

# The Interface between Human Rights and Terrorism: Towards Achieving an Effective Counter-Terrorism Regime

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**Abstract:** *Terrorism has become an emerging challenge to human rights protections today. Although terrorism has been present throughout modern history, international concern against it has become more visible since September 11, 2001. The international community has adopted various instruments on counterterrorism, provisions of which have been incorporated into the domestic laws of different countries. These instruments representing the current counterterrorism regime prioritise national security over other issues including human rights. Therefore, while employing counterterrorism measures states often tend to promote their security at the expense of the lives, liberties, and properties of civilians. To protect the human rights of innocent people against such actions it is crucial to adopt an effective counterterrorism regime. This article explores how states could establish such a regime. It suggests that the proposed regime should be based on the human rights framework. The principles of necessity and proportionality will provide a useful guideline in this respect.*

**Keywords:** Terrorism, Counter-Terrorism, International Human Rights Law

## 1. Introduction

Terrorism has emerged as a significant challenge in today's world. Modern history has witnessed threats of terrorism in different phases of its development and emphasized redressing them.<sup>1</sup> Compared to the past, the issue of combatting terrorism has received more attention in the present, particularly in the aftermath of September 11, 2001. Although current counterterrorism efforts existing in international and domestic spheres appear to balance national security and human rights, they often pose a great challenge to human rights protections. Terrorism connotes the systematic use of coercive intimidation which usually aims to serve political and religious ends.<sup>2</sup> This means that terrorism involves a broad political-

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<sup>1</sup> Paul Hoffman, 'Human Rights and Terrorism' (2004) 26(4) Human Rights Quarterly 932, 933.

<sup>2</sup> Christopher L. Blakesley, 'Terrorism, Law and our Constitutional Order' (1989) 60 University of Colorado Law Review 471.

strategic concept that is different from violence in general.<sup>3</sup> It could be committed by both State and non-State actors. The exercise of coercive power by States against their oppositions aiming to suppress the latter refers to state terrorism.<sup>4</sup> Further, terrorism could assume an international character when it is committed outside the national boundary against citizens or instrumentalities of a foreign State. Whatever may be the place of occurrence of these acts, they cause a gross violation of the human rights of civilians. For example, terrorism often leads to genocide, torture, and similar cases (explained in Section 2.2).

States respond to this situation by adopting international treaties under the United Nations (UN) and several regional organizations. They also adopt anti-terrorism laws and various counterterrorism measures. These instruments adopted at both the national and international levels representing a counterterrorism regime aim to redress terrorism by preventing acts constituting this offence and prosecuting those who commit terrorism. A major limitation of these instruments is that the application of many of them causes violations of human rights. . For example, anti-terrorism laws often curtail freedom of expression and other basic human rights (detailed in section 4). The application of counterterrorism measures by States in a discriminatory manner creates another problem.

Daniel Moeckli observes that the most dangerous aspect of the counterterrorism measures is that any State could use them in a discriminatory manner against its religious, ethnic, or other minority groups.<sup>5</sup> This indicates that the counterterrorism efforts conflict with international human rights norms in many cases which lead to the violation of human rights of innocent individuals. Although many studies focus on this problem, they hardly suggest how States can respond to it properly. This article fills this gap in the existing literature by suggesting how States can offer an effective response to the challenges of violation of human rights faced by counterterrorism measures.

This article aims to investigate how States can develop an effective counterterrorism regime and why they should do so. In answering these questions, it analyzes the connection between terrorism and human rights which provides a general idea of what terrorism means and how it impacts human rights. This study also explores counterterrorism measures prescribed by international law and domestic law. It also emphasizes how counterterrorism measures reflect human rights standards and how a balanced approach can be achieved between them. Finally, this article argues that States should rely on the principles of necessity and

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<sup>3</sup> Ibid.

<sup>4</sup> V. S. Mani, 'Future Strategies in the War against Terrorism and Proliferation of Weapons of Mass Destruction: An Indian Perception' (2004) 44(2) *Indian Journal of International Law* 221, 223.

<sup>5</sup> Daniel Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford University Press 2008) 12.

propinquity (explained in Section 4) in attaining the balanced approach between human rights norms and counterterrorism measures. This will help achieve an effective counterterrorism regime.

## 2. Terrorism and Human Rights

Terrorism usually shares ‘an inverse relationship’ with human rights.<sup>6</sup> Given this, Jordan J. Paust maintains, “[w]hen human rights are protected, terrorism is necessarily set back.”<sup>7</sup> The fact that terrorist acts violate many human rights including the right to life lends credence to this assertion. However, such a simplistic position cannot always stand. Some human rights, for example, the right to self-determination might justify political or other form of violence which could otherwise be treated as acts of terrorism.<sup>8</sup> To bring an effective counterterrorism regime it is crucial to understand the nature of interconnections between terrorism and human rights. Conceptual clarity about terrorism is also vital in this respect. Accordingly, this section discusses the notion of terrorism and revisits the connection between terrorism and human rights.

### 2.1 Understanding Terrorism: The Challenge of Definition

As a form of human rights violation, terrorism has become widely known since the 9/11 terrorist attacks in the United States of America (USA). However, it was not the case that the world community was ignorant of it prior to that time. An international concern against terrorism was found even before the creation of the UN, under the auspices of the League of Nations. The latter organisation drafted the Convention for the Prevention and Punishment of Terrorism in 1937. This Convention is still relevant despite the facts that it was never enforced, and it recognized only terrorist acts against States rather than civilians.<sup>9</sup> The Convention offers a conceptual clarity about the term ‘terrorism’. It defines terrorism as, “[a]ll 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>10</sup> A series of international instruments adopted later under the UN<sup>11</sup> lack a similar definition that could have been universally accepted as a definition of

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<sup>6</sup> James I. Walsh and James A. Piazza, ‘Why Respecting Physical Integrity Rights Reduces Terrorism’ (2010) 43(5) *Comparative Political Studies* 551.

<sup>7</sup> Jordan J. Paust, ‘The Link between Human Rights and Terrorism and Its Implications for the Law of State Responsibility’ (1987) 11 *Hastings Int’l & Comp. L. Rev.* 41.

<sup>8</sup> Michael Ignatieff, ‘Human Rights, the Laws of War, and Terrorism’ (2002) 69(4) *Social Research: An International Quarterly* 1143.

