, 81 (2006). [Hereinafter SAUL 2006].

<sup>35</sup>India was the only country to ratify this Convention.

<sup>36</sup>The countries that signed were: Albania, Argentina, Belgium, Great Britain, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, India, Norway, the Netherlands, Peru, Romania, Czechoslovakia, Turkey, U.S.S.R., Venezuela, and Yugoslavia.

<sup>37</sup>See SAUL 2006, *supra* note 34, at 82.

<sup>38</sup>M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001 (Hotei Publishing, 2001); See also M. Cherif Bassiouni, "Legal Control Of International Terrorism: A Policy-Oriented Assessment", 43 HARV. INT'L L.J. 83, 91, 2002. [Bassiouni 2002].

<sup>39</sup>Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, UN Treaty Series 1975 .Available at <http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>. Last assessed on 14.06.2012.

<sup>40</sup>Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, UN Treaty Series 1992, (221). Available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>. Last assessed on 14.06.2012; See also Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 2005 [Available at [https://www.unodc.org/tldb/en/2005\\_Protocol2Convention\\_Maritime%20Navigation.html](https://www.unodc.org/tldb/en/2005_Protocol2Convention_Maritime%20Navigation.html)]. Last assessed on 14.06.2012].

<sup>41</sup>Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, UN Treaty Series 1977 at 167. Available at <http://treaties.un.org/doc/db/Terrorism/english-18-7.pdf>. Last assessed on 14.06.2012; See also Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Supp. No. 49, at 299, U.N. Doc. A/49/49 (1994).

<sup>42</sup>Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991, UN Treaty Series 1995 (359). Available at <http://treaties.un.org/doc/db/Terrorism/Conv10-english.pdf>. Last

nuclear terrorism<sup>43</sup>, nuclear material<sup>44</sup>, suppression of the financing of terrorism<sup>45</sup>, suppression of terrorist bombings<sup>46</sup>, continental shelf safety<sup>47</sup>, taking of hostages<sup>48</sup>, suppression of unlawful seizure of aircraft,<sup>49</sup> offenses committed on board aircraft,<sup>50</sup> and unlawful acts of violence at airports.<sup>51</sup> These Conventions do not adopt a generic means of arriving at an understanding of terrorist acts, but rather reflect a case-by-case approach addressing particular events.<sup>52</sup> They characterize certain acts as terrorists act and do not define terrorism per se. This may be perhaps the right way to deal with the issue, at least for the purpose of International Law. The reason being the tremendous developments in the field of communication and technology have given rise to new forms of activities that may qualify as terrorist acts. It is as such vital to bring all these activities under a certain legal regime so that they can be countered effectively.

The Council of Europe Convention on the Prevention of Terrorism, adopted in Warsaw in 2005, although more elaborate when describing different forms of terrorist acts- such as recruitment, public provocation and training of terrorists, still fails to properly define terrorism and settles instead for the similar trick: namely referring to a list of conventions in which issue-specific acts of terrorism have been

assessed on 14.06.2012.

- <sup>43</sup>International Convention for the Suppression of Acts of Nuclear Terrorism. Available at <http://treaties.un.org/doc/db/Terrorism/english-18-15.pdf>. Last assessed on 14.06.2012.
- <sup>44</sup>Convention on the Physical Protection of Nuclear Material, 3 March 1980, UN Treaty Series 1987 at 124. Available at <http://treaties.un.org/doc/db/Terrorism/Conv6-english.pdf>. Last assessed on 14.06.2012.
- <sup>45</sup>International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc.A/54/49. Available at <http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>. Last assessed on 14.06.2012.
- <sup>46</sup>International Convention for the Suppression of Terrorist Bombings, 15 December 1997, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249. Available at <http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf>. Last assessed on 14.06.2012.
- <sup>47</sup>Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, UN Treaty Series 1992 (304). Available at <http://treaties.un.org/doc/db/Terrorism/Conv9-english.pdf>. Last assessed on 14.06.2012.
- <sup>48</sup>International Convention Against the Taking of Hostages, 17 December 1979, UN Treaty Series 1983 (205). Available at <http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>. Last assessed on 14.06.2012.
- <sup>49</sup>Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, UN Treaty Series 1973 at 105, available at: <http://www.unhcr.org/refworld/docid/3ddcaa774.html>. Last assessed on 14.06.2012; See also Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, 2010.
- <sup>50</sup>Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, UN Treaty Series 1969 at 218. Available at <http://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>. Last assessed on 14.06.2012.
- <sup>51</sup>Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the [Montreal Convention], Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474.
- <sup>52</sup>Thomas M. Franck & Bert B. Lockwood Jr., "Preliminary Thoughts Towards an International Convention on Terrorism", 68 AM. J. INT'L L. 69, 70 (1974).



criminalized.

