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# **COMMITTEE OF EXPERTS ON TERRORISM (CODEXTER)**

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## **Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts**

### **Discussion Paper**

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## I. Introduction

The CODEXTER has decided that the relationship between IHL and criminal law in terrorism cases in connection should be a topic for one of its thematic discussions for 2017. The present paper has been prepared by the Secretariat in response to this request.

The purpose of this discussion paper is to serve as a basis for the deliberations of the CODEXTER concerning the application of international humanitarian law (IHL) and domestic criminal law provisions on terrorism in cases where foreign terrorist fighters have been involved in combat situations and/or acts of terrorism during their time abroad.

There have been widespread calls to bring to justice European nationals suspected of being involved in perpetrating, or aiding and abetting, extreme acts of terrorist violence in the context of an armed conflict. In some cases, such as the unlawful killing by members of Daesh of the Jordanian air force pilot Muath Al-Kasasbeh in January 2015, the crime may arguably be punishable under both international humanitarian law and under domestic criminal law provisions related to terrorism. In other cases, a clear distinction can be made between war crimes and crimes against humanity, on the one hand, and terrorist crimes on the other, though committed by the same persons in the same places, but in different contexts.

This discussion paper is to help member States address paradigmatic issues relating to criminal justice approaches towards conflict-related terrorism, and as such does not seek to revise, adapt, restrict or otherwise interfere with the regulation of the law of armed conflict in any way that would undermine humanitarian protections, human rights obligations or the rule of law. Rather, this discussion paper reflects a need to establish to which degree the different legal regimes of international humanitarian law and domestic criminal law may be considered as competing, or partly overlapping, in which case member States are left with the possibility of applying one or the other legal regime. Ensuring respect for these regimes and their integrity is central to this exercise.

In any case, the aim should always be to ensure that member States are able to bring returned or otherwise apprehended foreign terrorist fighters to justice in the most efficient and effective manner, in accordance with applicable and relevant law, and taking into account the need to provide for a fair trial.

## II. Background

As a number of reports indicate,<sup>1</sup> there is a real risk of European foreign terrorist fighters returning to their home States after joining a non-state armed group, participating in terrorist activities, or otherwise directly participating in hostilities during an armed conflict. Many of these foreign fighters may, by virtue of joining a listed terrorist organisation or other non-state armed group, end up rightfully investigated and prosecuted for complicity in acts that are not only considered acts of terrorism, but could also be qualified as gross violations of the rules of international humanitarian law (IHL).

Furthermore, though Daesh has certainly been the most prominent terrorist group engaged in armed conflict across Iraq and Syria, there are a number of other listed terrorist groups considered parties to an armed conflict in, for instance, Yemen, Mali, Libya, Nigeria, Pakistan and Afghanistan.<sup>2</sup>

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<sup>1</sup> See, for instance, Europol, *EU Terrorism Situation and Trend Report (TE-SAT)* (2016), <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2016>; Christopher Paulussen, *Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights* (2016) (The International Centre for Counter-Terrorism – The Hague 7, no. 10), <https://icct.nl/publication/repressing-the-foreign-fighters-phenomenon-and-terrorism-in-western-europe-towards-an-effective-response-based-on-human-rights/>; Arie Perliger and Daniel Milton, *From Cradle to Grave: The Lifecycle of Foreign Fighters in Iraq and Syria* (2016) (Combating Terrorism Centre at West Point, United States Military Academy), <https://www.ctc.usma.edu/wp-content/uploads/2016/11/Cradle-to-Grave2.pdf>.

<sup>2</sup> These include groups such as the Nusra Front (renamed Jabhat Fateh al-Sham), Al-Qaida in the Arabian Peninsula (AQAP), Al-Qaida in the Islamic Maghreb (AQAIM), Islamic-State associated forces in Egypt and Libya, Boko Haram, and the Taliban.

The interaction of IHL and counter-terrorism law at the domestic level presents problems to both substantive and procedural criminal law. As the application of either legal framework triggers a different set of corresponding obligations for States, in certain cases there could be considerable challenges in securing adequate criminal justice responses to conflict-related terrorism as well as for the State's compliance with IHL.

War crimes (and grave breaches of IHL) in both international armed conflict and non-international conflict are governed under treaty-based and customary IHL whereas terrorism is regulated by reference to a number of complex, sectoral, offence-based instruments, UN Security Council Resolutions, regional Conventions such as the Council of Europe Convention on the Prevention of Terrorism and its Additional Protocol, and domestic penal laws. Though in many cases prosecutors may determine that the prosecution of mere membership of a listed terrorist organisation will be the best approach, regardless of specific acts while part of that organisation, it is foreseeable that certain cases may not be so clear-cut.<sup>3</sup> The varied responses from counter-terrorism entities and the surrounding discourse, at both domestic and international levels, has contributed to a significant blurring of the relationship between the legal regimes governing acts of terrorism and armed conflict.

As such, there are open questions as to the suitability and applicability of anti-terrorism legislation in relation to criminal conduct during armed conflicts. It is thus in the spirit of systemic harmonisation and complementarity that this study was undertaken, in order to ensure, where relevant and appropriate, a degree of clarity as to how to approach differing legal regimes which have or are likely to become blurred. Member States are therefore encouraged to consider whether all appropriate steps have been taken to ensure that the interaction of the IHL and counter-terrorism frameworks do not result in any clear legal gaps, or otherwise contradict or clash in such a manner as to frustrate the course of justice.

