



INTERNATIONAL JOURNAL OF HUMAN RIGHTS LAW REVIEW

Volume 3 | Issue 1

Art. 3

2024

TERRORISM AND PROHIBITION ON TORTURE

Priyanka Walter

Recommended Citation

Priyanka Walter, 'Terrorism and Prohibition on Torture' (2024) 3 IJHRLR 46-65.
Available at www.humanrightlawreview.in/vol-3-issue-1/.

This Art. is brought to you for free and open access by the International Journal of Human Rights Law Review by an authorized Lex Assisto Media and Publications administrator. For more information, please contact info@humanrightlawreview.in.

TERRORISM AND PROHIBITION ON TORTURE

Priyank Walter¹

ABSTRACT

The Geneva Convention is a set of international treaties that establish international law standards for humanitarian treatment in war. This paper analyses the Geneva Convention provisions related to terrorism, non-state actors and torture prohibition and examines the definition of terrorism and the legal implications of torture prohibition. It also explores the challenges of implementing these provisions in practice, particularly in counter-terrorism operations. Finally, the paper concludes that while the Geneva Convention provides a strong legal framework for human rights protection in times of war, there are significant challenges in ensuring compliance with these provisions in practice.

KEYWORDS

Torture, Non-combatant, Terrorism, Geneva Convention, Non-state actors

I. INTRODUCTION

Terrorism is a global phenomenon and ranges from political motives to criminal activities. It is often justified as a response to terrorism, but the general outrage that occurs when a terrorist act takes place can sometimes result in a laxer interpretation of the laws of war. Despite this, many governments around the world continue to use torture, often in the context of national security or counterterrorism efforts. International humanitarian law provides relief in situations of international armed conflict and holds parties accountable for the crimes committed; however, due to the archaic nature of the law, there are many loopholes which are persistent in the modern setting. Since the international law is not strictly binding to the states, by virtue of them being sovereign nations, the

¹ Law Student, 5th Year, School of Law, Manav Rachna University.

international law has a lot more to deal with the geopolitical notes and the global domination than to do with the aim of provide justice to the people who are suffering at large by the actions of the state.

Geneva Convention and its additional protocols have not been amended as should have been required or as frequent need arises. Looking at the current instability of the international laws and the tug of war being played by various international players (being the states) there is now a need to create either a new set of international laws or amend the existing legislation drastically to contain in it the vastness of the modern democracy and political situations.

II. GENEVA CONVENTION

The Geneva Convention and its additional protocols² are a group of international conventions that outline the fundamental standards governing the conduct of armed conflict and constitute the basis of International Humanitarian Law. These norms govern the conduct of hostilities and aim at limiting the consequences. *“They are there to protect civilians, medical workers, aid workers, and soldiers no longer engaged in hostilities (the wounded, sick, and shipwrecked soldiers and prisoners of war).”*³

The term ‘*terrorist*’ has not been defined within the context of armed conflicts, so the application of IHL to cases of terrorism and to counterterrorism is not straightforward. If what would be criminal actions in a time of peace are committed, they become war crimes in armed conflict, according to IHL, and thus become punishable. For example, the taking of hostages is prohibited under the International Convention against the Taking of Hostages, 1979⁴.

² International Committee of the Red Cross 2010, *The Geneva Conventions of 1949 and their Additional Protocols* - ICRC, icrc.org.

³ *Ibid.*

⁴ *International Convention against the Taking of Hostages* 1979, 17 December.

These are forbidden by the Geneva Conventions, not merely because they amount to punishment, but also “as part of the measures of collective punishment,” which would create a situation of terror. They are protected, and so pillaging is forbidden, reprisals upon protected persons and their property being forbidden. Specific arrangements may be concluded between powers with respect to the movement of protected persons.⁵ As war is sometimes justified as a response to terrorism, it seems the general outrage that occurs when a terrorist act takes place can sometimes result in a laxer interpretation of the laws of war. But the laws of war are applicable to all sides in an armed conflict, irrespective of the grounds for the conflict.