Similar regional efforts have been made in Asia as well. The first of these efforts was made by the South Asian Association for Regional Cooperation [SAARC] by adopting the SAARC Regional Convention on Suppression of Terrorism, 1987 which was later on supplemented in 2004 by the Additional Protocol to the Regional Convention on Suppression of Terrorism. Neither the Convention nor the Protocol defines terrorism. The Convention simply points to the other multilateral conventions where certain specific acts have been classified as terrorist acts. One such Convention which actually defines terrorist act is the Convention against Terrorism, 2004 of the Cooperation Council for the Arab States of the Gulf which defines "terrorist act"<sup>53</sup> and "terrorist offence"<sup>54</sup>. However, these definitions are very vague and do not in any way conform to the established international standards on the same.

## 2.2: ACADEMIC DEFINITIONS

Both terms, "terrorism" and "terror", came to the spotlights of the political discourse during the Jacobinic terror period of the French Revolution (1793-1794). However, for a very long time since then these terms were used without any proper or uniform meaning. The first aggregate definition discussed is by Alex P. Schmid. In formal terms, it is a "long" one – and, as such, perhaps description could be considered as a more pertinent title. After having sent a draft definition to the members of the research community in the mid-1980s, he projected their reactions into the final version, which included 16 most common elements like violent act, civilian target, psychological effect on a certain population, intimidation, and so on.<sup>55</sup> The definition itself is an intimidating one and should not be incorporated *paramateriain* domestic anti-terror laws. It can certainly be used a basis for providing a proper definition. The second "aggregating" project, presented by a team of researchers composed of Leonard Weinberg, Ami Pedahzur and Sican Hirsch-Hoefler<sup>56</sup>, chose the opposite approach. Having analysed 73 definitions appearing in major academic journals in the field, the authors decided to refrain from incorporating as many elements as possible and, instead, proposed a consensus definition based on the lowest common denominator:

*"Terrorism is a politically motivated tactic involving the threat or use of force or violence in which the pursuit of publicity plays a significant role."*

In spite of all the attempts to draft a general definition, various political reasons have

<sup>53</sup>Article 1(2), Convention against Terrorism

<sup>54</sup>*Ibid.* Art. 1(3).

<sup>55</sup>Alex P. Schmid, "Terrorism: The Definitional Problem", 36 Case W. Res. J.Int'l L. 375 (2004).

<sup>56</sup>L. Weinberg, A. Pedahzur & S. Hirsch-Hoefler "The challenges of conceptualising terrorism", 16 Terrorism and Political Violence 777-794 (2004).

precluded any successful efforts. However, all these different attempts as well as the definitions used by various institutions and academics provide us with information on the elements that, in most cases, have been included in a definition and further help us to determine which elements are especially of interest for a legal definition. It is possible to identify a number of definitional elements in academic literature. Schmid and Jongman counted 22 of them.<sup>57</sup> The underlying perception of the wrongfulness of terrorism is echoed throughout the definitional elements. Ranking from high to low frequency, the elements mentioned include: violence, force; the political; fear, terror emphasized; threat; (psych.) effects and (anticipated) reactions; victim-target differentiation; purposive, planned, systematic, organized action; method of combat, strategy, tactic; extra-normality, in breach of accepted rules, without humanitarian constraints; coercion, extortion, induction of compliance; the publicity aspect; arbitrariness, impersonal, random character, indiscrimination; civilians, non-combatants, neutrals, outsiders as victims; intimidation; innocence of victims emphasized, group, movement, organization as perpetrator; the symbolic aspect, demonstration to others; incalculability, unpredictability, unexpectedness of occurrence of violence; clandestine, covert nature; repetitiveness, serial or campaign character of violence; the criminal; demands made on third parties. Although very useful for analysis and the drafting of a definition, a direct copy of these elements into a definition is no guarantee of a sound legal definition. Other definition given by experts in this field includes the definition by Yonah Alexander which defines terrorism as follows<sup>58</sup>:

*"Terrorism is defined as the calculated employment or the threat of violence by Introduction individuals, sub-national groups, and state actors to attain political, social, and economic objectives in the violation of law. These acts are intended to create an overwhelming fear in a target area larger than the victims attacked or threatened."*

CarstenBockstette of George C. Marshall Center for European Security Studies has attempted to define terrorism as follows<sup>59</sup>:

*"Terrorism is defined as political violence in an asymmetrical conflict that is designed to induce terror and psychic fear (sometimes indiscriminate) through the violent victimization and destruction of noncombatant targets (sometimes iconic symbols)...."*

<sup>57</sup>Schmid, A. & A. Jongman "Political Terrorism. A guide to actors, authors concepts, databases, theories and literature", in WP-4 *supra* note 18 at 97.