<sup>9</sup> Javier Rupérez, *The United Nations in the fight against terrorism* (United Nations Counter-Terrorism Committee Executive Directorate 2006) 14.

<sup>10</sup> *Ibid* 1; Convention for the Prevention and Punishment of Terrorism 1937, article 1(2).

<sup>11</sup> See section 3.

terrorism. Indeed, arriving at a conclusive definition of terrorism seems to be impossible in the existing global environment. Anthony Aust observes “[r]eaching an internationally agreed definition has proved elusive.”<sup>12</sup>

Defining the term terrorism remains a difficult exercise because it involves a wide array of perceptions regarding the characterisation of terrorist acts, their purposes, motivations, and the perpetrators’ inconsistent identity.<sup>13</sup> According to Blakesley, terrorism is “the application of terror led violence against innocent individuals for the purpose of obtaining some military, political or religious end from a third party.”<sup>14</sup> Antonio Cassese holds a similar position. He argues that terrorism refers to violent acts that are used to overthrow the government, introduce changes to the social order, or promote any other politically motivated purposes.<sup>15</sup> However, political motivation and violent acts of changing the existing order do not always signify terrorism. These features could be found even in the actions of a freedom fighter. Because of this it often becomes difficult to distinguish a terrorist from a freedom fighter.

In other words, the same person could be treated as a terrorist and a freedom fighter at the same time based on two different perspectives. This dilemma is well described through the statement “one person’s terrorist is another person’s freedom fighter.”<sup>16</sup> The controversial perception reflected through this widely known phrase was highly visible during the decolonisation movement, amongst the colonies exiting in different parts of the world and their masters, the big empires. The right to self-determination has acted as an impetus for national liberation movements in many countries. States often have used the term terrorism in dealing with such situations that involved acts of violence directed against them.<sup>17</sup> This shows that terrorism remains a controversial issue in the political realm.<sup>18</sup> Given this, the term terrorism should be defined with proper care and caution which will emphasize that it (terrorism) is a politically, ethically, and morally divisive subject.<sup>19</sup>

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<sup>12</sup> Anthony Aust, ‘Counter-Terrorism—A New Approach’ (2001) 5 Max Planck Yearbook of United Nations 285, 306, 290.

<sup>13</sup> Javaid Rehman, *International Human Rights Law* (Pearson Education 2003) 439.

<sup>14</sup> Blakesley (n 2) 471.

<sup>15</sup> Antonio Cassese, ‘Terrorism and Human Rights’ (1982) 31(4) *American University Law Review* 946.

<sup>16</sup> Hoffman (n 1) 932, 936; Walter Laqueur, *The Age of Terrorism* (Little, Brown and Company 1987) 7, 302.

<sup>17</sup> Mani (n 4) 223.

<sup>18</sup> *Ibid* 222.

<sup>19</sup> Rehman (n 13) 440.

Terrorism, as a social and political phenomenon, manifests in different forms and different contexts. It can be triggered by both domestic and international matters. Acts of terrorism are mostly clandestine in nature, involving few individuals. While terrorist acts are defined as criminal offenses at the domestic level, certain types of terrorist acts such as hijacking, attacks “against international civil transport and communications systems, and crimes against diplomatic persons” are recognized as international crimes. The process of globalisation of the 1980s and 1990s with significant development in science and technology has helped increase the acts of terrorism.<sup>20</sup> Globalization propelled by information technology has greatly helped intensify cooperation between diverse terrorist outfits, drug traffickers, and organized criminal groups. It also facilitates money laundering and transnational clandestine movements of terrorists and terrorist devices.<sup>21</sup> Therefore, based on the recent nature of the terrorist acts, terrorism may take the form of hijacking, ariel sabotage, sabotage at sea, hostage taking, and attacks on internationally protected persons and similar acts as recognized under various international treaties and conventions. Civilians are the primary targets of these acts. However, they could be carried out against public infrastructures, transportation systems, and other instruments.

Along with these recent acts of violence, the definition of terrorism should include the previous acts of terrorism which are applied against individuals to attain political, religious, or other purposes. In this regard, the definition of terrorism prescribed by the United Kingdom (UK) Terrorism Act 2000 can be considered as it focuses on most forms of these violent acts. Sections 1(1) and 1(2) of this Act state that terrorism refers to violence or threat of using it which causes serious damage to person and property of individuals, threatens their lives, endangers public health and safety, or leads to similar actions. <sup>22</sup> The purpose of such use or threat of action should be “to influence the government or to intimidate the public or a section of the public,” and to advance “a political, religious or ideological cause.”<sup>23</sup> Since this definition contains important features of terrorist acts, the international community could embrace them along with other internationally important issues in designing a universally accepted definition of terrorism.

However, a major ideological conflict existing in this regard between the developing states and the developed states would create a significant challenge in reaching to a universal definition. In their dealing with terrorism, the developing countries have emphasized racial oppression and colonial regimes whereas their

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<sup>20</sup> Mani (n 4) 226.

<sup>21</sup> Ibid.

<sup>22</sup> Terrorism Act 2000, section 1(1)(2).

<sup>23</sup> Ibid, section 1(1).

developed counterparts have concentrated on individual acts of terrorism.<sup>24</sup> The developed countries have insisted on a complete prohibition of terrorism irrespective of the underlying motivating factors which has not been accepted by the developing world. The latter claims that the reasons of terrorism are rooted in colonial or racist regimes.<sup>25</sup> Such ideological divisions were addressed by the UN General Assembly Resolution 34\145 passed in 1979. It condemned all terrorist acts including those which unjustly deny people's legal right to self-determination and independence.<sup>26</sup>

This document and international human rights instruments can be considered a significant step to ease the divisions between developing and developed states regarding the concept of terrorism. Developing countries' participation in Resolution 34\145 and major human rights instruments particularly reveals their tendency to shift from their previous position to the new international order. The end of the decolonisation process and the cold war perhaps encouraged these states to agree with the international approach to terrorism. It can be argued from this that today the world community holds almost a common position regarding the protection and promotion of human rights against terrorist acts. The presence of a comprehensive definition of terrorism can help in identifying states' specific obligation for combatting terrorism.

