ZfWT Vol 10, No. 3 (2018) 277-299

THE OBLİGATİON OF THE UNİTED NATİONS HUMAN RİGHTS COUNCİL NOT TO RECOGNİZE AS LAWFUL RESOLUTİON 30/1 OF THE UNİTED NATİONS HUMAN RİGHTS COUNCİL

BİRLEŞMİŞ MİLLETLER İNSAN HAKLARI KONSEYİ`NİN 30/1 SAYILI KARARININ, BİRLEŞMİŞ MİLLETLER İNSAN HAKLARI KONSEYİ TARAFINDAN YASAL KABUL EDİLMEMESİ ZORUNLULUĞU

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Özet

Birleşmiş Milletler İnsan Hakları Konseyi`nin Sri Lanka için almış olduğu 30/1 kararının uluslararası organizasyonların haksız fiili olarak kabul edilmesi gerekmektedir. İnsan Hakları Konseyi 30/1 sayılı kararında Birleşmiş Milletler Kontre-Terorrism Strateji çerçevesindeki yükümlülüklerini yerine getirmemiş bulunmaktadır. 30/1 sayılı kararını alırken İnsan Hakları Konseyi, Terör örgütü PKK ile ortak uluslararası suç faaliyetlerinde bulunan Tamil Elam Kurtuluş Kaplanlarının, Sri Lanka için almış olduğu 25/1 sayılı kararında Tamil Elam Kurtuluş Kaplanları için kullanmış olduğu terör örgütü tanımında bulunmamıştır. Tamil Elam Kurtuluş Kaplanları, terör faaliyetlerini dünyanın çeşitli bölgelerindeki uyuşturucu ticareti, insan kaçakçılığı, deniz korsanlığından sağlamıştır. İnsan Hakları Konseyi`nin 30/1 sayılı kararı Tamil Elam Kurtuluş Kaplanlarını terör örgütü olarak tanımlamadığı ve aynı zamanda Tamil Elam Kurtuluş Kaplanları terörü finansmanının araştırılması için uluslararası bir komite kurulması kararı almadığı için uluslararası bir kuruluşun haksiz fiili olarak kabul edilmesi gerekmektedir. Uluslararası toplumun, Birleşmiş Milletleri oluşturan idealler ve ilkeler çerçevesinde , İnsan Hakları Konseyi`nin 30/1 sayılı kararını yasal kabul etmemesi zorunluluğu bulunmaktadır.

Anahtar Kelimeler: Jus Cogens, Erga Omnes, Terörizm, Cezasızlık, Uluslararası İnsancıl Hukuk, LTTE, Birleşmiş Milletler, İnsan Hakları Konseyi

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Abstract

The United Nations (UN) Human Rights Council (HRC) resolution 30/1 for Sri Lanka is an international wrongful act of an international organization. In his resolution 30/1, the HRC did not respect and fulfill his obligation to the UN Global Counter-Terrorism Strategy (UNGCTS) by his mandate given by the General Assembly of the UN. The HRC prepared the resolution 30/1 without taking account of the systematic acts of terrorism of the Tamil militant Liberation Tigers of Tamil Eelam (LTTE) and did not defined LTTE as a terrorist organization as defined in his resolution 25/1. LTTE financed his terrorism acts by different international criminal sources including drug dealing with the terror organization PKK, illegal human trafficking and international sea piracy. The resolution of HRC 30/1 can only be defined as the internationally wrongful act of the HRC organization by not defining LTTE as a non-state armed group designated as terrorist as well not asking an international investigation for the perpetrators of financing terrorism. The international community has an obligation not to recognize as lawful the HRC 30/1arising from the spirit, principles and ideals of the UN.

Key Words: Jus Cogens, Erga Omnes, Terrorism, Impunity, International Humanitarian Law, LTTE, United Nations, Human Rights Council

INTRODUCTION

By the resolution 25/1 of 27 March 2014, "Promoting reconciliation, accountability and human rights in Sri Lanka", the HRC requested the Office of the High Commissioner for Human Rights (OHCHR) in the operational article 10 (b) to organize a committee of inquiry on Sri Lanka to establish the facts and circumstances of serious violations and abuses of human rights and related crimes by both parties alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability.