<sup>58</sup>YONAH ALAXANDER, COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES 3-4 (Univ. of Michigan Press, 2002).

<sup>59</sup>Bockstette, Carsten, "Jihadist Terrorist Use of Strategic Communication Management Techniques", George C. Marshall Center Occasional Paper Series, 2008, 20. Cited in John Varaghese, "Coping with International Terrorism-An Indian Experience" .Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=16060228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=16060228) .Retrieved on 23/2/2011.



In an attempt to provide a concise definition of terrorism that could be utilized as a foundation for further academic research, Boaz Ganor of the International Institute for Counter-Terrorism has proposed that 'terrorism is the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims'.<sup>60</sup>The broad scope of the definition is based on three elements that Ganor considers to be of utmost importance in establishing an agreed-upon legal definition: 1) use or threat to use violence, 2) the aim of the activity is always political, and 3) the targets are civilians. Ganor's definition would never qualify as a sound legal definition installing individual criminal responsibility. Moreover, as far as individuals, according to international law, can be held individually responsible for crimes committed by the state, these acts would fall under the scope of a different legal regime.

## 2.3: COUNTRY-WISE DEFINITIONS<sup>61</sup>

### 2.3.1: UNITED STATES OF AMERICA

Since 1983, the U.S. Department of State has used Title 22 of the United States Code, to define terrorism. In the introduction to the Department's *Patterns of Global Terrorism*, terrorism is defined as politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. Twelve days after 11 September 2001, President George W Bush made an Executive Order on Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to commit, or Support Terrorism<sup>62-63</sup>. The United States Congress then followed, on 25 October 2001, by enacting its own legislative definition. With only one dissenting vote in the Senate and 66 dissenting votes in the House of Representatives, Congress passed the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* ('USA PATRIOT Act'). Section 802 of which amended the definition of 'domestic terrorism' within Title 22 of the United States Code.

<sup>60</sup>See *supra* note 17.

<sup>61</sup>For critical analysis of domestic definitions of "terrorism", see Steven & Anthony, *Supra* Note 1 at p. 9; Also See Susan Tiefenburn, 'A Semiotic Approach to a Legal Definition of Terrorism' 9 ILSA J. Int'l & Comp. Law 357 (2003); See also Golder & Williams, *supra* note 3.

<sup>62</sup>Exec Order No 13,224, 66 Fed Reg 49 079 (Sept 23, 2001). Available at <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>. Last assessed on 16.06.2012.

<sup>63</sup>Section 3(d) defined 'terrorism' as an activity that -

- (i) involves a violent act or an act dangerous to human life, property or infrastructure; and appears to be intended -
  - (a) to intimidate or coerce a civilian population;
  - (b) to influence the policy of a government by intimidation or coercion; or
  - (c) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

### 2.3.2: UNITED KINGDOM

The present definition of terrorism used in UK legal systems is to be found in Section 1, Terrorism Act 2000, as amended. This definition<sup>64</sup> is of real practical importance. It triggers many powers, as well as contributing to the description of offences. For example, it enables the authorities to take action in relation to suspected breaches of Section 1, Terrorism Act 2006, which makes it an offence to publish a statement intended indirectly to encourage acts of terrorism; to proscribe organizations under Terrorism Act 2000 Section 3; to deal with terrorist property; to cordon areas; to arrest a person reasonably suspected of being a terrorist without warrant, pursuant to section 41; to stop and search without suspicion under Section 44; to detain and question persons at ports of entry under Schedules 7 and 8.

### 2.3.3: INDIA

After the repeal of Prevention of Terrorism Act, any act of terrorism in India is governed by the Unlawful Activities (Prevention) Act, 1967 which was amended in 2008 after the 26/11 terrorist attack on Mumbai. It provides as follows:

“Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,

- (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause
  - (i) death of, or injuries to, any person or persons; or
  - (ii) loss of, or damage to, or destruction of, property; or
  - (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
  - (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

<sup>64</sup> 1. Terrorism: interpretation

- 1) In this Act “terrorism” means the use or threat of action where—
  - a. the action falls within subsection (2),
  - b. the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and
  - c. the use or threat is made for the purpose of advancing a political, religious or ideological cause.



- (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or
- (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

For the purpose of this section, public functionary means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as a public functionary."