IHL is often enforced through international tribunals, whereas there is no formal international mechanism for the prosecution of members of listed terrorist groups. The primary responsibility for the prosecution and prevention of crimes under both regimes rests with the states and national procedures are likely to remain the most practical and efficient means of holding perpetrators to account.<sup>4</sup> At the domestic level, all such investigations, prosecutions and eventual punishments of suspected terrorists and foreign terrorist fighters should therefore be in accordance with the relevant Council of Europe standards, particularly the European Convention on Human Rights, while also fully respecting the principles, norms and rules of IHL.

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<sup>3</sup> Membership or "mere" association with a listed terrorist group may not be sufficient for criminal liable in certain jurisdictions. For instance, in Belgium, courts have held that persons may be punished for knowingly carrying out an activity for a terrorist group, including supporting activities such as cooking or acting as a driver, but that mere membership is not punishable. See Eurojust, *Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response – Third Eurojust Report* (2015), p. 27.

<sup>4</sup> For instance, under Common Articles 49/50/129/146 of the Four Geneva Conventions of 1949, States Parties "undertake to enact any legislation necessary to provide effective penal sanctions committing, or ordering to be committed, any of the grave breaches of the present Convention". Also see: Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law – Volume 1: Rules* (Cambridge University Press 2005), Rule 158: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects", further noting that "There is, however, sufficient practice [...] to establish the obligation under customary international law to investigate war crimes allegedly committed in non-international armed conflicts and to prosecute the suspects if appropriate."; Also see Parliamentary Assembly to the Council of Europe Resolution 1840 (2011), para 6, which "considers that terrorism should be dealt with primarily by the criminal justice system, with its inbuilt and well-tested fair trial safeguards to protect the presumption of innocence and the right to liberty of all."

The International Committee of the Red Cross (ICRC) and the UN Office on Drugs and Crime (UNODC) have stated that compliance with IHL should be no obstacle to counter-terrorism activities, and that the application of IHL should not in any way prevent or obstruct a criminal justice response to terrorist acts.<sup>5</sup> However, at the same time, the ICRC has warned of the “potentially adverse effects” that the counterterrorism regime could have on IHL, particularly in regards to the issues relating to non-state armed groups designated as “terrorist”.<sup>6</sup>

### III. Scope of Application of IHL

There are fundamental issues relating to the geographical and temporal scope of hostilities, and the threshold when IHL applies to violence involving acts of terrorism or terrorist groups. The IHL legal framework is both treaty-based and customary, operating alongside international human rights laws which continue to apply during armed conflict.

#### i. Classification of the Conflicts

In general, IHL provides for two similar but distinct sets of rules, covering three potential classifications of a conflict depending on parties to the conflict and territory. An international armed conflict (IAC) applies to all cases of declared war but also to any other armed conflict which may arise between two or more State Parties. Common Article 3 to the Geneva Conventions (CA3) defines internal armed conflicts, known as a non-international conflict (NIAC), between a state and one (or more) non-state groups occurring “on the territory of a State Party”.<sup>7</sup> Additionally, there is a transnational armed conflict between a State and a non-state armed group which takes place on the territory of more than one State, known as an “internationalised” non-international armed conflict. Though many of these rules are relatively straightforward, there are a number of questions and complications that have practical consequences when it comes to terrorism and during non-international armed conflicts.

For non-international armed conflicts, certain criteria must be met to establish that the situation is, in fact, an ‘armed conflict’. These criteria are generally considered to involve situations with a certain intensity of fighting (by reference to means or methods of warfare, for instance, the types of weapons used), the protracted nature of violence (beyond riots or domestic disturbances and giving rise to multiple casualties),<sup>8</sup> and the degree of organisation of the parties to the conflict (by reference to command and communication structures, akin to traditional armed forces).<sup>9</sup>

#### ii. Application of IHL to non-state armed groups and terrorist organisations

The obligation to comply with fundamental rules of humanitarian protection binds all parties to the conflict, including State actors, non-state armed groups and “hybrid” groups (combining characteristics of both non-state armed groups and terrorist organisations) engaging in belligerent activities.<sup>10</sup>

<sup>5</sup> International Committee of the Red Cross (ICRC), *The Applicability of International Humanitarian Law to Terrorism and Counter-Terrorism* (2015), <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>; UN Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism* (2009), p. 27, [https://www.unodc.org/documents/terrorism/Handbook\\_on\\_Criminal\\_Justice\\_Responses\\_to\\_Terrorism\\_en.pdf](https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf).

<sup>6</sup> ICRC, *The Applicability of International Humanitarian Law to Terrorism and Counter-Terrorism* (2015).

<sup>7</sup> Common Article 3 to the Four 1949 Geneva Conventions, also Additional Protocol II, Art 1(1) which is binding insofar as it “develops and supplements Article 3 common to the Geneva Conventions [...] without modifying its existing conditions of application.”

<sup>8</sup> “Protracted” refers to the intensity and duration of violence. See: ICTY, *Prosecutor v Ramush Haradinaj et al.*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para. 49.

<sup>9</sup> See, for instance, Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952), pp. 49-50; ICTY, *Prosecutor v Haradinaj*, Case No. IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, para 60.