A special investigation team established within OHCHR in Geneva which began its work from 1 July 2014 and named as OHCHR Investigation on Sri Lanka (OISL). The High Commissioner for Human Rights also invited three experts, Mr. Martti Ahtisaari, former President of Finland, Dame Silvia Cartwright, former High Court Judge of New Zealand, and Ms. Asma Jahangir, former President of the Human Rights Commission of Pakistan, to play a supportive and advisory role to the investigation. The mandate was given to the investigation; however, covering a time period from February 2002 to November 2011 is much broader than the end of the conflict on 19 May 2009.

OISL finished and published his report on 16 September 2015 namely "Report of the OHCHR Investigation on Sri Lanka, A/HRC/30/ CRP.2."

In paragraph, 9 of the HRC Resolution 25/1, "*Promoting reconciliation, accountability and human rights in Sri Lanka"* defined the situation of the past armed conflict as combat terrorism but however in paragraph 1141 of the OISL report, the past armed conflict in Sri Lanka was defined as an internal armed conflict. In paragraphs 168 and 661 of the OISL report, the Liberation Tigers of Tamil Eelam (LTTE) was defined as a non-state armed group (NSAG). In paragraph 154 of the OISL report, LLTE's relation as a terrorist organization is mentioned as a point of view of some States but not as an OISL point of view. Even if in OISL report, LTTE was put under the definition of a NSAG, in paragraph 49 of the OISL report, universally accepted acts of terrorism, which were made by LTTE, were written in detail as:

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

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

> "*Unlawful killings in paragraph 1118, abduction and forced recruitment in paragraphs 1136,1137,1138,1139, recruitment of children and use in hostilities in paragraphs 1140, 1141, impact of hostilities on civilians and civilian objects in paragraphs 1157, 1158, 1159, control of movement in paragraphs 1161, 1162, 1163, 1164, denial of humanitarian assistance in paragraphs in 1167, 1168.*"

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

Even though, in paragraph 20 of the recommendations part of the OISL report, it is asked for an *ad hoc hybrid court*, integrating international judges, prosecutors, lawyers and investigators, mandated to try claimed war crimes and

crimes against humanity, including sexual crimes and crimes committed against children, with its own independent investigative and prosecuting organ, defense office, and witness and victims protection program, justice for the victims of terrorism was not mentioned, based on the United Nations Global Counter-Terrorism Strategy (UNGCTS) which is an obligation to be followed by the OHCHR in the recommendations part.

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

By the operative paragraph 6 of the resolution 30/1 of the HRC on October 2015, "*Promoting reconciliation, accountability and human rights in Sri Lanka*", based on the recommendations of the OISL report paragraph 20, HRC calls upon the importance of participation in a Sri Lankan judicial mechanism the special counsel's office, of Commonwealth and other foreign judges, defense lawyers and authorized prosecutors and investigators, but not asked for an international investigation of the finance of LTTE which is in fact an obligation according to the UNGCTS. HRC by the resolution 30/1 disregarded his own obligation of the justice for the victims of terrorism by the UNGCTS as well.

The difference of legal definition of the past-armed conflict in Sri Lanka by the HRC Resolution 30/1 and OISL report created not only legitimize the terrorism of LTTE but gives impunity to the members of LTTE whom should be subject to criminal investigation for individual indirect responsibility for the financing of terrorism under the UNGCTS in the world.

1. Definition of an Armed Conflict

The concept of "*armed conflict*" is not defined in the 1949 Geneva Conventions – either for international armed conflicts in Article 1 or non-international armed conflicts in common Article 3. There is not a single definition of armed conflict under International Humanitarian Law (IHL). IHL distinguishes between international armed conflicts and armed conflicts "*not of an international character*". Definition of an armed conflict for the purpose of the application of IHL as spelled out by the International Criminal Tribunal for ex-Yugoslavia (ICTY) in Dusko Tadic case Appeals Chamber, 2 October 1995 is as:

> *"An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within*

> *a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, IHL continues to apply to the whole territory of the Warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."*

2. Definition of Non-State Armed Group

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

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

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

Two main legal sources must be examined in order to determine what a NIAC under international humanitarian law is: a) common Article 3 to the Geneva Conventions of 1949; b) Article 1 of Additional Protocol II:

3.1 Non-International Armed Conflicts within the Meaning of Common Article 3

Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "*in the territory of one of the High Contracting Parties*" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention

3.2 Non-International Armed Conflicts in the Meaning of Art. 1 of Additional Protocol II

A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts "*which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*". This definition is narrower than the notion of NIAC under common Article 3 in two aspects. Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control "*as to enable them to carry out sustained and concerted military operations and to implement this Protocol*". Secondly, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups. (ICRC) Opinion Paper, 2008, p.3-4)

In Article 1 (2) of Additional Protocol II, defines not to be applied "to situations of internal *disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts"*. The last phrase is the key because it clearly provides a threshold for all NIAC conflicts including common Article 3 and the narrower definition of Additional Protocol II. (Berman, 2013, p.37-38)

4. The End of a Non-International Armed Conflict

The implication of the insistence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Tadić case that IHL applies "*in the case of internal conflicts, until a peaceful settlement is achieved*". This makes perfect sense from the standpoint of an international criminal tribunal, which wants to stabilize its jurisdiction and bring to account as many perpetrators of war crimes as possible. Thus, for instance, with respect to the NIAC between Serbia and the Kosovo Liberation Army in 1998, the first ICTY Trial Chamber judgment in the Haradinaj case found that *"since according to the Tadić test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period, and a NIAC*." For an example of a NIAC

ending through the complete defeat of an adversary, we need only look at the Sri Lanka conflict. (Milinkovic, 2014, p.180)

5. The Geographic Reach of International Humanitarian Law Applicability

IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of its territorial scope of applicability by specifying certain acts as prohibited "*at any time and in any place whatsoever*." International jurisprudence has, in this vein, explicitly confirmed in the ICTY Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Judgment of 12 June 2002 as:

> "*There is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there."*

6. Definition of the Acts of Terrorism

In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal sectoral treaties relating to specific aspects of it define certain acts and core elements. (OHCHR, 2008, p.5)

IHL does not provide a definition of terrorism but prohibits most acts committed in armed conflict that would commonly be considered "terrorist". It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. This principle of "distinction" is the cornerstone of IHL. Many IHL rules specifically aimed at protecting civilians – such as the prohibition against deliberate or direct attacks against civilians and civilian objects, the prohibition against indiscriminate attacks or the prohibition against the use of "human shields" are derived from it. IHL also prohibits hostage taking. There is no legal significance in describing deliberate acts of violence against civilians or civilian objects in situations of armed conflict as "terrorist" because such acts already constitute serious violations of IHL. (ICRC, 2015)

Moreover, IHL specifically prohibits "measures" of terrorism and "acts of terrorism." Article 33 of the Fourth Geneva Convention states that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

Article 4 of Additional Protocol II prohibits "acts of terrorism" against persons not or no longer taking part in hostilities. The main aim of these provisions is to emphasize that neither individuals nor the civilian population may be subjected to collective punishment, which, among other things, obviously terrorizes. Additional Protocols I and II also prohibit acts aimed at spreading terror among the civilian population: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (Article 51, paragraph 2, of Additional Protocol I; Article 13, paragraph 2, of Additional Protocol II). These provisions do not prohibit lawful attacks on military targets, which may spread fear among civilians, but they outlaw attacks that specifically aim to terrorize civilians; for example, conducting shelling or sniping campaigns against civilians in urban areas.(The Red Cross and Red Crescent, 2015, p.17-18) In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism set out in its resolution 49/60, and in the operative article 3 stated that terrorism includes:

> *"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" and that such acts "are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."*

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

> *"Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."*

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

> *"Unlawfully* and intentionally" causing, attempting or threatening to cause:
>
> (a) Death or serious bodily injury to any person; or
>
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
>
> (c) Damage to property, places, facilities, or systems… resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."

In the Article 2 of the Statue of the International Criminal Tribunal for the Former Yugoslavia defines grave breaches of the Geneva Conventions namely the following acts:

> (a) Willful killing;
>
> (b) Torture or inhuman treatment, including biological experiments;
>
> (c) Willfully causing great suffering or serious injury to body or health;
>
> (d) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
>
> (e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> (f) Willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> (g) Unlawful deportation or transfer or unlawful confinement of a civilian;
>
> (h) Taking civilians as hostages.