### 3. DEFINING TERRORISM: WHAT STOPS US FROM DOING IT?

#### 3.1: IDEOLOGICAL BARRIER AND THE WAY OUT

Natural Sciences use numbers to communicate an idea, social sciences uses words. Unlike numbers, however, words mean different things to different people. Where everyone with a basic education is able to add "4" to "5" and come to the same result, if we ask a group of people to describe "freedom", we may end up with many different results depending upon the particular persons' origin, culture and experience. Words such as "freedom", "liberty", etc. do not have the same meaning for everybody and such differences obviously hamper communication. Same is true about terrorism. Haven't we been hearing that one man's terrorist is another man's freedom fighter? Whatever we take for granted to be terrorism and whomever we assume to be a terrorist may not be so for others. It as such becomes very difficult to find an objective definition for 'terrorism'. The proliferation in the definitions of terrorism is a proof in itself that it is difficult to agree upon an objective definition. In fact, one can rightly say that there is a consensus on the fact that there is no consensus on the definition of 'terrorism'. Some have likened 'the search for the legal definition of terrorism ... [to] the quest for the Holy Grail'<sup>65</sup>. The subject gets more convoluted when we undertake to study it in the context of a socio-religio-cultural jungle like India. So, it becomes very difficult to quantify an objective definition for terrorism in such a milieu.

Due to the failure of the governments to appreciate the extent and implications of the terrorist threat to modern societies, a large number of countries, including Western democracies, have not been able to develop strong commitments to deal effectively with the challenge of defining terrorism. A major reason for this failure is the definitional and moral confusion over what constitutes terrorism<sup>66</sup>. The

<sup>65</sup>Geoffrey Levitt, *Is "Terrorism" Worth Defining?* 13 Ohio N. U. L. Rev. 97 (1986).

<sup>66</sup>See SAMI *supra* note 25 at 223.

demographical and ideological difference among the nations makes it different for the nations to agree upon a consensual definition of terrorism. Differential and ideological posturing, the absence of boundaries of conflict and fixed enemies, messages of fear, legal narratives, and creating, remaking and reconfiguring judicial reality have a profound tendency to make terrorism a never ending battle.<sup>67</sup>For some, terrorism is an offense, and for others, it is an activity assigned by God; for some, it is a distinctive act of maintaining power pride, and for others, it is a justified action against oppression; for some, it is an attack on the peace and security and for others, it is a quest for identity.<sup>68</sup>This is where a *general* approach to defining terrorism can be useful. However, this approach can only be used for the purpose of defining terrorism at national level. The employment of such approach restricts the affect of social variables while defining terrorism. As has been pointed, it cannot be used for the purpose of international law.

### 3.2: A GENERAL OR SPECIFIC DEFINITION: WHY NOT BOTH?

The definitions of terrorism that we have analyzed above show that two approaches i.e. *general* and *specific* have usually been adopted while defining terrorism. Trying to define terrorism using the *specific* approach restricts the definition to a certain specific subject-matter. The *specific* approach identifies certain activities as terrorism, such as hijacking and taking hostages, without seeking to define general category of terrorism per se. The *general* approach seeks to arrive at a general definition of terrorism, by reference to criteria such as intention, motivation, and so forth. While *specific* approach is *inductive* in nature, the *general* approach is *deductive*. The question which the legislators, lawyers and judges face while drafting a definition is which option to chose? Which approach would produce a definition that will be effective and consistent with the norms of humanitarian law? I am going to argue in support of the *general* approach.

The first problem with adopting *specific* approach is in relation to the subject-matter of the same. What should we include and should we exclude? And who decides what is in and what is out? As stated already, modern state terrorism is being played out on an entirely different level. So many acts can be associated with terrorism that it would be difficult to quantify all of them as terrorist acts using the *specific* approach definition. All this is going to over-burden the legislature and give time to terrorists to carry out their evil plans. Terrorism is like a many headed monster which takes on a different form every time one of its head is severed, the new one probably more deadly than the previous one. It will be impossible for the legislators

<sup>67</sup>Upendra D. Acharya, "War on Terror or Terror Wars: The Problem in defining Terrorism", 37 4 Denv J. Int'l & Pol'y (2009).

<sup>68</sup>Daniel Lazare, "We are all Terrorists", 29 RADICAL SOC'Y: REV. CULTURE & POL. 13 (2002); See also Sami Zeidan, "Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World", 29 HASTINGS INT'L & COMP. L. REV. 215, 219 (2006).



to keep reviewing the definition every now and then. As new forms of technology are created, new forms of terrorist acts are likely to develop.<sup>69</sup> A *general* approach may be needed to 'cover these new modalities'.<sup>70</sup>

The use of *specific* approach also involves the risk of political manipulation. Some commentators have argued that it is the *general* approach that involves such a risk.<sup>71</sup> However, I strongly disagree with them and believe *vice-versa* to be true. Defining terrorism using *specific* approach would give political parties more space to target political opponents. It will be left to the liberty of such a party to decide whether a particular conduct or activity should be put in the list of specific terrorist acts.