<sup>10</sup> Dieter Fleck, *Handbook of International Humanitarian Law* (2<sup>nd</sup> Ed, Oxford University Press 2013), p. 631.

A majority of scholars have argued non-state armed groups, and their members, are bound by the rules of IHL because their “parent” State has, by nationality or territory, legislated obligations derived from international law, regardless of whether the group has consented.<sup>11</sup> Thus, individual members of a non-state armed group, including hybrid groups, may incur individual criminal responsibility for violations of IHL, which may also entail a degree of accountability for the group to which they are a member.<sup>12</sup>

The law of non-international armed conflict contains a number of significant rules that are considerably more limited than the elaborate and expansive rules pertaining to international armed conflicts. Some of these rules also apply by virtue of customary IHL, and thus to non-state armed groups.<sup>13</sup>

Alongside the law provisions, customary international law offers supplemental means of regulation in non-international armed conflicts. Notably, the principle of proportionality applies, such that it would be a violation to carry out an attack where it may be expected to “cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>14</sup> Additional protections include the prohibitions on targeting civilians, attacking civilian objects, and indiscriminate attacks that strike both military objectives and civilians or civilian objects without distinction, and the prohibition on acts designed to cause unnecessary suffering.<sup>15</sup>

Individual criminal responsibility for violations of IHL has been borne out in the case law of certain member States of the Council of Europe. In Sweden, a Syrian male with Swedish residency was prosecuted and sentenced for unlawfully executing a Syrian soldier while a member of a non-state armed group called the “Suleiman Company” (“Firqat Suleiman el-Muqatila”). The court judged that the connection between the unlawful killing and the non-international conflict in Syria qualified the crime as a serious violation of IHL and sentenced the man to life imprisonment.<sup>16</sup>

### iii. IHL and Hybrid Armed Groups

International reporting has documented a wide-range of terrorism offences, war crimes and crimes against humanity committed by entities listed as terrorist groups by the United Nations Security Council. Different organisations and entities have characterised particular acts of violence committed by these groups differently, and often inconsistently, as either acts of terrorism or violations of IHL, or both. For instance, in response to the execution of journalists by Daesh in Syria in 2014, the UN Security Council referenced the protections afforded journalists under IHL while simultaneously stressing the “need to bring perpetrators of these reprehensible acts of terrorism to justice.”<sup>17</sup>

In the context of the Syria conflict, the UN Security General has noted evidence that hybrid groups such as Daesh and the Al Nusra Front are “violating the laws and customs applicable in non-international armed conflicts, such as failing to adhere to the international humanitarian law principles of distinction, proportionality and precautions in attack, the prohibition of indiscriminate attacks, rape, sexual slavery, the recruitment of children and their use in hostilities under 18 years of age and the displacement and deportation of civilians”.<sup>18</sup>

<sup>11</sup> Commonly referred to as the “doctrine of legislative jurisdiction”. See: Jann Kleffner, ‘The applicability of international humanitarian law to organised armed groups’, 93 882 *International Review of the Red Cross* (2011), pp. 445-449; also see: Lindsay Moir, *The Law of International Armed Conflict* (Oxford University Press 2002), pp. 53-54.

<sup>12</sup> Jann Kleffner, ‘The applicability of international humanitarian law to organised armed groups’, 93 882 *International Review of the Red Cross* (2011), p. 450-451.

<sup>13</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law – Volume 1: Rules* (Cambridge University Press 2005), Rules 1, 2, and 5-24.

<sup>14</sup> Michael N Schmitt, Charles HB Garraway & Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary* (International Institute of Humanitarian Law 2006), p. 22, <http://www.ihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf>.

<sup>15</sup> *Ibid.* p. 8, 18.

<sup>16</sup> See press release: <http://www.stockholmstingsratt.se/Om-tingsratten/Nyheter-och-pressmeddelanden/Mass-execution-in-Syria-is-assessed-to-be-a-serious-crime-against-the-law-of-nations-and-results-in-life-imprisonment/>.

<sup>17</sup> See: ‘UN Security Council Press Statement on Murder of James Foley’, *UN Doc SC/11531-IK/689* (22 August 2014); ‘UN Security Council Press Statement on Murder of Stephen Sotloff’, *UN Doc SC/11550-IK/689* (6 September 2014).

<sup>18</sup> Report of the Secretary-General, ‘Situation of human rights in the Syrian Arab Republic’, *UN Doc A/70/919* (9 June 2016), para 8.

Both customary IHL and CA3 entail rules that regulate the conduct of hostilities and requirements for humane treatment of persons not actively participating in the conflict, including armed forces which have surrendered or are *hors de combat*. The Office of the High Commissioner of Human Rights has reported violations of CA3 by hybrid groups, noting that they are both non-state armed groups and terrorist groups designated by the United Nations.<sup>19</sup> The OHCHR uses the framework CA3 to report violations by hybrid groups, including failing to protect persons not actively participating in hostilities and subjecting them to violence to life and person (including murder, mutilation, cruel treatment and torture), committing outrages upon personal dignity including humiliating and degrading treatment, the taking of hostages, and the imposition of sentences or carrying out of executions without appropriate judicial guarantees.