7. Non-State Armed Groups Designated as Terrorist

There are several important distinctions between the legal frameworks governing armed conflict and terrorism, based primarily on the different reality that each seeks to govern. The main divergence is that, in legal terms, armed conflict is a situation in which certain acts of violence are allowed (lawful) and others prohibited (unlawful), while any act of violence designated as terrorist is always unlawful. As already mentioned, the ultimate aim of armed conflict is to prevail over the enemy's armed forces. For this reason, the parties are permitted, or at least are not prohibited from, attacking each other's military objectives. Violence directed at those targets is not prohibited as a matter of IHL, regardless of whether it is inflicted by a state or a non-state party. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians, as well as civilian objects, from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence and is the only body of international law that takes such a two-pronged approach. IHL both: prohibits, as war crimes, specific acts of terrorism perpetrated in armed conflict, and prohibits, as war crimes, a range of other acts that would commonly be deemed "*terrorist*" if committed outside armed conflict. (ICRC, 2015, p.18)

8. The United Nations Global Counter-Terrorism Strategy

The General Assembly by its resolution 60/288 of September 2006 was adopted the UNGCTS as a form of a resolution and an annexed Plan of Action. The UNGCTS is a comprehensive instrument intended to enhance coordination of national, regional and international efforts to counter terrorism. The Strategy takes a holistic approach addressing four pillars as written in resolution 60/288 : I) Measures to address the conditions conducive to the spread of terrorism; II) Measures to prevent and combat terrorism; III) Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard; and IV) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

The UNGCTS intended as an "all-encompassing counter terrorism instrument," this resolution called for a wide range of activities (many of which were repeated from Security Council resolutions) as part of a larger strategy to combat terrorism. In the web page of UN Global Counter-Terrorism Strategy, it is specified that to ensure a systemic and cohesive UN effort to help Member States implement the Global Strategy, the Secretary-General, established the Counter-Terrorism Implementation Task Force (CTITF), currently composed of

38 entities from within and outside the UN system, which engage in multilateral counter-terrorism efforts and which coalesce around 12 counter-terrorism thematic Working Groups. These Working Groups reflect trends in terrorism as well as UN programmatic responses, and they bring stronger cohesion to international counter-terrorism activities implementing the Strategy. The CTITF and its Working Groups are supported by the CTITF Office, which also supports the UN Counter-Terrorism Centre (UNCCT), created in 2011 with extra-budgetary funds from multiple Member State sources to provide additional counterterrorism programming and capacity-building support to the Member States seeking to implement the Global Strategy. The UN Office of Counter-Terrorism was established through the adoption of General Assembly resolution 71/291 on 15 June 2017.

9. Finance of Terrorism and the United Nations Global Counter-Terrorism Strategy

Terrorist financing involves the solicitation, collection or provision of funds with the intention that they may be used to support terrorist acts or organizations. Funds may stem from both legal and illicit sources. (IMF, 2018) The European Union gives a definition in Article 1 of the Third Directive on money laundering and terrorist financing (ML/TF). It defines terrorist financing as "the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism".

International efforts to curb money-laundering and the financing of terrorism are the reflection of a strategy aimed at, on the one hand, attacking the economic power of criminal or terrorist organizations and individuals in order to weaken them by preventing their benefiting from, or making use of, illicit proceeds and, on the other hand, at forestalling the nefarious effects of the criminal economy and of terrorism on the legal economy. The 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is the first international legal instrument to embody the money-laundering aspect of this new strategy and is also the first international convention which criminalizes money laundering. (UNODC,2018)

When the criminalization of terrorism financing was first addressed in an international instrument through the International Convention for the

Suppression of the Financing of Terrorism in 1999, drafters were faced with the challenge of establishing a regime that would criminalize the funding of an act that had not been previously defined in a comprehensive manner. Making the financing of terrorism a legal offense separate from the actual terrorism act itself gives authorities much greater powers to prevent terrorism.(CTITF, 2009, p.5)

UN Security Council Resolution 1373 of 21 September 2001 amounted to an obligation to apply the operative parts of the UN International Convention for the Suppression of the Financing of Terrorism. Under Resolution 1373, which reproduces the terms of the 1999 Terrorist Financing Convention, terrorism financing is defined as "the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."(Boutin, 2017)