The International Criminal Tribunal for the former Yugoslavia in the *Galic*⁶ case, in reiterating this criminal mental intent (*mens rea*) requirement, stated that such acts fall within the general prohibition of attacks against civilians and that the nature of the acts or threats of violence can vary. It further stated that this prohibition is sourced not only in treaty law, but in customary international law as well, the violation of which constitutes a war crime.

“*Terrorism*” is also expressly not permitted by article 33 Geneva Convention IV which prohibits “*all measures of intimidation or of terrorism*” as part of collective punishment, which could induce a state of terror, as well as by article 4(2)(d) Additional Protocol II which simply prohibits “*at any time and in any place whatsoever ... acts of terrorism*”.⁷

Further the Geneva Conventions provides for the prohibition of torture and other inhuman treatment or punishment that is cruel, degrading or

⁵ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (2nd part)* n.d., OHCHR.

⁶ *Prosecutor v. Stanilav Galic (Trial Judgement and Opinion)*, IT-98-29-T, ICTY

⁷ ICRC 2023, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Icrc.org.

otherwise unlawful⁸. Its provisions encompass all persons, both civilian and prisoner of war, within the control of a party to an armed conflict.⁹ The International Committee of the Red Cross (ICRC) recognizes the prohibition against torture and other acts of cruel, inhuman or degrading treatment as a “custom”, in its own study Customary International Humanitarian Law (Rule 90)¹⁰. The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to prisoners of war: mutilation; torture; violence to life and person in general. Further, the convention also states that the Prisoners of war (PoW) must at all times be humanely treated. This also includes no physical or moral coercion to be exerted on prisoners of war in order to extract from them information of any kind.

III. TORTURE

Article 1 of Geneva Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment defines ‘*torture*’.¹¹ This definition of torture encompasses the physical and mental to cause any pain or suffering, however, it does not take into consideration the psychological torture which can be considered as a long-drawn form of torture and is long-lasting.¹² The Geneva Convention does not take into account the mental or psychological aspect of torture which is the biggest loophole when it comes to the definition of torture.

- **Nuances in definition**

Inclusion of the same for the means to extract any information from the detainees would make it difficult for the state parties while making them more accountable for infringing human rights. While torture is

⁸ United Nations 1984, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OHCHR.

⁹ *What Does the Law Say about torture?* - ICRC 2011, Icrc.org.

¹⁰ *Ibid.*

¹¹ *Supra*, note 7

¹² Reyes, H 2007, ‘The Worst Scars Are in the mind: Psychological Torture’, *International Review of the Red Cross*, vol. 89, no. 867, pp. 591–617.

strictly prohibited but the Convention puts only an obligation on the state parties to not subject the detainees to cruel, inhumane and degrading treatment¹³. There needs to be a distinction between the two notions in international law. In relation to the Geneva Convention along with its additional protocols, which is strictly limited to armed conflicts, the ICCPR strictly prohibits both things.¹⁴

This mere obligation to not treat the detainees under cruel or inhumane conditions does not expand upon the use of other methods of torture which can be deeply wounding to the individual even if it is under the pretence of extracting information. Except the aforementioned convention, the Universal Declaration of Human Rights (UDHR)¹⁵, the European Convention of Human

Rights (ECHR)¹⁶ and the Rome Statute¹⁷ also strictly prohibits the use of torture and ‘cruel, inhumane and degrading’ treatment to human being on the virtue of being human¹⁸.

The issue with the limited definition of torture as provided by the Geneva Convention is that it only includes direct infliction of pain or suffering; which leaves the other elements open for interpretation. Human rights advocates are of the opinion that punishments such as solidarity confinement are also a form of torture as the punishment plays heavily on the deprivation of human contact altogether along with removal of sunlight, small breathing spaces; all of which is borderline torture but is packaged under the definition of punishment.

¹³ *Supra*, note 7 (A.16)

¹⁴ United Nations 1966, *International Covenant on Civil and Political Rights*, OHCHR, United Nations.