Given the lack of a comprehensive definition of 'terrorism', individual states can define the term in their own way following international human rights norms. Such reliance on human rights standards will enable states to reduce the scopes of "unintended human rights abuses and deliberate misuse of the term".<sup>27</sup> Alternatively, states can employ more efforts in developing such a definition of terrorism at the international level. Both approaches are fine, but they encounter different challenges based on the areas of their operations. The challenges relating to the latter approach have been discussed above. Regarding the former view, it might be difficult to convince states to regard some acts, such as state-sponsored violence, as terrorism. For example, a state might not be willing to treat the acts of oppression of political opposition as terrorism. In the same way, it might be reluctant to consider illegal force used against those who exercise their right to self-determination as terrorism.

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<sup>24</sup> Rehman (n 13) 440.

<sup>25</sup> *Ibid*, 441.

<sup>26</sup> UN General Assembly, 'Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes' (A/RES/34/145, 17 December 1979) < <https://www.refworld.org/docid/3b00f1ab17.html>> accessed 9 August 2023.

<sup>27</sup> Rehman (n 13) 555.

The problem regarding the definition of terrorism existing at the national and international levels could be resolved by effectively mainstreaming human rights law into the notion of terrorism. All kinds of deadly attacks on the lives of civilians irrespective of the purposes of the attacks should be considered as terrorism. The world community's commitment to human rights would discourage them from denying such a view about terrorism. Based on this, Paul Hoffman assumes that the world community might not be hesitant to treat the acts of targeting and destructing civilians as terrorism.<sup>28</sup> Their commitment to human rights would encourage all states to reach an agreement that every attack on civilians should be considered a terrorist act.<sup>29</sup>

Therefore, terrorism should be referred to all kinds of violent acts which endanger civilians' right to life, liberty, property, and various other human rights. Such acts should be categorized as terrorism irrespective of their underlying factors. This means that a terrorist act cannot be justified on any ground including moral or political considerations.<sup>30</sup>

## 2.2 Applying Human Rights Law to Combat Terrorism

It is evident from the above that terrorism threatens some basic human rights. Alongside, it endangers public order and national security.<sup>31</sup> Whatever might be the form of terrorism, it brings a devastating impact on the enjoyment of various human rights enshrined in the human rights treaties and constitutions of the nation-states. Terrorism sometimes leads to gross violation of human rights in the form of genocide and torture. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), terrorism can "destabilise governments, undermine civil society, jeopardise peace and security, threaten social and economic development, and may especially negatively affect certain groups."<sup>32</sup> It identifies that terrorism has some specific impact on the enjoyment of human rights. The OHCHR notes, "[t]errorism threatens the dignity and security of human beings everywhere, endangers or takes innocent lives, creates an environment of fear, jeopardizes fundamental freedoms, and aims at the destruction of human rights."<sup>33</sup> This adversely affects the rule of law, socioeconomic developments, and friendly relations and cooperation among

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<sup>28</sup> Hoffman (n 1) 937.

<sup>29</sup> Ibid, 932, 937.

<sup>30</sup> Rehman (n 13).

<sup>31</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights* (Hart Publishing 2008) 2.

<sup>32</sup> Office of the United Nations High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism' (Fact Sheet No. 32, 2008) <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>> accessed 9 August 2023.

<sup>33</sup> Ibid.

states which further hamper the protection of human rights.<sup>34</sup>

Kalliop Koufa, the UN Special Rapporteur on Terrorism and Human Rights, has mentioned two types of impact of terrorism on human rights- direct and indirect impacts. Terrorism's impact on human rights is direct when it leads to human rights violations such as torture and killing. This influence becomes indirect when a state adopts arbitrary laws and policies in responding to terrorism.<sup>35</sup>

Legal regimes regarding combatting terrorism intersect with human rights law in two ways: states need to respond to terrorism efficiently; and they must develop their anti-terrorism measures within the human rights paradigm.<sup>36</sup> Therefore, human rights could be considered a framework in both cases of states' obligations. The Human Rights Resolution 2005/81 passed by the OHCHR explains this issue. For example, it treats every act, method and practice aiming to destroy human rights as an act of terrorism and emphasizes that the measures adopted to fight such actions should not be against the principles of human rights law.<sup>37</sup> This clarifies that both terrorist acts and counter-terrorism measures can violate human rights.<sup>38</sup> This might lead one to argue that the application of the human rights principles in the counter-terrorism regime would help provide a suitable response to terrorist acts.

However, human rights law's application to counterterrorism efforts remains problematic as states sometimes oppose it. For example, some argue that as terrorism involves armed conflict and state emergency, counter-terrorism measures would allow deviation from human rights.<sup>39</sup> Those who hold such a view allege that human rights law is not applicable to counter-terrorism measures pursued in a foreign territory.<sup>40</sup> Regarding the anti-terrorism measures that run beyond a state territory, it is sometimes argued that humanitarian law should be applied to such cases. The war against terrorism led by big powers particularly triggered this argument. For example, Paul Hoffman observes that both human rights law and

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<sup>34</sup> Ibid.

<sup>35</sup> Ms. Kalliopi K. Koufa, 'Terrorism and Human Rights', Special Rapporteur's Report, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, Item 6 of the provisional agenda, 2001.

<sup>36</sup> Sottiaux (n 32) 2.

<sup>37</sup> OHCHR, 'Protection of human rights and fundamental freedoms while countering terrorism' (Human Rights Resolution 2005/80, Preamble) <<https://www.ohchr.org/en/issues/terrorism/pages/srterrorismindex.aspx>> accessed 9 August 2023.

<sup>38</sup> Ibid.

<sup>39</sup> Martin Scheinin, 'Terrorism' In Daniel Moeckli (ed), *International Human Rights Law* (Oxford University Press 2014) 550

<sup>40</sup> Ibid.

humanitarian law should be engaged with anti-terrorism discourse.<sup>41</sup>

Some commentators hold an opposite view claiming that to apply humanitarian law in dealing with terrorism should be incorrect in that the acts of terrorism do not involve international armed conflicts.<sup>42</sup> Even if terrorist acts are treated as armed conflict in rare circumstances, certain human rights norms such as safeguards as to arbitrary detention, prevention of torture, or other cruel, inhuman treatment should still be applied to them in accordance with customary international law.<sup>43</sup> These human rights principles are also applicable to those cases where a state declares an emergency following a major terrorist attack. It can be argued from this that terrorism should be dealt with within the human rights framework though it would involve some theoretical challenges. Section 4 elaborates this issue.