However, this does not mean that the *specific* approach will fail in all the cases. *Specific* approach can play a very vital role in providing an effective definition of terrorism. My argument has been that it cannot on its own provide the same. This approach can certainly be combined with *general* approach so as to provide an even more effective definition.

### 3.3: POLITICAL ROADBLOCK AS A HINDRANCE

It goes on without saying that terrorism has political side to it. Unfortunately, this political side is not restricted to the 'political motivation' behind a terrorist act. It exists even at the stage where we try to counter it. In most of the countries which follow a multi-party system, a problem that is generally faced while trying to enact a law on terror is the hindrance caused because of the ideological differences between the political parties. Parties try to use 'terrorism' to satisfy their political interests. This has adverse effects on the attempts of the civil society to fight terrorism. Even if there is a political consensus among the parties for enacting an anti-terror law, this consensus may not apply to the substantive content of such law later on. The need of the time is that the political parties should keep aside their differences as far as the enactment and substantive content of anti-terror law is concerned.

### CONCLUSION

It would be ignorant on our part to deny the complexity which exists in the quest for finding an objective definition of terrorism. However, not defining it would be idiocy. A State interacts with its citizens in accordance with the law of the land. Any response to terrorism requires the State to interact with its citizens be it for the purpose of detection, at the stage of occurrence of a terrorist act or at post-occurrence stage. This interaction which is regulated by law can have serious human

<sup>69</sup>Susan Tiefenburn, 'A Semiotic Approach to a Legal Definition of Terrorism' 9 ILSA J. Int'l & Comp. L. 357, 365 (2003).

<sup>70</sup>*Ibid.*

<sup>71</sup>*Ibid.*; See also Golder & Williams, *supra* note 3 at 287.

rights issues if the term terrorism is not properly defined. The laws of terrorism and human rights are very intricately caught up with each other. *Prima facie* both are antithesis to each other. However, both are equally critical for the subsistence of the society. This calls for a need to balance the variance that exists between the two. One juncture at which this balance can be appropriately struck is the definitional stage. The definition of "terrorist", "terrorist act", "terrorist organisation" etc is going to determine who can and to what extent can a person be governed by a terrorism law. Vague definitions, accompanied by harsh penalties and wide ancillary powers of detention and investigation, can be misused to persecute political opponents or authorize repressive measures against unpopular or marginal religious and ethnic populations. This is the primary reason for which we need to have a proper definition of terrorism. In order to ensure that only conduct of a terrorist nature is covered by counterterrorism measures, the Special Rapporteur of United Nations in his Report on promotion and protection of human rights and fundamental freedoms while countering terrorism recommends that any definition of terrorism should contain the following three cumulative characteristics:

- The acts are committed with the intention of causing death or serious bodily injury (and not just property damage).
- The acts are committed for the purpose of provoking terror in the general public or part of it, intimidating a population, or compelling a government or an international organization to do or refrain from doing any act.
- The acts constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>72</sup>

The definition of terrorism as provided in Unlawful Activities (Prevention) Act, 1967 (as amended in 2008) does not satisfy the above criteria and needs to be made consistent with the same.<sup>73</sup> Even though India has followed the *general* approach to define 'terrorist act', it still does not conform to the international standards and safeguards regarding legislations that deal with terrorism. Moreover, there is a need to clearly delineate the ordinary criminal acts from those that may qualify as terrorist act.<sup>74</sup> Also, another issue in relation to India is the lack of consensus among the political parties over the nature of terrorism laws. We saw this affecting the operation of TADA and POTA which even though were constitutionally upheld in the courts of law, were put out of existence due to the political intervention. The concept of 'terrorism' has entered public and political discourse and is playing an important role in both these realms. If the law is to keep pace with such discourse then the challenge for us is to formulate a generic definition that reflects our contemporary understanding of terrorism.

<sup>72</sup>See Martin Report, *supra* note 22.

<sup>73</sup>Human Rights Watch, "Back to the Future: India's 2008 Counterterrorism Laws", July 2010. Retrieved from [http://www.hrw.org/sites/default/files/reports/india0710webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf) on 16.06.2012.

<sup>74</sup>See Commission 2008, *supra* note 20 at 115.