¹⁵ United Nations 1948, *Universal Declaration of Human Rights*, United Nations.

¹⁶ *European Convention on Human Rights* 1950, European Convention on Human Rights, European Court of Human Rights .

¹⁷ International Criminal Court 1998, *Rome Statute of the International Criminal Court*, 17 July, International Criminal Court.

¹⁸ Fasel, RN 2018, “Simply in virtue of being human”? A critical appraisal of a human rights commonplace’, *Jurisprudence*, vol. 9, no. 3, pp. 461–485.

Another issue with the definition as given under the Geneva Convention and the Rome Statute is there is no intensity of pain provided or defined.

Further, the other conventions do not define torture but only prohibits its usage. Since there is no universal definition yet established by the international courts, the loopholes are used by various governments for their own personal gains especially when it comes to fighting terrorism.

IV. TERRORISM

The famous quote of the U.S. President Ronald Regan, “*One man's terrorist is another man's freedom fighter*” in his radio address to the nation¹⁹ where he tried to give the difference between the motivations behind a freedom fighter and how they are different from that of a terrorist.

Terrorism is a global phenomenon and ranges from political motives to criminal activities. Till now there is no fixed definition for terrorism, however, many institutions have tried. Due to the vast nature of the crime, it gets difficult to pinpoint all the elements which terrorism can include.

There is only one international treaty -- International Convention for the Suppression of Terrorist Bombings; which defines terrorism and includes non-state parties as well.²⁰ The elements of this definition are as follows -

1. An act intended
2. Death or serious bodily injury
3. Civilian population

¹⁹ *Radio Address to the Nation on Terrorism* 1986, Ronald Reagan.

²⁰ *United Nations Treaty Collection* 1997, treaties.un.org, viewed 24 September 2023, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=en>.

4. Nature or contact; intimidate population or compel a government or international organisation
5. To do or abstain from doing an act.

However, this definition has political connotations attached to it.²¹ Even though its political implications this definition is important because this was the first agreement between international organisations concerning a shared understanding of what terrorism entails. It should further be mentioned that the term is not only concerned with physical violence committed by States. It also involves violent acts committed by nonstate entities, including terrorist groups and individuals.

In international human rights law, terrorism has several critical aspects in its definition. Firstly, terrorism is an act of human injustice. It is a breach of the most basic of human rights to life, safety and live free from fear. Secondly, it can never be justified. It is never justifiable to use violence, or the threat of violence, as a tool for pursuing political or ideological objectives. Thirdly, the definition of terrorism does not aim at covering all forms of violence with an excessively broad brush. It specifically refers to acts of violence aimed at creating terror or intimidating a population.

- **Nuances in definition**

Two biggest issues with this definition are that there is neither any differentiation between political violence and terrorism nor in terrorism or other forms of criminal activities. For example, some people argue that the use of violence by armed resistance groups in the context of colonial or foreign occupation is justified and should not be considered terrorism. Others argue that any act of violence that is directed against

²¹ Ganor, B 2002, 'Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?', *Police Practice and Research*, vol. 3, no. 4, pp. 287–304.

civilians is terrorism, regardless of the political context.

Another example, some people argue that organised crime groups that engage in violence and intimidation should be considered terrorist organisations. Others argue that organised crime groups are motivated by financial gain, not by political or ideological aims, and therefore should not be considered terrorist organisations.

V. NON-COMBATANT

The Geneva Convention defines non-combatant as any individual who is no longer participating in hostilities in a situation of armed conflict where the international humanitarian law applies.²² The Geneva Conventions do not elaborate upon this definition which leaves a wide range of hostilities to take place. Even though the terrorist groups are heavily armed and trained they are not considered as combatants²³ and are classified as non-state actors ; this leads to the inevitable use of torture on them using these loopholes.²⁴

- **Nuances in definition**

There is no specific article which defines the term “non-combatant”, which in itself is the biggest loophole when it comes to tackling the usage of torture and the fight against terrorism. When guerrilla warfare is taking place, there is no clear distinction between civilians and combatants, and conventions based on a distinction of this kind will lead to inevitable gaps in case of guerrilla warfare²⁵. The difficulty arises when certain circumstances make it hard to determine whether a

²² Thomas, AR n.d., *CHAPTER II Noncombatant Persons, International Law Studies - Volume 73*.