It appears from the above that terrorism encompasses a wide array of violent actions which are used to terror a group of people. Any kind of terrorist act puts a target group under extreme fear and stress aiming to coerce them to fulfil the perpetrators' political purposes.<sup>44</sup> It threatens human rights of individuals belonging to the target group and beyond. This poses an investigation of how states could ensure human rights in the face of constant terrorist threats from different national and international actors. The adoption and implementation of effective counter-terrorism measures could help states protect human rights against terrorist acts. The following section focuses on this.

### **3. The Counter-terrorism Regime**

Counter-terrorism regime comprising of various international instruments and domestic laws seeks to prosecute perpetrators of terrorism and prevent the acts of terrorism. Different conventions, protocols, resolutions, and declarations adopted under the UN and regional bodies deal with counter-terrorism measures. A trend has also been developed at the domestic level since 9/11, to adopt special legislation for combatting terrorism. This section reveals how international instruments respond to terrorism through their counter-terrorism measures. The later part of this section focuses on how states respond to the issue of terrorism in their domestic arenas.

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<sup>41</sup> Hoffman (n 1) 932, 937.

<sup>42</sup> Scheinin (n 39) 550.

<sup>43</sup> Ibid, 550.

<sup>44</sup> Alex Schmid, 'Terrorism - The Definitional Problem' (2004) 36 Case Western Reserve Journal of International Law 275.

### 3.1 International Instruments Responding to Terrorism

Because of the lack of consensus within the world community over the nature of terrorism as explained above, a single consolidated instrument on terrorism could not be formulated. The UN remains at the centre of the current international counter-terrorism regime under which a series of conventions and protocols have been negotiated since 1963.<sup>45</sup> Although acts of terrorism were an international concern for a long time, they have begun to receive significant attention in the aftermath of 11 September 2001. Therefore, the recent counter-terrorism efforts could be traced at the UN's initiatives adopted during this period to combat terrorism.

Following the 9/11 attack, the UN adopted the Security Council Resolution 1373 on 28 September 2001. The Resolution "imposes a wide range of legal, financial, police and cooperation measures" upon member states and requires them "to ratify the international counter-terrorism conventions and incorporate them into domestic law."<sup>46</sup> A committee called the UN Counter-Terrorism Committee (CTC), consisting of all members of the Security Council, would supervise states' compliance with the Resolution.<sup>47</sup> Such compliance refers to the submission of reports to the CTC by states periodically regarding their actions in criminalising, preventing, and punishing terrorism-related activities; the ratification of international legal instruments on terrorism, and the enactment of the domestic legislation essential to enforce them.<sup>48</sup> By promoting these activities the CTC endeavours to develop an overarching international legal framework to combat terrorism.<sup>49</sup>

Following the 1373 Resolution, the UN has adopted various other anti-terrorism instruments under the Security Council as well as other UN agencies. Similar initiatives also came into being through different multilateral and regional organisations. To coordinate the programs pursued by different organisations, in 2005 the UN established the Counter-Terrorism Implementation Task Force (CTITF) comprising representatives from more than 20 bodies, such as the International Atomic Energy Agency (IAEA), the International Criminal Police Organization (INTERPOL), and the World Bank. In the following year, the UN General Assembly adopted another important resolution called the Global Counter-Terrorism Strategy which emphasised states' capacity building on the

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<sup>45</sup> Sebastian von Einsiedel, 'Assessing the UN's Efforts to Counter Terrorism United Nations University Centre for Policy Research Occasional' (2016) Paper 8, 1.

<sup>46</sup> Rupérez (n 9) 18.

<sup>47</sup> Ibid.

<sup>48</sup> Beth Elise Whitaker, 'Compliance among weak states: Africa and the counter-terrorism regime' (2010) 36(3) *Review of International Studies* 639, 641.

<sup>49</sup> Ibid, 642.

prevention of terrorism and addressing its underlying causes.<sup>50</sup> This instrument, as Beth Elise Whitaker maintains, “is meant to serve as a unifying framework for multilateral counter-terrorism efforts coordinated by the CTITF [..]”<sup>51</sup>

Although regarding counter-terrorism measures, the post 9/11 instruments receive prime attention, the previous documents should also be explored to learn how the counter-terrorism regime has been developed. Some instruments which dealt with terrorism before 2001 require attention. The Tokyo Convention on the Crimes on Board the Aircraft 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973, the International Convention against the Taking of Hostages 1979, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989, and the Montreal Convention on the International Marking of Plastic Explosives for the Purpose of Detection 1991 represent such documents adopted under different UN bodies including General Assembly and Specialised Agencies. . In addition, Conventions which dealt with terrorism were the International Convention for the Suppression of the Financing of Terrorism 1999, the International Convention for the Suppression of Terrorist Bombings 1997, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1988, and the Convention on the Physical Protection of Nuclear Material 1980. These instruments show that the international community has dealt with various terrorist acts in a piecemeal fashion by adopting one treaty at a time in order to respond to a particular category of terrorist acts which adversely affect innocent human beings.

An examination of the above instruments indicates that they aim to: (1) define various terrorist acts committed by a state outside its national boundary which primarily endanger human rights of civilians; (2) develop an idea of international criminal jurisdiction that would identify and recognize states’ authority to employ their “criminal jurisdiction” in their dealings with terrorist acts; (3) evolve a movement which would identify states’ obligations on extraditing and prosecuting terrorists “in cases of competing claims to jurisdiction” and (4) impose an obligation upon states to cooperate with each other in carrying out prosecution against terrorists.<sup>52</sup>

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<sup>50</sup> Ibid, 641.

<sup>51</sup> Ibid.

<sup>52</sup> Mani (n 4).

Although counter-terrorism instruments have played an important role in offering international counter-terrorism standards and providing a basis of ensuring states' cooperation on them, their response to terrorism is relatively weak. These instruments' failure to provide a comprehensive definition of terrorism, as explained above, remains a vital factor responsible for this.<sup>53</sup> Moreover, the counter-terrorism instruments lack 'a monitoring and follow-up regime' which renders them incapable to address terrorism adequately.<sup>54</sup> However, this does not indicate that global instruments on counter-terrorism did not have any impact on anti-terrorism efforts at all. These instruments have helped to make states aware of the acts of terrorism and take measures to fight terrorism accordingly. Further, their failure to provide a concrete definition of terrorism does not preclude counter-terrorism instruments from condemning any act of terrorism,<sup>55</sup> or imposing obligations upon states to adopt measures to redress terrorism. Amongst various states' obligations regarding counter-terrorism efforts as recognized by these instruments, the domestication of the provisions of anti-terrorism conventions deserves special attention.