Resolution 1373 also provided for the setting up of the Counter-Terrorism Committee (CTC) to monitor the implementation of the Resolution by the states. In April 2002, the International Convention for the Suppression of the Financing of Terrorism became effective, giving the measures contained in Resolution 1373 a permanent existence. By the end of June 2006, the Convention had 154 signatories highlighting the increased political will to counter terrorist financing. This formed the key legal framework in combatting terrorist financing, requiring signatories to adopt domestic legislation to criminalize and punish terrorist financing, license or register all money transmitting services, detect and control the physical cross-border transportation of currency and negotiable instruments, and develop and implement internal controls to prevent financial institutions from being used to transfer funds to terrorists. (Shillito, 2015, p.330)

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

10.Individual Criminal Responsibility for the Finance of Terrorism

International Convention for the Suppression of the Financing of Terrorism 1999, the term, "indirectly" is used for the responsible for the acts of terrorism. In the dart article 2 of the Ad Hoc Committee of General Assembly the terms "unlawfully and intentionally" causing is used. The Special Tribunal for Lebanon (STL) definition of terrorism "indirectly" acts of terrorism are also put under criminal responsibility. The STL, in establishing the raison d'etre of the tribunal to prosecute the crime of terrorism, recognized the customary international law prohibition of terrorism as an international crime imputing individual criminal responsibility. Any person who unlawfully and intentionally involved in any terrorist organization is under individual criminal responsibility for crimes of the terrorist organization.

UN Security Council Resolution 1373 in the operative paragraph of the Article 1 (b) individual criminal responsibility is defined as;

> *"Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; Knowledge is defined as: A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events".*

In the operative paragraph 4, Security Council identifies the connection between international terrorism and transnational organized crime as:

> *"the close connection between international terrorism and transnational organized crime, illicit drugs, money laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, sub regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;"*

11. Ending of Impunity for the Perpetrators of Financing Terrorism

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

impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and making reparations to their victims."(Orentlicher, 2005, p.6)

The General Assembly by the Resolution 67/1 of 24 September 2012 "the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", in paragraph 22, ensure that: "impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law."

In paragraph 26 of the resolution 67/1 member states reiterate that: "Strong and unequivocal condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security; we reaffirm that all measures used in the fight against terrorism must be in compliance with the obligations of States under international law, including the Charter of the United Nations, in particular, the purposes and principles thereof, and relevant conventions and protocols, in particular, human rights law, refugee law, and humanitarian law."

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

12. Obligations *Erga Omnes* and Obligations *Erga Omnes Partes* for the Violations of International Humanitarian Law

In 1970, the International Court of Justice (ICJ) introduced the concept of obligations *erga omnes* in the international law debate for the first time in the Barcelona Traction Case. According to a very famous dictum:

> *"An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the*

> *importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."*

Accordingly, obligations *erga omnes* are those international customary obligations that are the concern of every state since they are owed towards the international community as a whole, rather than towards one or more states. Similarly, obligations *erga omnes partes* are those treaty obligations owed towards a group of states parties to the same treaty, which all have a legal interest in respecting the rules embodied therein. The core element of these kinds of obligations is the fact that the legal interest in their compliance is common to and shared between a number of states or every state in the international community. Accordingly, they are a manifestation of the shift of the international community from bilateral and multilateral relations towards common concerns and interests. (Longobardo, 2018, p.9)

According to common Article 1 of the 1959 Geneva Conventions, "'*the High Contracting Parties undertake to respect and to ensure respect' for the 1949 Geneva Conventions 'in all circumstances*". This provision is restated in the API, and it is considered to be part of customary law. There has been an extensive debate regarding the meaning of the words "*ensure respect"*; although some scholars have argued that these provisions add nothing to the duty to respect the Conventions and to prevent private actors from violating them, it has also been asserted that they emphasize the fact that the 1949 Geneva Conventions embody obligations *erga omnes* and *obligations erga omnes partes*. (Longobardo, 2018, p.12)

Additionally, it is noteworthy that the words "*ensure respect*" were introduced through a proposal of the International Committee of the Red Cross (ICRC), which aimed at the creation of additional obligations for states beyond their own commitment to respect the Conventions. International case law confirms the interpretation that common Article 1 of the 1949 Geneva Conventions refers also to conduct in relation to other states. First, in the Wall opinion, the ICJ strengthened its finding regarding the consequences of Israeli violations of certain obligations *erga omnes* by invoking common Article 1 of the 1949 Geneva Conventions. Moreover, the ICJ invoked briefly common Article 1 of the 1949 Geneva Conventions in the Nicaragua case in order to spell out US duties regarding a conflict to which it was not a party, emphasizing that the duties to respect and to ensure respect are separate. In addition, the ICTY had invoked common Article