#### IV. Terrorism and the Law of Armed Conflict

Hybrid groups complicate the relationship between terrorism and the law of armed conflict. On the one hand, they are comparable to 'traditional' non-state armed groups while engaging in belligerent conduct against the armed forces of a State and yet, on the other hand, they are also engaged in acts of transnational terrorism against non-combatants, civilians, and a number of foreign nationals.<sup>20</sup> Such hybrid groups blend a number of combined modalities, incorporating both conventional and unconventional battlefield tactics with acts of organised crime and terrorism.<sup>21</sup> As such, the group's membership is composed of traditional soldiers (including former professional soldiers), guerrilla fighters, terrorists, saboteurs and ordinary criminals.<sup>22</sup>

The interaction of IHL and counter-terrorism law is highly contextualised, complex, and varied.<sup>23</sup> International counter-terrorism law emanates from a number of sources at the regional and international level.

At the Council of Europe, the key instruments are the European Convention on the Suppression of Terrorism (1977), the Council of Europe Convention on the Prevention of Terrorism (2005), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism (Warsaw Convention, 2005), and the recently adopted Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga Protocol, 2015).

For European Union Member States, the EU Framework Decision on Combating Terrorism of 2002 defined "terrorist offences" in order to enable mutual recognition of legal decisions and the use of the European Arrest Warrant, and also required approximation of terrorist offences in domestic laws.<sup>24</sup>

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<sup>19</sup> Report of the United Nations High Commissioner for Human Rights, 'Report of human rights in Yemen', *UN Doc A/HRC/33/38* (4 August 2016), para 68.

<sup>20</sup> Special Rapporteur Ben Emmerson, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', *UN Doc A/HRC/29/51* (16 June 2015), paras. 14, 17; Also see: Rolf Mowatt-Larsen, *ISIL as an Insurgency and a Terrorist Threat* (25 September 2014), <http://www.belfercenter.org/publication/isil-insurgency-and-terrorist-threat>; also see: Scott Jasper and Jason Moreland, 'ISIS: an Adaptive Hybrid Threat in Transition', *Small Wars Journal* (October 2016), <http://smallwarsjournal.com/jrn/art/isis-an-adaptive-hybrid-threat-in-transition>.

<sup>21</sup> It is also important to note that the legal status of terrorist organisations is unaffected by the application of IHL. CA3 states that the application of its provisions "shall not affect the legal status of the Parties to the conflict". The application of IHL does not therefore imply any form of recognition that a terrorist organisation has any particular legal status or authority, nor does it confer any "legitimacy" to the group as a party to a conflict. Belligerent status should not affect the capacity of states to prosecute and convict persons suspected of criminal offences. See: Stéphane Ojeda, 'Global counter-terrorism must not overlook the rules of war', *Humanitarian Law & Policy* (December 2016), <http://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>.

<sup>22</sup> Scott Jasper and Jason Moreland, 'ISIS: an Adaptive Hybrid Threat in Transition', *Small Wars Journal* (October 2016).

<sup>23</sup> Ben Saul, 'Terrorism, Counter-Terrorism and International Humanitarian Law', *Sydney Law School Legal Studies Research Paper No.16/37* (2016), p. 13.

<sup>24</sup> 'EU Framework Decision on Combating Terrorism', *2002/475/JHA* (13 June 2002), *OJ L164/3* (22 June 2002); 'EU Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States', *2002/584/JHA* (13 June 2002), *OJ L 190/1* (18 June 2002).

At the global level, the United Nations has facilitated the adoption of 18 counter-terrorism treaties covering specific “thematic” offences of transnational terrorist violence,<sup>25</sup> and the UN Security Council has adopted a number of Resolutions imposing sanctions on specific terrorist actors as well as broad requirements to take national legislative and enforcement measures.<sup>26</sup> Notably, several UN General Assembly and Security Council Resolutions have also emphasised that States must respect their all of their obligations under IHL when taking measures to counter terrorism.<sup>27</sup>

i. Foreign Terrorist Fighters and IHL

Recently, in light of the emergence of hybrid groups in Iraq and Syria, UN Security Council Resolution 2178 compels all UN Member States to prosecute any travel abroad, or intended travel, to join or train with a terrorist organisation. The Resolution called on States to criminalise foreign terrorist fighters, restricted solely to those involved in “terrorist acts”, but does not criminalise all fighters travelling with intent to participate in foreign armed conflicts.<sup>28</sup>

Following Resolution 2178, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism supplemented the Convention with a series of provisions that sought to ensure the criminalisation of a number of mostly preparatory acts relating to primary terrorist offences.

For IHL purposes, the ICRC has noted that the concept of a “foreign fighter” or “foreign terrorist fighter” is not a term of art within IHL. Combatant status, and related privileges and protections including those relating to prisoners of war, does not exist in non-international conflict. As such, the relevant provisions of Common Articles 2 & 3, the IHL will therefore govern the actions insofar as they have a nexus to an ongoing armed conflict and directly participate in hostilities, regardless of nationality.<sup>29</sup>