### 3.2 Domestic Framework on Counter-terrorism

The number of counter terrorism legislation has increased dramatically across the world in recent years. Most of these laws have come into being as a response to the UN Security Council Resolution 1373.<sup>56</sup> Special legislation developed this way and provisions on terrorism incorporated in criminal laws of states represent the national counter-terrorism regime under the current system.<sup>57</sup> States like the USA, UK, France, Germany and India represent the former system and some states such as Austria, Niger, Slovakia, and Thailand represent the latter.<sup>58</sup>

The advantage of having a domestic anti-terrorism mechanism is that it enables a state to define 'terrorism' in accordance with its specific context. Based on the location and political circumstances of different countries, terrorist acts vary from one form to other. For example, a state in civil war experiences terrorism in a different way from those that run under a law and order. Given states' different situations and the lack of a universal definition of terrorism, national counter-terrorism measures have the potential to provide a useful guideline in conceptualising terrorism. Another advantage of such a mechanism is that it

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<sup>53</sup> Einsiedel (n 45) 1.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid; Rupérez (n 9) 14.

<sup>56</sup> Elena Pokalova, 'Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?' (2015) 27(3) *Terrorism and Political Violence* 474-496.

<sup>57</sup> Ibid, 477.

<sup>58</sup> Ibid, 476, 477.

facilitates taking prompt and effective actions against terrorist acts which might not be possible under ordinary laws. These factors and other various reasons discussed below are responsible for the current rise of the national counter-terrorism mechanism.

Although states' interest in adopting counter-terrorism measures was not very strong as it is found today, many of them endeavoured to address terrorist acts by enacting counter-terrorism legislation or incorporating special provisions in their criminal laws. For example, Sri Lanka's anti-terrorism legislation called the Prevention of Terrorism Act 1979 was used against the Liberation Tigers of Tamil Eelam (LTTE).<sup>59</sup> A similar practice was found in case of Russia which adopted legislation in 1998 to combat the acts of terrorism that it faced "during the first Chechen ethno-nationalist separatist campaign of 1994–1996."<sup>60</sup> These anti-terrorism measures existing in the past were related to the terrorist groups' operations in a particular country.<sup>61</sup> Although these efforts suffered from various limitations, they deserve attention in that they were employed for decades to deal with an existing or real threat to human rights, security, and the rule of law.<sup>62</sup>

Unlike the former, the current anti-terrorism regime is driven mostly by a common assumption of the terrorist threat.<sup>63</sup> This often creates serious human rights concerns. For example, the Anti-terrorism, Crime and Security Act 2001, the anti-terrorism legislation of the United Kingdom, provided that foreign citizens could be treated as threats to national security and placed accordingly under 'indefinite detention' based on the subjective satisfaction of the Home Secretary.<sup>64</sup> Such arbitrarily powers led to human rights violations of religious and ethnic minorities in the UK, particularly those belonging to Muslim and Arab communities.<sup>65</sup> Another significant challenge that lies with anti-terrorism legislation is that many states misuse such laws for political gains rather than combatting terrorism (detailed in the following section). Oppression of political opposition, jailing of journalists, closure of media and similar actions through which the authoritarian regimes perpetuate their powers represent such political purposes<sup>66</sup> which bring a significant threat to human rights.

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<sup>59</sup> Ibid, 474.

<sup>60</sup> Ibid, 475.

<sup>61</sup> Ibid, 474.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> The Prevention of Terrorism Act 2005 repealed such provisions of the Act of 2001 on the grounds of them being inconsistent with the European Convention on Human Rights. Ibid, 479, 494.

<sup>65</sup> Ibid, 479.

<sup>66</sup> Ibid, 474.

The states pursuing such measures justify the broadening of their powers in the guise of strengthening counter-terrorism efforts.<sup>67</sup> However, offences of serious nature that should have been treated as terrorism, are sometimes excluded from such efforts. For example, offences like ethnic cleansing are hardly covered by anti-terrorism measures. Instead, these measures sometimes have enabled states to disproportionately interfere with the rights of minorities, as explained above regarding the Anti-terrorism, Crime and Security Act 2001. Therefore, offences that do not constitute terrorism, however serious their nature might be, are not considered within the purview of anti-terrorism laws.<sup>68</sup> This challenge represents a drawback of anti-terrorism measures that encourages human rights violations in many cases.

A key reason responsible for the misuse of anti-terrorism laws is that these laws have not always derived from the states' genuine desire to combat terrorism. Instead, the availability of funds from Western donors remains a vital factor that motivates different states to adopt anti-terrorism legislation.<sup>69</sup> A study related to a few African countries such as Kenya, Uganda, and Tanzania lends credence to this.<sup>70</sup> A review of state practices on adopting anti-terrorism laws reveals that states' impetus to adopt anti-terrorism laws is related to their tendency to impress the international community rather than an intention to genuinely redress terrorism.<sup>71</sup>

It appears from the above that despite its various limitations, the UN's framework on counterterrorism provides specific guidelines on how states can deal with the challenge of terrorist threats and acts existing at the domestic and international levels. Domestic anti-terrorism laws also serve the same purpose by offering a country-specific counterterrorism regime. However, these counterterrorism measures threaten human rights in different ways. The following section elaborates this issue by explaining how counter-terrorism measures interact with human rights.

#### **4. How Counter-terrorism Measures Interact with Human Rights**

Terrorism was largely viewed as a matter of civil emergency, and terrorists were treated as criminals in the past. The recent trend is to treat terrorists as enemies and combatants rather than criminal suspects, and the fight against terrorism a war. This led to increasing emphasis on anticipatory risk assessment, and "pre-emptive and preventive response to terrorism". Such states' actions and other anti-terrorism efforts discussed above threaten the protection of human

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<sup>67</sup> Ibid, 24.

<sup>68</sup> Ibid.

<sup>69</sup> Whitaker (n 48) 640.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

rights. This section explains how counter-terrorism measures run by states within their territories and beyond undermine human rights principles.

National security is a primary concern of every state. Therefore, international law allows states to use force and other measures to defend security. However, such actions should not be unreasonable and against human rights principles. Specific treaties adopted in accordance with international human rights law and humanitarian law provide such directions. The relevant provisions of these treaties are binding upon all states big or small, rich or poor. However, with the changing scenario of post 9/11 the world has witnessed the big powers' deviation from these obligations. The war on terrorism led by the USA violated the treaty provisions in various ways by prioritising state security over human rights.<sup>72</sup> This raised a significant problem regarding human rights protections.