1 of the 1949 Geneva Conventions to rule out reciprocity in IHL, referring to "*absolute obligations […] that are unconditional*", just after having recalled that its own case law had qualified those obligations as obligations *erga omnes*. (Longobardo, 2018, p.18)

13. Responsibility of International Organizations for Internationally Wrongful Acts

The draft articles on the responsibility of international organizations by the International Law Commission intend to cover issues of responsibility that concern international organizations and that were not addressed in the articles on the responsibility of States for internationally wrongful acts. The more recent articles consider first of all the internationally wrongful acts committed by international organizations and the content and implementation of responsibility when an organization is responsible towards another organization or a State or the international community as a whole. These articles also address questions relating to the responsibility of States for the conduct of an international organization, as well as the responsibility of an organization for the conduct of a State or another organization. (Gaja, 2018, p.1)

Article 3: Responsibility of an international organization for its internationally wrongful acts

The wording of Article 3 is identical to that of Article 1 of the articles on the responsibility of states for internationally wrongful acts, except for the replacement of the word "state" with "international organization." When an international organization commits a wrongful act, its responsibility is entailed. One may find a statement of this principle in the advisory opinion of the ICJ on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, in which the court said, "The Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity." "The UN may be required to bear responsibility for the damage arising from such acts." (Kaulahao and Güzel, 2018, p.69)

Article 4: Elements of an internationally wrongful act of an international organization

The obligation may result from either a treaty binding the international organization or any other source of international law applicable to the organization. As the ICJ noted in its advisory opinion on the Interpretation of the Agreement of March 25, 1951 between the World Health Organization (WHO)

and Egypt, international organizations "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."(ILC, 2011, p.5)

Article 26: Compliance with peremptory norms

It is clear that international organizations, like states, could not invoke a circumstance precluding wrongfulness in the case of noncompliance with an obligation arising under a peremptory norm. The purpose of this provision in Article 26 is to "make it clear that circumstances precluding wrongfulness do not authorize or excuse any derogation from a peremptory norm of general international law." (Kaulahao and Güzel, 2018, p.75)

Article 42: Particular consequences of a serious breach of an obligation under this chapter

In its report to the UN General Assembly, the ILC asked two questions of the governments and international organizations:

Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?

According to Article 41, paragraph 1, on responsibility of states for internationally wrongful acts, when a state commits a serious breach of an obligation under a peremptory norm of general international law, the other states are under an obligation to cooperate to bring the breach to an end through lawful means. Should an international organization commit a similar breach, are states and also other international organizations under an obligation to cooperate to bring the breach to an end?

Several states expressed the view that the legal situation of an international organization should be the same as that of a state having committed a similar breach. Response of Switzerland for the question: As to the commission's second question, in paragraph 28(b), concerning whether states and other international organizations had an obligation to cooperate to bring to an end a serious breach by an international organization of an obligation under a peremptory norm of general international law, his delegation's answer was "Yes" (UN Document A/C.6/61/SR.15, p. 3). Response of Denmark on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden): With regard to the second question, which asked whether states and other international

organizations were under an obligation to cooperate to bring to an end a serious breach of an obligation under a peremptory norm of international law, the most appropriate approach would be to echo Article 41, par. 1, of the articles on responsibility of states for internationally wrongful acts, which did impose such an obligation. The rationale for the existence of such a principle in inter-state relations was all the more compelling in relations between states and international organizations, particularly where the state in question was a member of the organization. The commentary to Article 41, par. 1, of the articles on responsibility of states for internationally wrongful acts could be helpful in suggesting the precise content of such an obligation (UN Document A/C.6/61/SR.13, p. 7)

Moreover, several states maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.(ILC, 2011, p.66-67) The Organization for the Prohibition of Chemical Weapons made the following observation: "States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State." With regard to the obligation to cooperate on the part of international organizations, the same organization noted that an international organization "must always act within its mandate and in accordance with its rules." (Kaulahao and Güzel, 2018, p.80)

14. The Obligation of the Non-Recognition in International Law

The obligation of non-recognition of an unlawful situation is in large part based on the well-established general principle that legal rights cannot derive from an illegal act, ex-injuria jus non oritur. As a minimum, the rationale of the obligation of non-recognition is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a fait accompli resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order.(Dawidowicz, 2010, p.677)

