

STATE SPONSORED TERRORISM AND THE INTERNATIONAL LEGAL REGIME

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INTRODUCTION

States in the International community have for centuries engaged in the practice of war, either openly or in its more subtle forms. Though the International legal regime has developed to curb the use of war as an instrument of dispute resolution amongst States, the menace of terrorism threatens to circumvent all these controls. Countries have used various devices for evading the legal repercussions of war. Most common amongst these devices has been the concealment of the State's resort to the use of armed force by perpetuating aggressive acts without any overt State involvement - by *proxy war*. This allows the State to publicly claim that they are not involved in the acts of aggression thereby avoiding international sanction and retaliation. Hence there is a need to identify at what point should these covert acts of the State be deemed grave enough to qualify as an act of aggression or war, thus attracting international legal sanction. This article examines whether the existing International legal regime provides for the identification of State sponsored terrorism as a form of aggression under the 1974 Draft definition of Aggression adopted by the UN General Assembly as the parameter.

THE CONCEPT OF STATE SPONSORED TERRORISM

Terrorism is commonly recognised as a series of violent, criminal acts directed against a State, with a view and intention to create a state of terror in the minds of the public.¹ A terrorist act is aimed at destabilising the existing socio-political set-up. Any government engaged in acts of violence or threat of violence, in order to pursue its policies of domination, exploitation or expansion and hegemony is deemed to be committing an act of terrorism.² When a Government supports acts of terrorism by sponsoring terrorist groups, either by providing them with the financial support, or through the provision of a safe haven for the training and supply of arms, it is known as State sponsored terrorism.

There are certain factors that are inherent in the global strategic balance and the current conditions of international relations that are clearly conducive to unconventional and covert warfare of all kinds, most prominently that of State

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1 This is the definition adopted by the *Convention on the Prevention & Punishment of Terrorism 1937*, cf. T.S. Rama Rao, *State Terror as a response to terrorism - National and International Dimensions*, 27 *IJIL* 183 (1987).

2 The Ad Hoc Committee on International Terrorism, 34 GAOR Supp. No. 37, UN Doc A/34/37.

sponsored terrorism.³ Today, the most widely used and commonly accepted forms of covert State aggression is State sponsored terrorism. The primary factor that weighs heavily upon the minds of potential aggressors is the global ostracisation that follows the event of an open unjustified armed conflict, through the imposition of sanctions and collective action by the international community. Therefore, it means that while there exists a strong deterrent in the form of strict legal regime in the event of a full scale war, the opportunity to incite instability in an enemy State continues to be provided through the staging of proxy wars by State sponsored terrorism. That is why State sponsored terrorism has emerged as the single largest threat to the process of peace.

THE IMPOTENCY OF THE INTERNATIONAL LEGAL REGIME

The fundamental principle of International Law is that an aggressive attack is to be prohibited and that proportional force may be used against such an attack.⁴ The problem that arises in the case of State sponsored terrorism is that the aggressive action of the State is not identifiable or attributable to it. This in turn means that the action is not deemed to be an aggressive act of State and the International legal regime is rendered impotent. This is primarily due to the fact that the threat in the case of proxy wars, as opposed to conventional warfare, is in the form of clandestine armed attacks. Several regimes fight guerrilla wars which go against the core Charter principles and simultaneously publicly deny any State sanctioned use of force as to gain protection from the very legal order that they are attacking. Thus their assault undermines both the authority of the prohibition against aggression as well as the effectiveness of the right to self defence.

It is amply evident that there is a pressing necessity for a more comprehensive International legal regime to control the menace of state sponsored terrorism that has emerged as the most dangerous brand of violence, the most often practised and on the most comprehensive scale.⁵

Indeed to bolster the effectiveness of the International legal regime, it would be advantageous to examine whether the existing understanding of the International Law concept of aggression is broad enough for the affixation of liability upon a State sponsoring terrorist activities.

International law has traditionally emphasised the importance of protecting the territorial integrity and political independence of States against external

3 See, Y.K. Tyagi, *Political terrorism: National and International Dimensions*, 27 IJIL 160 (1987). The author is of the opinion that terrorism is a form of undeclared war.

4 This dual principle is embodied in Article 2(4) & Article 51 of the UN Charter and virtually every other normative modern statement on the use of force in International Relations.

5 See, The observations of States in accordance with GA Resolution 3034 (xxvii) UN General Assembly A/C 160/1, add. 5, p. 9.

aggression.⁶ The most concrete move taken to define aggression was the UN Draft Definition of Aggression, 1974.⁷ The Draft definition equates aggression with the use of armed force and sticks to the traditional notion of the aggressor being defined as the first to attack.⁸ The most significant development comes in the form of Article 3 of the Draft Definition where the requirement for the formal declaration of war is done away with and indirect aggression in some forms have been recognised. Clauses (f) and (g) are notable in this regard,⁹ as they do away with the requirement that the aggressor State's armed forces be directly involved, for an act to constitute aggression. This means that the very act of a State in allowing its territory to be used by another to perpetuate acts of aggression against a third State would be deemed as aggression as would the sending of armed bands by one State into another. This would sufficiently cover instances of State sponsored terrorism like that of the Pakistan sponsored invasion of Kashmir by armed bands, and their continuing support thereof; the Libyan act of harbouring terrorists and even the alleged use of Indian soil to train Tamil terrorists. Hence there does exist an acceptable parameter by which acts of State sponsored terrorism maybe deemed as those of aggression and suitable action taken against the aggressor State.