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<sup>25</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (Tokyo Convention 1963) and Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 4 April 2014, not yet in force) (Montreal Protocol 2014); Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971), 860 UNTS 105 (Hague Convention 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (adopted 23 September 1971, entered into force 26 January 1973), 974 UNTS 178 (Montreal Convention 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977), 1035 UNTS 167 (Protected Persons Convention 1973); International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983), 1316 UNTS 205 (Hostages Convention 1979); Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101 (Vienna Convention 1980); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989), 974 UNTS 177 (Montreal Protocol 1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 221 (Rome Convention 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 304 (Rome Protocol 1988); Protocol 2005 to the Rome Protocol 1988 (adopted 14 October 2005, entered into force 28 July 2010) (Protocol 2005 to the Rome Protocol 1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359 (Plastic Explosives Convention 1991); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001), 2149 UNTS 256 (Terrorist Bombings Convention 1997); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention 1999); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) A/59/766 (Nuclear Terrorism Convention 2005); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005 (adopted 14 October 2005, entered into force 28 July 2010); and the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted 10 September 2010, not yet in force) (Beijing Convention 2010) and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, done at Beijing (adopted 10 September 2010, not yet in force) (Beijing Protocol 2010).

<sup>26</sup> UNSC Resolution 1373 (2002) S/RES/1373; UNSC Resolution 1566 (2004) S/RES/1566; UNSC Resolution 2178 (2014) S/RES/2178.

<sup>27</sup> UNGA Res 60/288 (20 September 2006), A/RES/60/288, para 3; also see UNSC Res 1456 (20 January 2003), S/RES/1456 annex para 6, UNSC Res 1624 (14 September 2005), S/RES/1624, para 4.

<sup>28</sup> United Nations Security Council Resolution 2178 (2014), S/RES/2178.

<sup>29</sup> ICRC, *The Applicability of International Humanitarian Law to Terrorism and Counter-Terrorism* (2015).



As such, IHL does not recognise or confer any specific legal status to persons designated or classified as “terrorist”, “foreign terrorist fighter”, or “foreign fighter”, and persons who are deemed members of, or associated with, hybrid armed groups will only be subject to IHL according to their conduct in the context of an armed conflict. The ICRC states quite unequivocally that:

*“Relevant IHL norms on the conduct of hostilities will govern the behaviour of foreign fighters, regardless of their nationality, in both IAC and NIAC. Foreign fighters are thus subject to the same IHL principles and rules that are binding on any other belligerent.”*

Additionally, “foreign fighters” are not to be understood as “mercenaries” under IHL, though they may fit the definition of a mercenary as contained in national laws.<sup>30</sup> IHL does not expressly recognize the status of *terrorist* as such and there is no special legal status for persons designated ‘terrorists’, nor any lacuna excluding them, in IHL. However, an individual may have a dual legal status, which is not mutually exclusive: one under a source of counterterrorism law and another under IHL. Persons participating in attacks against lawful targets should not be defined as “terrorist” and criminalised under the counterterrorism legal framework.<sup>31</sup>

Furthermore, under IHL, any person directly participating in hostilities loses their protected status and may therefore be legitimate targets of attack by opposing forces.<sup>32</sup> However, outside of this very narrow range of exceptions for direct participation in hostilities, persons who are not ‘regular’ members of a party to a conflict or who do not have a continuous combat role in the armed conflict, i.e. civilians, who are engaging in terrorist actions, within or outside the context of the armed conflict, may not be attacked.<sup>33</sup> However, the generality and ambiguity inherent to IHL notions of ‘direct participation in hostilities’<sup>34</sup> and the blurring of IHL/counter-terrorism regimes may weaken rule of law safeguards and related norms of international human rights law.

## ii. IHL Prohibition of Acts of Terrorism

The crime of terrorism under IHL is a distinct offence that shares many similarities with the peacetime description of terrorism found in the sectoral counter-terrorism instruments. IHL takes a more limited approach in that ‘acts of terrorism’ refers to a war crime of terrorism rather than the independent self-contained category of terrorism crimes found elsewhere in international law. Where sufficiently connected to the armed conflict, criminal acts aimed at terrorising local populations may be prohibited as a war crime under IHL. Depending on the conduct at issue, the jurisprudence of the international criminal tribunals has found that the underlying acts comprising particular instances of terrorism may be constituted of a number of violations of IHL, provided that the requisite intent to spread fear and terror is involved.

<sup>30</sup> Ibid.

<sup>31</sup> *International humanitarian law and the challenges of contemporary armed conflicts*, document prepared by the ICRC for the 32nd International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015), p. 18, <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>.

<sup>32</sup> CA3 to the Geneva Conventions refers to “persons taking no active part in the hostilities”; Article 51(3) of Additional Protocol I, in reference to the principle of distinction between legitimate targets and protected persons, states that it applies “unless and for such time as [civilians] take a direct part in hostilities”; Article 13(3) of Additional Protocol II also limits this in case of non-international armed conflict; Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law – Volume 1: Rules* (Cambridge University Press 2005), Rule 6.

<sup>33</sup> See: ICRC, *Interpretive guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Nils Melzer ed., 2009).

<sup>34</sup> Direct participation in hostilities (DPH) is constructed, not without controversy, as entailing acts that meet certain criteria, namely that the act meets a threshold of harm towards a party to the conflict, that there is a direct causal link between the act and the likely result, and that the act must have a ‘belligerent nexus’ in that it supports one party to the conflict to the detriment of the other. See: ICRC, *Interpretive guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Nils Melzer ed., 2009), pp. 46-64.