The ILC on his work Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) explains, without much further elaboration, that this general obligation of non-recognition reflects a well-established practice' and is thus said to embody existing customary international law. The development of such objective obligatory laws [as entailed by the UN systems] points clearly to the creation of an international community in which a breach of law has deemed an offense against the entire community and each of its members. It matters little who is materially injured by the breach: every

member of the community is entitled to claim the vindication of law as a matter of his own legal right. In such a community, an objective standard binding on all would exist for testing the legal validity of the acts of its members. Non-recognition would be the natural attitude of the law-abiding members towards illegal acts. Probably the main difference between international and international society lies, not in the lack of objective law for testing the validity of acts, but in the lack of a central authority to administer the test, and the lack of effective means to rectify the situation. (Dawidowicz, 2010, p.678)

In its Articles on ARSIWA, the ILC has extended the obligation "not to recognize as lawful" beyond aggression and the illegal use of force to all situations created by a serious breach of a jus cogens obligation. While there is some State practice with regard to the non-recognition of situations created by a serious breach of the right of self-determination of peoples and the prohibition of racial discrimination (viz. the prohibition of apartheid), there is virtually no such practice to support a duty of non-recognition with regard to situations created by serious breaches of other jus cogens norms such as the prohibitions of slavery and the slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against humanity, or the basic rules of international humanitarian law. (Talmon, 2005, p.113)

The second approach is that codified by the ILC at Articles 40 and 41 of the articles on the ARSIWA and it may be better described as "communitarian" according to its content and rationale. A duty of non-recognition shall arise when the situation is the result of a "gross violation of obligations deriving from a peremptory norm" of international law. Replacing the previous idea of setting up a special regime for international crimes and of relying on the concept of erga omnes obligations, the ILC in the 2001 draft articles decided to introduce the notion of "serious violations of peremptory norms of international law" in order to spell out an aggravated regime of State responsibility. Among the consequences of the responsibility arising out of grave breaches of peremptory norms, for example the prohibition of aggression or the obligation to respect the rights of self-determination of peoples, Article 41(2) provides for the obligation for States not to "recognize as lawful a situation created by a serious violation" of a peremptory norm, together with the additional obligation not to render aid or assistance in maintaining that situation.(Güzel, 2018, p.93-94)

The ICJ in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case, asked the question of the action is required to bring to an end by the UN on a breach of an erga omnes norm of self-

determination and reminded that international community is under an obligation not to recognize the illegal situation resulting. The ICJ in his decision in paragraph 155 specified that:

"The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of al1 States" and, "In view of the importance of the rights involved, al1 States Cain be held to have a legal interest in their protection" The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination and certain of its obligations under the international humanitarian law."

The ICJ emphasized the obligation of non-recognition in his decision in paragraph 159 as:

"Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

15. Conclusion

In paragraph 9 of his resolution 25/1 of 27 March 2014, the HRC defined the past armed situation in Sri Lanka as "combat terrorism" and asked a committee of inquiry from OHCHR to establish the facts and circumstances of serious violations and abuses of human rights and related crimes by both parties alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability. The established committee of inquiry OSIL in their report defined the past armed conflict as an "internal armed conflict" and LTTE was defined as NSAG, not as a terrorist organization as defined in the mandate given by the HRC Resolution 25/1 as terrorist.

The HRC in his resolution 30/1 as well despite defining in his resolution 25/1 LTTE as terrorist by defining the past armed conflict in Sri Lanka as combat terrorism, did not define LTTE as terrorist and did not respect to his responsibility to full fill UNGCTS and did not ask for an international

committee of inquiry for the perpetrators of financing terrorism in Sri Lanka in the world.

The OISL, in his report, used some parts of IHL. The OSIL report limited the time and the territory of the past armed conflict in Sri Lanka by using the IHL. On the other hand, even if the OISL report in his findings well described the acts of terrorism of LTTE, the report itself did not use these acts of terrorism as war crimes to define LTTE as a terrorist organization by using the IHL also refused the used the "combat terrorism" definition of the HRC resolution 25/1.

The OISL report is under the definition of the international wrongful act of an international organization.