The problem that arises is what force the "Draft Definition of Aggression" carries in the International legal regime. It has yet to be converted into a Treaty and can be at best viewed as customary international law.¹⁰ However, some States have contended that the Draft Definition is nothing more than a recommendation and the Security Council is free to decide what weight, if any, it is to be given.¹¹

6 Beginning with the Treaty of Versailles (1919), there were a number of moves by the International legal community to translate their concern for peace into concrete legal norms. *See also:* The Treaty of Mutual Assistance, 1925 under the auspices of the League of Nations which made aggressive acts into International crimes; The Kellogg-Briand Pact (1925) which contained a general renunciation of aggression; The Geneva Disarmament Convention (1933) which used the primacy test (first to attack) to define aggression; The London Charter (1945) & The Nuremberg Principles were post II World War provisions imposing criminal sanctions for acts of aggression.

7 UN Draft Definition of Aggression, GA Resolution 3314, 29 UN GAOR Supp (#31), UN Doc. A/9631. The definition that the UN was able to come out with the result of several compromises made at the time of drafting due to the concerns by members states. The General Assembly expressed its conviction that the 10 preambular paragraphs and 8 articles would contribute to the strengthening of world peace. For a detailed analysis of the Draft Definition, *See, B.B. Ferencz, Encyclopaedia of Public International Law, Instalment 1, (1981), 1982; Also see, Defining Aggression, Where it stands, where it's going, 66 AJIL 491 (1972).*

8 Although the Draft Definition deals with aggression, it completely excludes the threat of aggression.

9 Clause (f) makes the act of a State allowing its territory, which it has placed at the disposal of another state for perpetuating acts of aggression against a Third State, one of aggression. Clause (g) makes the sending of armed bands which carry acts of armed forces against other States of such gravity as to amount to substantial involvement, one of aggression.

10 The Draft Definition was used in *The United States v. Nicaragua*, 1986 ICJ Rep 14.

11 *See, "The question of defining aggression", Yearbook of the United Nations, Vol. 28, Office of Public Information, New York (1977).*

Other States have argued that the Security Council is bound to accept the definition of aggression as an authoritative and binding interpretation as a part of International Law. All States have agreed however that the Security Council has the final decision in deciding whether an act amounts to one of aggression. This leaves the area open to uncertainty and subjectivity on part of the deciding States. There exists a pressing need for a binding Treaty definition of aggression to be accepted as a benchmark so that the prevailing acts of State sponsored aggression are clearly highlighted.

AFFIXING RESPONSIBILITY FOR STATE SPONSORED TERRORISM

There are usually three possible outcomes of an act of State sponsored Terrorism being declared as one of aggression:

- a) The Security Council, after having made a determination of aggression, under Article 39 of the U.N. Charter,¹² or when the General Assembly makes a finding of aggression, recommends collective sanction to make the aggressor State restore or maintain peace or;
- b) Under Article 51 of the UN Charter, the State that has been attacked may act in exercising its right of Self Defence¹³ or;
- c) Apart from the aggressor State, the individuals responsible for the acts of aggression maybe charged before a tribunal for having committed the criminal offence of aggression.

The affixation of individual criminal liability upon aggressors is based on the Nuremberg Principles.¹⁴ The International Law Commission, in an attempt to chalk out a comprehensive principle of individual and State responsibility for acts that amount to aggression, has drafted articles of the Draft Code of Crimes Against the Peace and Security of Mankind.¹⁵ The significance of these developments is immense. International Law can not only impose sanctions upon the State responsible for terrorist activities that amount to aggression, but also affix liability upon individuals responsible for making the concerned decisions. Moreover, the Draft Code of Crimes goes one step ahead of the Draft Definition of Aggression by rendering even the mere threat of aggression a criminal act. Hence there is a positive initiative to move towards a more comprehensive

12 Article 39 allows the UN to take enforcement action against an act of aggression.

13 It is debatable whether acts of aggression not amounting to a full scale war amount to an "armed attack" as required for the exercise of the right of self-defence under Article 51 of the UN Charter.

14 The judgment of the Nuremberg International Tribunal in 1946 establishing the guilt of War criminal gave rise to certain principles of individual criminal responsibility which were subsequently formulated by the International Law Commission of the UN as a Draft Code of Principles Recognised in the Tribunal's judgement; See, F.B. Schick, 'Nuremberg Trials and International Law of the Future', 41 AJIL 770 (1947). These principles were re-affirmed in the Genocide Convention (1948), adopted by the UN General Assembly on 9/12/1948.

15 See, *International Legal Materials*, Vol. xxx, No. 6, Nov. 1991, p. 1584.

affixation of liability for acts of a State as well its leaders in sponsoring or supporting terrorism. However it must be noted that these developments are to be treated with a fair measure of scepticism until such time that the Draft Code of Crimes are given Treaty status in International Law.

CONCLUSION

It is clear that while the International Legal Regime deals extensively with the threat of conventional war, the concept of aggression through proxy war and State sponsored terrorism, remains inadequately addressed. There is a pressing need for a binding legal norm that addresses these subtle, although by no means less dangerous, forms of aggression.

The International Legal Community took a step in the right direction by drafting the 1974 Draft Definition of Aggression, but fell short of translating its good intentions into binding law, by failing to give the Draft Definition the status of a Treaty. It is the opinion of the author that the Draft Definition of Aggression is broad enough to include within its ambit the concept of State sponsored terrorism and the waging of proxy wars and should be recognised as the universal yardstick for defining aggressive covert acts of States as aggression. Hence there is a pre-existing parameter in the form of the Draft definition that deems acts of State sponsored as aggression. When read along with the Draft Code of Crimes evolved by the International Law Commission, the International Legal Regime would be effectively enabled to wipe out the threat of State sponsored terrorism by affixing individual as well as State liability for the commission of crimes against the peace and security of mankind.