²³ Ellen O’Connell, M 2004, ‘Enhancing the Status of Non-State Actors through a Global War on Terror?’, *Colum. J. Transnat’l L*, vol. 435, p. 43.

²⁴ *The Applicability of IHL to Terrorism and Counterterrorism* 2015, www.icrc.org.

²⁵ Bond, J 1971, *Protection of Non-combatants in Guerrilla Wars*, *Seattle University School of Law Digital Commons* , pp. 787–804.

person is a non-combatant or not.

IHL does not even expressly refer to combatants in non-international armed conflicts, primarily because States do not want to confer the right to fight government forces. Accordingly, non-state armed groups involved in a conflict are considered "parties to the conflict," which implies that they have organised armed forces²⁶. For instance, these forces must be under a certain command structure and capable of sustaining military operations.

VI. PROTECTED CLASSES UNDER THE GENEVA CONVENTION

As a set of international treaties, the Geneva Conventions establish standards of international humanitarian law (IHL) designed to protect individuals affected by armed conflicts. The purpose of these conventions is primarily to protect those individuals who are not currently engaged in hostilities or who have ceased to be so.²⁷ This includes military personnel who are hors de combat and civilians who are not directly participating in hostilities. As a result of their unique legal status and the nature of their operations, non-state actors, such as armed opposition groups, present unique challenges in the application and enforcement of these protections²⁸. A number of rights and protections are provided to those belonging to protected classes under the Geneva Conventions. Among them are:

1. **Wounded and sick military personnel:** The First Geneva Convention specifically addresses the protection and treatment of wounded and sick military personnel on the battlefield.²⁹

²⁶ *Principle of distinction | How does law protect in war? - Online casebook* n.d., casebook.icrc.org.

²⁷ *International humanitarian law and the challenges of contemporary armed conflicts* 2007.

²⁸ *Doctors without Borders | The Practical Guide to Humanitarian Law* 2010, Guide-humanitarian-law.org.

²⁹ *Ibid.*

2. **Prisoners of war:** The Third Geneva Convention establishes prisoners of war's rights and protections, including humane treatment, access to medical care, and the right to correspond with their families.³⁰
3. **Civilians:** The Fourth Geneva Convention focuses on civilian protection during armed conflicts, including the prohibition of violence, forced displacement, and inhumane treatment.³¹
4. **Medical and religious personnel:** The First Geneva Convention also provides protection for medical and religious personnel who assist the wounded and sick, ensuring their safety and the ability to carry out their duties.³²

There is ongoing debate regarding the extent to which non-state actors are bound by the Geneva Conventions and other bodies of international law, including human rights laws. The legal personality of non-state actors is often different from that of states and they may not be considered as full subjects of international law. In armed conflicts involving non-state actors, this creates loopholes in the application and enforcement of the Geneva Conventions. The reach of IHL may be limited in situations where armed violence does not rise to the level of an armed conflict, or where non-state entities have relatively stable control over territory and the population, particularly when it comes to socio-economic rights.³³ As a result, the application of the Geneva Conventions to non-state actors and individuals affected by them is further complicated³⁴. This lack of coverage is

³⁰ ICRC 2016, 'Frequently Asked Questions on the Rules of War', *www.icrc.org*.

³¹ Le Moli, G 2021, 'Torture by Non-state Actors', *Journal of International Criminal Justice*, vol. 19, no. 2, pp. 363–391.

³² *Supra*, note 24

³³ Gilles Giacca 2014, 'Human Rights Obligations of Armed Non-State Actors', *Oxford University Press eBooks*, pp. 230–272, viewed 15 October 2023, <<https://academic.oup.com/book/32689/chapter-abstract/270910648?redirectedFrom=fulltext>>.