Under IHL, terrorism is prohibited in all its aspects and under all circumstances, with a number of provisions explicitly designed to prohibited violence intended to spread terror among the civilian population. Article 51(2) of Additional Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”; Article 4(2)(d) Additional Protocol II prohibits “acts of terrorism” against all persons who do not take a direct part or who have ceased to take part in hostilities; additionally, Article 13(2) APII prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.<sup>35</sup>

According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the acts of violence at issue do not include legitimate attacks against enemy combatants, but are rather only in reference to unlawful attacks (and threats) against civilians,<sup>36</sup> including indiscriminate or disproportionate attacks where ‘extensive trauma and psychological damage form part of the acts or threats of violence.’<sup>37</sup> The subjective element of the crime is two-fold, in that there must be a general intent to wilfully target civilians, and a ‘specific intent’ to spread terror amongst civilians.<sup>38</sup> An act where the perpetrators specifically intent to spread fear and terror as one of the principal aims can thus be distinguished from the incidental or indirect fear that civilians may experience as a result of legitimate military acts.

The war crime of terrorism was recognised by the ICTY as a specific prohibition in line with the general prohibition on attacks against civilians in IHL.<sup>39</sup> As such, the Court held that it is possible to establish individual criminal responsibility for such acts of terrorism under customary IHL in both international and non-international armed conflicts.<sup>40</sup>

### iii. Conflict-related Acts of Terrorism

For acts taking place in the context of a non-international armed conflict, key questions emerge about potential points of interaction or clash between the legal regimes and the precise contours of the legal frameworks in light of exclusion clauses present in many counter-terrorism instruments. The global counter-terrorism legal framework is, generally, limited to offences that have transnational elements. Essentially, they do not apply where an offence is committed on the territory of one State where the offender and victims are also nationals of that State, and the suspected offender is still present in the State where the crime took place.<sup>41</sup>

In the past 15 years, there has been an increasingly broad consensus that terrorism, as a legal concept, entails a heightened form of criminal violence intended to intimidate or spread fear in a population or coerce a government/international organisation.<sup>42</sup> Many States add ulterior intentions to the crime of terrorism, often in pursuance of a political, religious or ideological cause, and to ensure that State activities do not fall under the same category of illegitimate political violence. However, there remain several different approaches among member States towards the precise definition and typology of the crime of terrorism, which and to what extent particular elements of the crime distinguish terrorist violence from other acts (such as hate crimes and other forms of violent extremism), and which groups can be designated ‘terrorist’ and under which criteria.

<sup>35</sup> Dieter Fleck, *Handbook of International Humanitarian Law* (2<sup>nd</sup> Ed, Oxford University Press 2008), p. 242.

<sup>36</sup> *Prosecutor v Galić* (Trial Chamber Judgment and Opinion) ICTY-98-29-T (5 December 2003), para. 135.

<sup>37</sup> *Prosecutor v Galić* (Appeal Chamber Judgment) IT-98-29-A, (30 November 2006), para. 102.

<sup>38</sup> *Prosecutor v Galić* (Trial Chamber Judgment and Opinion) ICTY-98-29-T (5 December 2003), para. 136.

<sup>39</sup> *Prosecutor v Galić* (Appeal Chamber Judgment) IT-98-29-A, (30 November 2006), paras. 87-90.

<sup>40</sup> *Ibid.* paras. 91-98.

<sup>41</sup> See: Tokyo Convention 1963, Article 5(1); Hague Convention 1970, Article 3(5) as amended by Beijing Protocol 2010; Montreal Convention 1971, Articles 4(2)-(5); Rome Convention 1988, Article 4(1)-(2); Rome Protocol 1988, Article 1(2); Hostages Convention 1979 Article 13; Vienna Convention 1980, Article 14; Nuclear Terrorism Convention 2005, Article 3; Terrorist Bombings Convention 1997, Article 3; Terrorist Financing Convention 1999, Article 3.

<sup>42</sup> Note UNSC Resolution 1566 (8 October 2004), para 3: “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism...”.

Assessing which conduct is within the bounds of the law of armed conflict and which is more likely qualified as terrorist can be further contextualised as operations that do not have an immediate military objective, but rather are acts intended to terrorise opposition within the framework of “strategic communications” or “psychological operations”. The aim of these actions is to spread “fear, dread, panic or mere anxiety [...] among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act - its shocking brutality, lack of discrimination, dramatic or symbolic quality and disregard of the rules of warfare and the rules of punishment.”<sup>43</sup> These propaganda techniques and strategic communications are critical to the success of such hybrid threat groups, as they seek to “systematically spread [propaganda and] disinformation, including through targeted social media campaigns, thereby seeking to radicalise individuals, destabilise society and control the political narrative.”<sup>44</sup>

To qualify as a war crime, the crimes in question must take place where the laws of armed conflict are in effect, and the offence must be committed in pursuance of the perpetrator’s goals in the conflict.<sup>45</sup> As such, there should be a nexus between the offence and the armed conflict which ‘created the situation and provided an opportunity for the criminal offence’, and secondly, particularly the conduct needs to be directed against persons not taking part in hostilities.<sup>46</sup>

To determine which acts by non-state armed groups and/or designated terrorist groups in the context of an NIAC falls under which regime, it may be necessary to distinguish between the following basic notions: 1) violence committed by parties to the conflict (and persons directly participating in hostilities) in furtherance of military objectives, including war crimes and other attacks on protected persons and objects, 2) criminal acts of terrorism, as defined by the global counter-terrorism instruments, which do not further military objectives of one party to the conflict, and 3) violence which has a ‘nexus’ to the conflict but is intended to threaten, coerce or intimidate a foreign power or international organisation, or spread fear or terror in the civilian population.