The HRC 30/1 by not asking an international committee of inquiry for the financing of terrorism in Sri Lanka gave impunity for the financing of terrorism which is against the UNGCTS that the HRC has an obligation to implement. It is an erga omnes and erga omnes partes obligation to criminalize gross violations of IHL as written for the acts of terrorism of the LTTE, as the victim based approach on right to life and impunity is forbidden in the UN system for the individual responsibility for the perpetrators of financing terrorism.

The HRC has an obligation not to recognize as lawful the impunity given to the perpetrators of financing terrorism in Sri Lanka by the HRC resolution 30/1 which should be accepted as the international wrongful act of an international organization. The members states of the UN also has erga omnes partes obligation not to recognize as lawful the HRC 30/1.

REFERENCES

31st International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015.

Boutin, Dr. Bérénice, Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters, ICCT, Retrieved November19, 2018 from https://icct.nl/publication/ countering-the-financing-of-terrorism-gone-wrong-prosecuting-the-parents-of-foreignterrorist-fighters/.

Chen, T-C, The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States, Praeger, New York , 1951.

Dawidowicz, Martin, The Obligation of Non-Recognition of an Unlawful Situation, In James Crawford, Allain Pellet and Simon Olleson (Ed), The

Law of International Responsibility, Oxford University Press, Oxford, 2010.

Gaja, Giorgio, Articles on the Responsibility of International Organizations, UN, Retrieved November 19 2018 from http://legal.un.org/avl/pdf/ha/ario/ario_e.pdf.

Güzel, Prof. Dr. h.c Mehmet, Solving Statelessness in Myanmar, Son Cag Yayincilik, Ankara, 2018.

ICRC, What Does IHL Say About Terrorism?, ICRC, Retrieved November 19 2018 from https://www.icrc.org/en/document/ international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

ICRC, How is the Term "Armed Conflict" Defined in International Humanitarian Law?, ICRC, Retrieved November 19 2018 from https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (Date of Accession: 30.09.2018).

ICRC, What Does IHL Say About Terrorism?, ICRC, Retrieved November 19 2018 from https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

International law Commission (ILC) Draft Articles on the Responsibility of International Organizations, with Commentaries, UN, Retrieved November 19 2018 from http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

Longobardo, Marco, The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes, Academiaedu, Retrieved November 19 2018 from https://www.academia.edu/37628355/The_Contribution_of_International_Humanitarian_Law_to_the_Development_of_the_Law_of_International_Responsibility_Regarding_Obligations_Erga_Omnes_and_Erga_Omnes_Partes.

Milanovic, Marko, The End of Application of International Humanitarian Law, International Review of the Red Cross, 2014, Vol: 96, No: 893, pp. 163-183.

Office of the United Nations High Commissioner for Human rights (OHCHR), Human Rights, Terrorism and Counter Terrorism, Fact Sheet No 32, OHCHR, Retrieved November 19 2018 from https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf .

Orentlicher, Diane, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, UN, New York, 2005.

Paul Berman, When Does Violence Cross the Armed Conflict Threshold? Current Dilemmas" Proceedings of the Bruges Colloquium, Scope of Application of International Humanitarian Law, Collegium N° 43, Autumn/Automne 2013, pp.33-42.

Shillito, Matthew Robert, Countering Terrorist Financing via Non-Profit Organizations: Assessing why few States Comply with the International Recommendations, Nonprofit Policy Forum, Vol: 6, No: 3, 2015.

Siu H.E. Leon Kaulahao & Prof. Dr. h.c Mehmet Şükrü Güzel , Modus Vivendi Situation of West Papua, Lulu Publishing Services, 2018.

Talmon, Stefan, The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance? http://users. ox.ac.uk/~sann2029/6.%20Talmon%2099-126.pdf.

United Nations Counter Terrorism Implementation Task Force (CTITF), Tackling the Financing of Terrorism, UN, Retrieved November 19, 2018 fromhttp://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf, United Nations Office of Counter-Terrorism, UN, Retrieved November 19 2018 from http://www.un.org/en/ counterterrorism/.

United Nations Office of Counter-Terrorism, "Countering the Financing of Terrorism", UN, Retrieved November 19 2018 from https://www.un.org/counterterrorism/ctitf/en/countering-financing-terrorism.

United Nations Office on Drugs and Crime , (UNODC) , UN Instruments and Other Relevant International Standards on Money-Laundering and Terrorist Financing, UNODC, Retrieved November 19218 from https://www.unodc.org/ unodc/en/money-laundering/Instruments-Standards.html.