³⁴ Worster, W 2016, 'Relative International Legal Personality of Non- State Actors RELATIVE INTERNATIONAL LEGAL PERSONALITY OF NON-STATE ACTORS', *Brooklyn Journal of International Law*, vol. 42, viewed 16 September 2023,

compounded by the fact that most countries lack clear legal definitions of what constitutes a non-state actor. As a result, it can be difficult to determine which actors are bound by IHL and which are not.³⁵ The unique legal status and nature of non-state actors, such as armed opposition groups, present challenges in applying and enforcing the Geneva Conventions, despite not being signatories to the Geneva Conventions, these actors are still bound by international humanitarian law (IHL). It should, however, be noted that countries may be able to violate the Geneva Conventions by exploiting the loopholes that have been created by non-state actors during armed conflicts. There are several ways in which this can occur:

1. **Indirect support and collaboration:** A country may provide indirect support to non-state actors, such as supplying them with weapons, training, or financial assistance. This support can enable non-state actors to commit violations of the Geneva Conventions, such as targeting civilians or engaging in terrorism³⁶.
2. **Lack of control over non-state actors:** Countries may claim that they have no control over non-state actors' actions, thereby avoiding responsibility for any violations of the Geneva Conventions committed by these groups. However, under IHL, states are still obligated to prevent and address misuse of the Geneva Conventions by non-state actors³⁷.
3. **Torture and inhumane treatment:** Non-state actors may engage in acts of torture or inhumane treatment, either on their own behalf or

<<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1659&context=bjil>>.

³⁵ United Nations Office on Drugs and Crime 2009, *Frequently asked questions on international law aspects of countering terrorism*, UNDOC.

³⁶ Eatwell, T & Powles QC, S 2021, "Quasi-governors" and Questions Relating to Impunity and Legal Certainty', *Journal of International Criminal Justice*, vol. 19, no. 2, viewed 8 April 2021, <<https://academic.oup.com/jicj/article-abstract/19/2/393/6359475?redirectedFrom=fulltext>>.

³⁷ Hofmann, C & Schnecken, U 2011, *Engaging non-state Armed Actors in state- and peace-building: Options and Strategies*, www.corteidh.or.cr.

on behalf of a state. While the Geneva Conventions primarily focus on the protection of individuals who are not or no longer actively involved in hostilities, such as wounded and sick military personnel, prisoners of war, and civilians, they also prohibit acts of torture and inhumane treatment in all armed conflicts.³⁸

4. **Occupation and civilian treatment:** In situations where a country occupies territory controlled by non-state actors, there may be a lack of clarity regarding the application of the Geneva Conventions. While the conventions primarily apply to state actors, they also provide specific protections for civilians living on occupied territory and this is regardless of whether the occupying power is a state or a non-state actor.³⁹ Countries may exploit this ambiguity to justify violations of the Geneva Conventions in occupied territories.
5. **War crimes and accountability:** Countries can potentially violate the Geneva Conventions by failing to investigate and prosecute war crimes committed by their nationals or armed forces, or by failing to exercise universal jurisdiction to investigate and prosecute war crimes perpetrated by individuals of any nationality. This can allow non-state actors to commit grave breaches of the Geneva Conventions with impunity.⁴⁰

To address this issue, states must uphold international humanitarian law. They should also take measures to prevent and address misuse of the Geneva Conventions by non-state actors. Such measures should include stricter enforcement of existing regulations and laws, and improved educational and training of soldiers and security personnel in

³⁸ Moli.L, 'Torture by Non-state Actors', *Journal of International Criminal Justice*, vol. 19, no. 2, pp. 363–391.

³⁹ Pejic, J 2022, *The Other Side of Civilian Protection: The 1949 Fourth Geneva Convention - Lieber Institute West Point*, Lieber Institute West Point.

⁴⁰ de Nevers, R 2006, 'The Geneva Conventions and New Wars', *Political Science Quarterly*, vol. 121, no. 3, pp. 369–395, viewed 7 June 2022, <<https://www.jstor.org/stable/20202724>>.

international human rights law. States should also create effective mechanisms to monitor compliance with humanitarian law and investigate any violations.