The first category is governed exclusively by IHL and international criminal law applicable to war crimes. Thus, IHL does not govern the second category of “ordinary” criminal acts of terrorism without a nexus to the armed conflict; rather, where such act were not committed for military purposes, they are likely subject to the application of domestic law-enforcement measures compatible with other relevant fields of international law, including international human rights law.

The third category of conflict-related acts of terrorism has much in common with the war crime of terrorism, but could also be supplemented by CTL instruments as appropriate. However, though the acts may be committed for military objectives, and the underlying conduct qualified as violations of IHL, where there is an additional transnational element, either in relation to the nationality of the perpetrator, victim or ultimate target of the attack, such acts may also be qualified as acts of terrorism provided the requisite intent is present.

In practice, it is no simple task to clearly distinguish between legitimate acts during armed conflict and criminal conduct against protected persons and persons not participating in hostilities in the context of an armed conflict. The core difference between IHL and counter-terrorism law in armed conflict situations, is that, in legal terms, IHL condones certain acts of violence as lawful or unlawful, whereas any act of violence designated as “terrorist” is always unlawful. Though they may share certain similarities, they remain fundamentally different with distinctive objectives, purposes, and operational structures. Under

<sup>43</sup> Alex Schmid (Ed.), *Routledge Handbook of Terrorism Research* (Routledge 2011), p. 86.

<sup>44</sup> European Commission and High Representative for Foreign Affairs and Security Policy, ‘Joint Framework on Countering Hybrid Threats: A European Union Response’ (2016) *JOIN(2016) 18 final*, <http://data.consilium.europa.eu/doc/document/ST-7688-2016-INIT/en/pdf>.

<sup>45</sup> Antonio Cassese, ‘The Nexus Requirement for War Crimes’ *Journal of International Criminal Justice*, vol. 10 (2012), p. 1397; Also see: *Prosecutor v Kunarac*, Judgment (Appeals Chamber) ICTY Case No. IT-96-23 & IT-96-23/1-A, para. 58: “the armed conflict may not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed [...] if [...] it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.”

<sup>46</sup> Antonio Cassese, ‘The Nexus Requirement for War Crimes’ *Journal of International Criminal Justice*, vol. 10 (2012), p. 1397.

IHL, lawful acts of war may include extreme violence if the target of attack is justified by military necessity, and any incidental loss of civilian life is not excessive or disproportionate in relation to the concrete and direct military advantage anticipated from the act itself.<sup>47</sup>

As the ICRC elaborates:

*"[A]cts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled "terrorist" at the international or domestic levels (although they remain subject to ordinary domestic criminalization where a NIAC is involved). Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as "terrorist" under another regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets."<sup>48</sup>*

A case-by-case assessment of the facts in light of the legal criteria is often required to discern whether terrorist acts form part of an armed conflict under the rules of IHL or are acts of unlawful terrorist violence as defined by the universal legal instruments.

## V. Interaction between IHL and Counter-Terrorism Law

It is widely accepted that there is no formal hierarchy between the sources of international law, but rather that an informal hierarchy may be determined through legal reasoning in accordance with the domestic legal system. The different national approaches to these issues may continue the fragmentation of legal regimes between States in light of the operation of the principle of *lex specialis* in regards to conflict-related acts of terrorism. The principle of *lex specialis* is broadly accepted as both a means of legal interpretation, where specific rules are understood against the background of a general standard, and, where two norms are valid or applicable, as a conflict-resolution technique whereby the more narrowly-defined specific rule prevails over the general rule.<sup>49</sup>

As there is no general, context-independent formula to resolve some of the normative issues at hand, the ramifications of the principle of *lex specialis* on the interaction of national laws, IHL and international counter-terrorism law remain somewhat unclear.<sup>50</sup> In essence, there remain relatively open questions, depending on the situation and conduct under examination, as to whether this entails that the more specific *rule* prevails over a more general rule, or whether this relates to the applicability of a specific *regime* (IHL over counter-terrorism law). In other words, the *lex specialis* principle may not apply to the general relationship between branches of law, but rather to the specific rules in specific circumstances.<sup>51</sup>

Depending on the facts of the case and applicable law, *lex specialis* may result in an elaboration and supplementation of specific norms over general regimes, or specific rules may create exceptions to general norms,<sup>52</sup> or, in limited circumstances, *lex specialis* may prohibit certain conduct which would otherwise be lawful under the general regime. An additional difficulty in the *lex specialis* rule emerges

<sup>47</sup> See, for instance, Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), para. 1389.

<sup>48</sup> ICRC, *The Applicability of International Humanitarian Law to Terrorism and Counter-Terrorism* (2015).

<sup>49</sup> Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law [Koskenniemi Report]* pp. 34-35, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

<sup>50</sup> *Koskenniemi Report*, pp. 64, stating "The role of *lex specialis* cannot be dissociated from assessments about the nature and purposes of the general law that it proposes to modify, replace, update or deviate from. This highlights the systemic nature of the reasoning of which arguments from "special law" are an inextricable part. No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes [...] not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished."