For example, different studies reveal that the USA's treatment of prisoners captured in the war on terror caused a gross violation of human rights.<sup>73</sup> They have widely reported the incidents of the use of torture on accused terrorists held in the USA custody in Iraq, Afghanistan, and Guantanamo Bay . Many prisoners have also known to have been held in secret prisons without notification to the accused's family or to any officials in the country of origin.<sup>74</sup> In addition to these, the USA's involvement in the transfer of prisoners to other state-known as 'extraordinary rendition'- extended the scopes of the violations of general international law and human rights law.<sup>75</sup> Similarly, the infliction of torture upon prisoners at Abu Gharib, a prison cell in Iraq, for obtaining information and confession or evidence gave rise to significant human rights concern.<sup>76</sup> The anti-terrorism efforts persuaded by the USA and its allies, as explained by Axel Dreher and others show how these initiatives threatened human rights. These scholars have done so by explaining the USA's treatment of prisoners in Guanta'namo Bay, Cuba where they were treated neither as prisoners of war nor as typical prisoners and were denied all basic human rights as well as fair treatment according to the Geneva Convention.<sup>77</sup>

The denial of basic human rights including the right to fair trial and non-discrimination to persons alleged to have committed terrorist acts is also prevalent

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<sup>72</sup> Dreher *Georg*, August Martin, Gassebner Lars-H. Siemers, 'Balancing Counter-terrorism measures with Protection of Human Rights' (2010) 53 *Journal of Law and Economics* 66.

<sup>73</sup> *Ibid*, Jessica Wolfendale, 'Terrorism, Security, and the Threat of Counterterrorism, *Studies in Conflict & Terrorism*' (2007) 30(1) 75-92.

<sup>74</sup> *Ibid*.

<sup>75</sup> Julie Mertus and Tazreena Sajjad, 'Human Rights Post-September 11' in (Rhonda L. Callaway and Julie Harrelson-Stephens (eds) *Exploring International Human Rights: Essential Readings* (Lynne Rienner 2007) 287-290.

<sup>76</sup> Dreher, August, and Siemers (n 72) 65, 66.

<sup>77</sup> *Ibid*.

in other state practices. For instance, the Anti-terrorism, Crime and Security Act 2001 allowed the UK to deprive a terrorist suspect of these rights. Similar provisions which override certain rights including the rights to: freedom from torture, liberty and fair trial, and non-discrimination are found under counter-terrorism measures adopted by different countries like the USA, Canada, Australia, and Germany. Since these rights are absolute and non-derivable, there is no scope to justify counter-terrorism law's derogation from them.

Counterterrorism measures developed this way by ignoring the fundamental requirement of human rights law sometimes bring a devastating impact in a community. This is because such measures can be applied in a discriminatory manner against religious, ethnic, national or other minorities living within a country.<sup>78</sup> In addition, the counter-terrorism policies of a country could affect the rights of other disadvantaged groups which might include refugees and asylum seekers. For example, Germany's anti-terrorism legislation passed in 2002 has introduced new grounds of expulsion of foreigners which have 'tightened' the country's immigration and asylum laws.<sup>79</sup> These grounds enable the government to expel foreigners including refugees and asylum seekers on different occasions. A similar provision, as noted above, was available in the UK under the Anti-terrorism, Crime and Security Act 2001. Because of such discriminatory and derogative attitude of anti-terrorism laws Conor Gearty argues that by imposing restrictions on human rights, anti-terrorism legislation create new scopes for derogating from international human rights law which largely undermines human rights protections.<sup>80</sup>

This problem can be resolved by resorting to human rights law which prescribes how non-derogable provisions of this law should be exercised. Hoffman's account of this could guide states in this respect. He maintains:

"International human rights law also explicitly recognises that there may be emergencies that justify the suspension of some international human rights protections during times of crisis. For example, Article 4 of the ICCPR allows for measures derogating from obligations assumed under the Covenant in a time of "public emergency" that is "officially proclaimed" and "threatens the life of the nation." Notification of this declaration must be given to other state parties through the Secretary-General. Derogating measures must only be to the extent "strictly required by the exigencies of the situation," and cannot involve discrimination on the ground of race, color, sex, language, religion, or social origin and cannot conflict with other international law obligations."<sup>81</sup>

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<sup>78</sup> Moeckli (n 5) 12.

<sup>79</sup> Ibid. 33.

<sup>80</sup> Conor Gearty, 'Terrorism and Human Rights' (2007) 42(3) *Government and Opposition* 340–362.

<sup>81</sup> Hoffman (n 1) 932, 951, 952.

The lack of such guidelines in anti-terrorism laws causes human rights violations when they are applied. This can be explained with reference to the USA PATRIOT Act, the anti-terrorism legislation adopted by the USA immediately after the 9/11 attack.<sup>82</sup> The Act's expansion of the state's powers in its dealing with terrorism and abstinence from providing a specific guideline to be followed in exercising such powers can be considered the two vital factors that allowed the USA to treat prisoners in an inhuman way and take other infamous actions against terrorism as discussed above. Other anti-terrorism legislations passed during this time in different jurisdictions suffer from the same problem.

In addition to these limitations, states' tendency to use anti-terrorism laws in an illegal way creates a further challenge to human rights protections. In fighting terrorism, governments often feel tempted to depart from constitutional rights and procedural safeguards regarding arrest and detention. They also use anti-terrorism measures for their own interests rather than fighting for a genuine cause. For example, a study conducted in 2015 shows that following September 2001 many countries such as Turkey, Azerbaijan, Uzbekistan, the Gambia, and Uganda have adopted and implemented counter-terrorism laws 'for dubious purposes.'<sup>83</sup> They have used counter-terrorism laws to silence the opposition, jail dissenters, and fight those who contest the legitimacy of state governments.<sup>84</sup>

Amongst other purposes, states' use of anti-terrorism laws to obstruct the freedom of expression deserves special attention. The collection and dissemination of information by the media have been threatened under various domestic anti-terrorism laws adopted since 2001 in different countries. For example, in the context of European countries, David Banisar explains that the enactment of laws aiming to prohibit speeches, that are likely to be extreme or support terrorism, significantly challenge the right to freedom of expression in many countries. Different states use these laws for political purposes which often extend to the closing of websites.<sup>85</sup> This practice is found in other parts of the world as well where many journalists are put behind the bar on the ground of 'spreading terrorist propaganda.'<sup>86</sup>

It can be argued from the above that states' response to terrorism is inadequate and, in many cases, it is conflicting with human rights norms. Currently, 'the war on terror' waged by the Western states impairs human rights principles by: rejecting or redefining human rights law; refusing their obligations under humanitarian

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<sup>82</sup> Moeckli (n 5) 31, 32.