VII. 9/11 ATTACK AND SITUATION OF US

After the September 11, 2001 terrorist strikes, also known as the 9/11 attacks⁴¹, the US foreign policy, its intelligence, and counterterrorism practices were heavily influenced. In response, the US launched a “Global War on Terror” which expanded way beyond Afghanistan where Al Qaeda leader Osama bin Laden was said to be holed up. Lawmakers in the U.S. government enacted laws, including the USA PATRIOT Act,⁴² a piece of legislation designed to improve federal law enforcement’s ability to preempt and respond to counterterrorism incidents. But the U.S. government’s response to the attacks was also accompanied by human rights abuses, from torture and other “enhanced interrogation techniques”.⁴³

It is a topic of debate whether the United States government should use torture in response to terrorist attacks. The Bush White House put out a series of secret memos claiming to justify, under law, what a wartime president “knew to be” torture — including waterboarding, stress positions and sleep deprivation for extended, excruciating periods.⁴⁴ The administration said that was not torture and that they didn’t afford al-Qaeda and Taliban fighters the protection of the Geneva Conventions as prisoners of war.⁴⁵ However, it was banned in 2009 by the incoming Obama administration, which viewed the techniques as torture.⁴⁶ The

⁴¹ *9/11: As Events Unfold* | Transportation Security Administration n.d., www.tsa.gov.

⁴² *UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT)*, 2001.

⁴³ Roth, K 2021, *9/11 Unleashed a Global Storm of Human Rights Abuses*, Human Rights Watch.

⁴⁴ Council on Foreign Relations 2022, *Timeline: How 9/11 Reshaped Foreign Policy*, Council on Foreign Relations, Council on Foreign Relations.

⁴⁵ *Ibid.*

⁴⁶ Stone, R 2015, *OPINION: Has Obama banned torture? Yes and no*,

Senate Select Committee on Intelligence, which is part of the US Government, published its damning report concerning the CIA's interrogation techniques, finding them both ineffective, and counterproductive, in 2014. Additionally, health professionals involved in the CIA torture program violated fundamental ethical standards universally shared among healing professions, according to the report.⁴⁷

The United States government's relentless pursuit of impunity for human rights abuses persists despite the ban on torture. Efforts to scrutinise and take legal action against acts like torture and other offences have been thwarted.⁴⁸ Even when President Obama declared that the torture program had ceased, he opted not to initiate criminal investigations against the higher-ranking officials who sanctioned it, justifying this by claiming the U.S. needed to focus on the future rather than dwell on the past⁴⁹. As a result, although illegal on paper, torturous practices functionally remain a policy option. The Trump administration even hinted at their desire to resurrect it.⁵⁰

Moreover, repercussions from the catastrophic 9/11 attacks propagated policies that further marginalized already vulnerable communities within America through measures such as registration based on immigration status, massive crackdowns and deportations, racial and religious profiling, pervasive surveillance systems coupled with militarised local police forces.⁵¹ These policies bolstered existing structures of oppression while simultaneously generating violations of human rights explicitly

america.aljazeera.com,

<<http://america.aljazeera.com/opinions/2015/12/has-obama-banned-torture-yes-and-no.html#:~:text=The%20manual%20repeatedly%20forbids%20torture>>.

⁴⁷ *The Aftermath of 9/11: The U.S. Torture Program in the 'War on Terror'* 2021, Physicians for Human Rights.

⁴⁸ *Life and Liberty Archive* n.d., www.justice.gov, Department of Justice.

⁴⁹ *Supra*, note 23

⁵⁰ Savage, C 2020, 'U.S. Used Patriot Act to Gather Logs of Website Visitors', *The New York Times*, 3 December, <<https://www.nytimes.com/2020/12/03/us/politics/section-215-patriot-act.html>>.

⁵¹ *The 9/11 Effect* n.d., Center for Constitutional Rights.

targeting immigrant populations alongside Muslim communities and black plus brown demographics both domestically as well as internationally.⁵²

VIII. NON-STATE ACTORS

The Geneva Convention, in its definition of torture⁵³ only prohibits the state parties to the convention from the use of torture. However, no prohibition is put on the non-state parties. Despite this, the International Criminal Court (ICC) defines them as “organised armed groups...which, under responsible command, exercise effective control over a part of the territory of a state.”⁵⁴

The Geneva Conventions do not apply to non-state actors in the same way they apply to states which are party to the convention⁵⁵. Terrorist organisations, rebel groups, and mercenaries are common non-state actors (NSAs), who operate outside the law on the territory of sovereign states. In spite of the fact that they are not subject to conventional law, a body of law is being developed over time based on established customs and practices of states; however, according to customary international humanitarian law, torture and other cruel, inhuman or degrading treatment or punishment are prohibited for everyone, regardless of their status.⁵⁶ It is thus imperative that parties in a conflict make distinctions between civilians and combatants and implement all feasible measures to direct operations against military targets.

The United States has employed what it terms non-state actors to rationalise the use of some questionable enhanced interrogation techniques, including waterboarding, on accused terrorists. In the United

⁵² *Ibid.*

⁵³ *Supra*, note 10

⁵⁴ *Supra*, note 16

⁵⁵ Robson, V 2020, ‘The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions’, *Journal of Conflict and Security Law*, vol. 25, no. 1, pp. 101–115.

⁵⁶ Ahmad Qureshi, W 2019, ‘Applicability of International Humanitarian Law to Non-State Actors’, *Santa Clara Journal of International Law*, vol. 17, no. 1.

States government's view, these methods are not covered by the Geneva Conventions because they are applied to non-state actors. Nevertheless, legal scholars and human rights advocates say the government's take exceeds what the law allows. They contend that customary international humanitarian law prescribes torture against all people, regardless of their status. Even though the international humanitarian law is silent on the matters of non-state actors and their involvement but the human rights law is still binding to them, and the use of torture is strictly prohibited under the same.

The NSLs program, which is one of many justifications used for exercising powers granted under the PATRIOT Act, hinges on the fact that some PATRIOT Act provisions may be used against non-state actors.⁵⁷ NSLs give the United States government access to data about people from businesses and organisations without a warrant. The United States government has claimed that NSLs are necessary for preventing attacks on America from non-state actors. But civil liberties advocates say many NSLs trample the Fourth Amendment's prohibition against warrantless searches and seizures.⁵⁸

The following are some specific examples of how the US government has used the concept of non-state actors to pass the PATRIOT Act and to justify its use of certain controversial interrogation techniques:

1. By framing their enemies as "non-state" forces, the U.S. government justified the PATRIOT Act. The Bush administration claimed that the PATRIOT Act would keep America safe from terrorists such as al-Qaeda.
2. The US government has used the term non-state actors to cover NSL use. According to the US government, NSLs are needed to obtain

⁵⁷ Congressional Research Service 2015, *National Security Letters in Foreign Intelligence Investigations: Legal Background*, CSR.gov, July.

⁵⁸ ACLU 2011, *National Security Letters*, American Civil Liberties Union.

intelligence related to suspected terrorists who may plan an attack in the US.

3. The US government has invoked the term non-state actor as justification for using so-called enhanced torture techniques like waterboarding. The U.S. government maintains that these techniques do not contravene the Geneva Conventions because they are applied to non-state entities.
4. The term non-state actor has proven divisive as a tool used by the US government. Various legal experts and human rights groups contend that the administration's interpretation of the law is far too narrow and would permit torture and other human rights violations.