<sup>83</sup> Pokalova, (n 56), 474.

<sup>84</sup> Ibid.

<sup>85</sup> David Banisar, 'Speaking of Terror: A Survey of the Effects of Counter-Terrorism Legislation on Freedom of the Media in Europe' (2009) 7(3) *International Journal of Civil Society Law* 34.

<sup>86</sup> Pokalova (n 56) 474.

law; and extending states' powers arbitrarily.<sup>87</sup> Under such a situation, ensuring strong counter-terrorism measures which will facilitate the promotion and protection of human rights remains problematic. This challenge is particularly found in implementing the right to fair trial. For example, on the one hand states are under an obligation to enforce the right to fair trial and- on the other hand they could allow the non-disclosure of evidence taken in a proceeding on terrorism.<sup>88</sup> These dilemmas should be addressed for guaranteeing procedural fairness under counterterrorism measures. This can be done by adopting a balanced approach that would establish a conducive relationship between human rights protections and counterterrorism measures.

### **5. Balancing Counter-terrorism Measures with Human Rights Protections**

To achieve an effective counter-terrorism regime, it is crucial to ensure that counter-terrorism measures conform to human rights norms. Given the fact that counter-terrorism measures may violate human rights, it is necessary to strike a balance between the imperatives of human rights protections and responses to terrorism. This means that anti-terrorism laws and process should adopt a balanced approach with human rights. The proposed approach will enable states to realize that curtailing liberty on the ground of national security might lead to a devastating consequence like arbitrary increase of state's powers.<sup>89</sup> This section recommends how a balanced approach between human rights and counter-terrorism measures can be obtained by applying the principles of necessity and proportionality in counter-terrorism measures.

Human rights law allows imposing restrictions on some rights, under certain situations. The limit of permitting such interference with rights varies in accordance with the nature of rights to be restricted and the relevant human rights convention.<sup>90</sup> The derogable rights which might be subject to such restrictions include the rights to freedom of expression, freedom of association and assembly, freedom of movement, and respect for one's private and family life. A derogation from these rights are usually allowed on the grounds of national security, law and order, morality and human rights protections recognized under various human rights treaties and national constitutions. These grounds, particularly national security, are often used to justify counter-terrorism measures' deviation from human rights principles. This has been proved problematic in different cases.

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<sup>87</sup> Gearty (n 80).

<sup>88</sup> Office of the United Nations High Commissioner for Human Rights (n 32).

<sup>89</sup> Sundaresh Menon, 'International Terrorism and Human Rights' (2014) 4(1) Asian Journal of International Law 1-33.

<sup>90</sup> Office of the United Nations High Commissioner for Human Rights (n 32) 22.

States possess obligations of both human rights protections and countering terrorism. Whereas human rights are not unqualified and reasonable restrictions can be imposed upon them, it might not be correct to assume that the grounds of restrictions, such as, national security could trump human rights.<sup>91</sup> Counter-terrorism measures' failure to emphasize this enabled them to disobey human rights law's requirements of following permissible limit of restrictions. For example, the right to fair trial and freedom from torture and cruel, inhuman, or degrading treatment or punishment being non-derogable in nature cannot be restricted in any situation including war and emergency which have been largely disregarded in counter-terrorism regimes. This challenges the very framework of international human rights law.

Counter-terrorism regime's reluctance to respect human rights principles undermines shared values as well as the scope of states' cooperation which is crucial for developing effective anti-terrorism measures.<sup>92</sup> Therefore, states' responsibility to respect, ensure, and protect human rights should be considered a touchstone of the anti-terrorism regime.<sup>93</sup> Such a regime should strictly comply with human rights law's principles on derogable and non-derogable rights and specifically define the scopes of reasonable restrictions relating to the exercise of the former category of rights.<sup>94</sup> Counter-terrorism measures should also follow other basic standards of human rights such as human dignity, equality and non-discrimination. In addition, they should emphasize that the right to security for the sake of which states appear to pursue anti-terrorism measures must be realized within the human rights framework, but not at the expense of human rights.<sup>95</sup>

It appears from the above that in order to become effective, counter-terrorism measures should be based on human rights framework. This poses an investigation into how human rights norms can be employed efficiently in counter-terrorism regime under which states use 'force' against existing and probable terrorist attacks. The principles of necessity and proportionality can provide useful guidelines in this respect. This means that counterterrorism measures should be considered credible when they have passed the tests of proportionality and necessity, the two principles which international law requires states to apply in exercising the right to self-defence. This indicates that self-defence should remain at the centre of the counter-terrorism regime that would avoid deterrent or punitive actions.

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<sup>91</sup> Scheinin (n 39) 550.

<sup>92</sup> *Ibid.*

<sup>93</sup> Office of the United Nations High Commissioner for Human Rights (n 32) 22.

<sup>94</sup> Hoffman (n 1) 932, 951, 952.

<sup>95</sup> *Ibid.*

## 5.1 Application of the Principles of Necessity and Proportionality in Counter-Terrorism Measures

States use force under counter-terrorism measures against terrorist attacks or threats of such attacks on the ground of self-defence, particularly national security. International law has recognized the principles of necessity and proportionality for long as pre-conditions of using force by states against such attacks.<sup>96</sup> Although article 51 of the UN Charter allowing the use of force in the right of self-defence does not mention them, the principles of necessity and proportionality are required to be applied in using the said force. The customary international law and the jurisprudence of the International Court of Justice (the ICJ) also stress on these principles. The ICJ observes, “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law....”.<sup>97</sup>