IX. ETHICAL IMPLICATIONS OF LOOPHOLES

Torture is a controversial and complex issue that raises critical ethical questions. The use of torture is illegal under international law, and it has been outlawed for decades. Despite this, many governments around the world continue to use torture, often in the context of national security or counterterrorism efforts.⁵⁹ The use of torture is never justified. Torture is a barbaric and inhumane practice that violates human rights and the rule of law⁶⁰. It is also ineffective as a means of obtaining reliable information, as people will often say anything to stop the pain. Furthermore, torture can have long-term physical and psychological effects on victims, including post-traumatic stress disorder, depression, and anxiety.⁶¹

Torture raises serious ethical concerns regarding the value of human life and dignity, the rule of law, and the state's duty to safeguard its citizens. Torture violates human rights and undermines justice and fairness ideals. It also establishes a dangerous precedent for the use of force and coercion

⁵⁹ Amnesty International 2019, *Torture*, Amnesty.org.

⁶⁰ *No More Excuses | A Roadmap to Justice for CIA Torture* 2017, Human Rights Watch.

⁶¹ *Supra*, note 28

in other circumstances, perhaps leading to a culture of impunity and abuse⁶².

There are various alternatives to using torture, such as adopting legal and ethical interrogation techniques, acquiring intelligence through surveillance and other ways, and resolving issues through diplomacy and dialogue. These alternatives are often more effective than torture, as they are based on respect for human rights and the rule of law⁶³.

X. LEGAL IMPLICATIONS OF THE LOOPHOLES

As discussed above regarding the non-state parties, it has a legal loophole in the Conventions regarding non-state parties and terrorism that some countries, including the United States, have exploited. Here are some of the legal implications of this loophole:

1. **NON-STATE ACTORS⁶⁴:** The Geneva Conventions were designed to regulate the behaviour of state parties during armed conflicts. However, most of today's armed conflicts involve non-state actors, such as terrorist groups, that are not bound by the same restrictions as state parties. This creates a legal grey area where the Conventions do not fully apply.
2. **TERRORISM:** The Conventions do not define terrorism, which allows states to label non-state actors as "terrorists" and treat them as such, even if they are not engaged in acts of terrorism. This can lead to abuses of human rights and violations of IHL.
3. **UNLAWFUL COMBATANTS:** The Conventions do not provide a clear definition of "unlawful combatants," which are non-state actors who do not meet the criteria for prisoner of war status under the

⁶² Miller, S 2017, *Torture (Stanford Encyclopedia of Philosophy)*, Stanford.edu.

⁶³ Assumpção, C 2020, *Can the Use of Torture in Intelligence Gathering Be Justified?*, E-International Relations.

⁶⁴ *Geneva Conventions More Crucial Than Ever, Humanitarian Experts Stress, as Security Council Marks Seventieth Anniversary of Key Instruments* | UN Press n.d., press.un.org.

Conventions. This has led to the detention of individuals at Guantanamo Bay and other detention centres without trial or access to legal representation.⁶⁵

The United States has been accused of misusing the legal loophole in the Geneva Conventions regarding non-state parties and terrorism. For example, the U.S. has labelled individuals as "enemy combatants" and held them at Guantanamo Bay without trial or access to legal representation. The U.S. has also engaged in "extraordinary rendition," which involves the transfer of individuals to other countries for interrogation and detention, often in violation of international law and human rights.⁶⁶

XI. CONCLUSION

Despite the complexity and multifaceted nature of the concept of terrorism, there is still a great deal of debate and disagreement about what constitutes terrorism and what does not constitute terrorism. In order to fully appreciate the nuances and complexities of the term, and to understand that terrorism is an act of human injustice that cannot be justified, it is essential to understand its nuances and complexities. As much as the international humanitarian law is necessary, it is outdated and does not take into account the multifaceted nature of the crimes that are being committed today and the role that the state plays in these crimes. In this regard, amendments to international law are necessary; although there is no one-size-fits-all definition of terrorism, it is imperative that we continue to have a conversation on the subject and work towards a shared understanding of what it truly means, especially in this fast-paced world where nations are vying for dominance all over the world.

⁶⁵ *Supra*, note 24

⁶⁶ Zachary, S 2005, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?', *Israel Law Review*, vol. 38, no. 1-2, pp. 378-417.