Necessity refers to a situation where there is no alternative but to use force against an armed attack or similar actions. In other words, the force can be used as a last resort and for the purpose of defence only. This indicates that the force cannot be used for a deterrent or punitive purpose. A study on necessity points out how the principle of necessity should be applied. It argues, “[a]t the heart of any defensive measures, avenues of non-forcible measures must be sought prior to any use of force, and force should only be utilised as a matter of last resort for self-defence.”<sup>98</sup> Like necessity, proportionality suggests how the force can be utilised reasonably in exercising the right of self-defence. The doctrine of proportionality requires that the force used by states should not be unreasonable and excessive. It prescribes the limits within which states can use the force. Such restrictions help mitigate ‘the severity’ as well as ‘durations of actions’ adopted by states as a means of self-defence.<sup>99</sup> They (the restrictions) do so by emphasising that the force should be proportionate to the damage likely to occur from the attack that causes the use of force. In other words, “[t]he physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack.”<sup>100</sup>

Therefore, the principles of necessity and proportionality have the potential to guide states in exercising their right to self-defence against terrorist attacks

<sup>96</sup> Christian J Tams and James G Devaney, *Applying Necessity And Proportionality To Anti-Terrorist Self-Defence* 45(1) *Israel Law Review* 91–106

<sup>97</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 ICJ Rep 226 (‘Nuclear Weapons’)

<sup>98</sup> PhD thesis [73,74]

<sup>99</sup> Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks* (2002) 88 *Cornell L. Rev.* 155 .

<sup>100</sup> Christian J Tams and James G Devaney (n 113) 102.

efficiently. However, the changed situation following September 11, 2001 reveals that different states using counter-terrorism measures as a means of defending their national security have largely deviated from these principles. For example, state practices discussed above show that countries like the USA, UK and others have often used these measures for punitive rather than defence purposes which is undesirable under international law.<sup>101</sup> Counter-terrorism measures' such deviation from the necessity and proportionality principles have created a significant threat to the human rights of innocent people. In addition to this practical problem, some limitations associated with the principles of necessity and proportionality hamper their proper application.

A vital challenge involved with the necessity principle is that before allowing the use of force it does not require a victim state to exhaust all non-forcible means available to respond to an attack. Although some studies suggest for exhaustion of 'non-forcible measures' one of which has been discussed above, it is not recognized under international law as a compulsory requirement for applying the necessity principle.<sup>102</sup> If it required victim states to assess the feasibility of ending an attack without using force, in good faith and based on existing facts, the necessity principle could have played a more effective role in the case of states' self-defence.<sup>103</sup> This would help design an effective counter-terrorism regime. A similar issue is found in the proportionality principle. The vital factors for applying proportionality: the extent of force used, damage consequential of it, and the severity of the armed attack against which the force is used are difficult to specify as they vary from case to case based on the locations and exigencies of their operations. Because of this the proportionality doctrine cannot always ensure a balance of interests between aggressor and victim states.<sup>104</sup> It can be argued from this that to apply the principles of necessity and proportionality effectively in counter-terrorism regime these challenges should be identified and responded to adequately in states' anti-terrorism efforts.

It is hard to suggest specific criteria for measuring how states should pursue these two principles. This is because the need and scope of using counter-terrorism measures, vary from one case to another. However, as a common method of applying necessity and proportionality principles in these measures states should conduct a detailed inquiry to ascertain whether a proposed restriction on human rights is genuinely required to respond to terrorism and whether it is proportionate to any permissible ground of restrictions.<sup>105</sup> In applying the principles of necessity

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<sup>101</sup> Ibid. 103.

<sup>102</sup> Ibid. 96.

<sup>103</sup> Ibid. 96.

<sup>104</sup> Ibid. 102.

<sup>105</sup> Moeckli (n 5) 10.

and proportionality, states should also assess critically whether the restrictive measures would be appropriate and effective, and they are likely to affect adversely any groups or individuals.<sup>106</sup> This clarifies that a pro-human rights anti-terrorism regime will not be possible if the regime does not pass the tests of necessity and proportionality.<sup>107</sup> In other words, states can limit the exercise of any right through their counter-terrorism measures only in those cases where this becomes essential to meet an urgent need (e.g., allowing the exercise of self-defence) and the limitation is proportionate to that need.

This reveals that although balancing between human rights and counter-terrorism measures involves a significant challenge, it will not be impossible for states to attain such a balance. If a state is willing to protect its citizens from terrorist acts, it will be able to do so by adopting a balanced approach between human rights and its counter-terrorism measures which will be based on the principles of necessity and proportionality. This would require the state to assess the extent of the terrorist threat and means of protecting citizens against it, promote the rule of law and human rights, follow principles of criminal law and other relevant laws, and comply with its international obligations relating to the promotion and protection of human rights.<sup>108</sup> This has been explained by the International Commission of Jurists in 2004. According to it,

“In adopting measures aimed at suppressing acts of terrorism, states must adhere to the rule of law, including the core principles of criminal law and international law, and the specific standards and obligations of international Human Rights law, refugee law and where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism.”<sup>109</sup>

## 6. Conclusion

This article agrees with the claim that terrorist acts cannot be justified by their motives, characteristics, and underlying causes. Such acts should be evaluated from the human rights perspectives and they will be considered a tool of human rights violations. Like terrorism, anti-terrorism regimes existing at both global and domestic levels are required to comply with human rights standards. Anti-terrorisms treaties, legislation, and other measures adopted under international law and national law should emphasize human rights protections. This can be

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid, 11.

<sup>108</sup> Jessica Wolfendale, ‘Terrorism, Security, and the Threat of Counterterrorism’ (2007) 30(1) *Studies in Conflict & Terrorism* 88.

<sup>109</sup> The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004.

explained with reference to states' responsibility of protecting national security. While all states are under an obligation to ensure security, they should fulfill this obligation within the human rights framework, rather than "at the expense of human rights".<sup>110</sup> As part of their efforts to protect national security states can adopt counterterrorism strategies and laws which would help them to defend their security against terrorist attacks. . However, in applying these counter-terrorism measures they should ensure that these measures do not diminish human rights provisions.

As explained above, counter-terrorism measures adopted by different states conflict with human rights norms. Moreover, they often limit the exercise of some human rights which are non-derogable in nature. To frame an effective counter-terrorism regime, it is crucial to prevent such state practices. This can be done by applying the rules of necessity and proportionality to counter-terrorism mechanism. The test of necessity and proportionality should be integrated into counter-terrorism laws as a yardstick to balancing anti-terrorism measures with human rights law. It can be argued from this that counter-terrorism regime can restrict the enjoyment of human rights in those cases only where such restrictions are permissible under human rights law, required for the purposes of self-defence and proportionate to that defence.

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<sup>110</sup> Hoffman (n 1) 932—955.