<sup>51</sup> Dieter Fleck, *Handbook of International Humanitarian Law* (2<sup>nd</sup> Ed, Oxford University Press 2013), p. 75.

<sup>52</sup> *Koskenniemi Report*, pp. 56-57.

from the relatively unclear distinctions between "general" and "special", in that no rule is general or specific in the abstract but only in relation to other rules which apply to the same situation.<sup>53</sup> Consequently, the principle of *lex specialis* does not necessarily supply a definitive answer to the potential conflicting norms between the counter-terrorism and IHL regimes, particularly where the IHL applicable to a NIAC is short on treaty norms and reliant largely on less-precise customary IHL rules.<sup>54</sup>

The global counter-terrorism conventions address certain violent conduct described as terrorism, potentially also within the context of an armed conflict; IHL addresses acts of violence within an armed conflict, which may also qualify as terrorism or not.<sup>55</sup> Furthermore, according to some perspectives, if the conduct took place primarily in the context of a NIAC, then the scope of application of many international counter-terrorism instruments is significantly limited and the norms of IHL should prevail as *lex specialis*.<sup>56</sup>

The main effect of these exclusion clauses is that military operations by State armed forces are excluded in almost all circumstances from the universal counter-terrorism regime, even where State forces take repressive measures intended to intimidate or spread fear in a civilian population. However, acts of violence by disorganised armed groups or civilians taking direct part in hostilities may still be covered by these treaties' provisions even if their conduct is also regulated by IHL.

However, it may also be the case that these regimes interact without displacing or limiting the other even though certain counter-terrorism treaties are intended to be entirely inapplicable in armed conflict. For instance, hostage taking in non-international armed conflict is prohibited under CA3 and customary IHL, but the Hostages Convention, though it contains an armed conflict exclusion clause, may also apply in non-international armed conflict and effectively supplement and criminalise the IHL prohibition applicable in that scenario.<sup>57</sup>

Other counter-terrorism conventions are less clear, providing exclusion clauses for 'activities of armed forces during armed conflict, as those terms are understood under IHL, which are governed by that law'.<sup>58</sup> Armed forces can be understood in IHL as referring to both State militaries, but also organised armed groups and hybrid groups provided that certain criteria are met.

The approach of national legal systems to these exceptions varies. Certain States, such as the United Kingdom, do not criminalise acts of violence in non-international armed conflicts as terrorist violence. In *R v Gul* [2013], the UK Supreme Court found that the international counter-terrorism instruments, and a number of national laws, were themselves inconsistent in regard to the existence and scope of exclusionary provisions, and did not establish a general exclusionary rule applicable to national terrorism offences.<sup>59</sup>

In the European Union, national courts have also referred to the Court of Justice of the EU (CJEU) to clarify some of these matters. In one case, the CJEU was categorical: "the applicability of international humanitarian law to a situation of armed conflict and to acts committed in that context does not imply that legislation on terrorism does not apply to those acts".<sup>60</sup>

In the Netherlands, a returned foreign terrorist fighter from Syria was trialled on suspicion of waging jihad while in the Netherlands, joining a jihadist group in Syria, and spreading material that incited the commission of terrorist offences. Though the defence argued that his actions were lawful under IHL, the

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<sup>53</sup> *Koskenniemi Report*, pp. 35-36

<sup>54</sup> Ben Saul, *Terrorism, Counter-Terrorism and International Humanitarian Law* (2016), pp. 9 -10.

<sup>55</sup> *Ibid.*, p. 9.

<sup>56</sup> UNODC, 'Universal Legal Framework Against Terrorism', *UNODC Counter-Terrorism Legal Training Curriculum* (2010), p. 38.

<sup>57</sup> *Ibid.*, p. 10; Ben Saul, *Terrorism, Counter-Terrorism and International Humanitarian Law* (2016), p. 9, quoting Hostages Convention Article 12, Geneva Convention Common Article 3(1)(b) and Customary IHL Rule 96.

<sup>58</sup> Nuclear Terrorism Convention 2005, Article 4(2); Terrorist Bombings Convention 1997, Article 19(2); Terrorist Financing Convention 1999, Article 2(1)(b); Vienna Convention 1980 (amended 2005), Article 2(4)(b); Hague Convention 1970 (amended Beijing Protocol 2010), Article 3 *bis*.

<sup>59</sup> *R v Gul (Appellant)* [2013] UKSC 64, paras. 48-51.

<sup>60</sup> Judgment of the General Court (Sixth Chamber, extended composition) of 16 October 2014, *Liberation Tigers of Tamil Elam (LTTE) v Council of the European Union*. Joined cases T-208/11 and T-508/11.

court held that IHL was not exclusively applicable in a NIAC and that participation in the armed conflict in Syria (and/or Iraq) was punishable under Dutch law.<sup>61</sup>

The relevant Council of Europe Conventions, and most of the global counter-terrorism instruments, contain obligations to apprehend, investigate, and prosecute or extradite alleged offenders in accordance with domestic law.<sup>62</sup> Additionally, most of these instruments require States Parties to provide “the greatest measure of assistance” in connection with criminal proceedings brought in line with the offences contained in the treaties.<sup>63</sup>

The lack of clear thresholds of application in relation to the two legal frameworks at issue presents additional problems for mutual legal assistance, particular in regards to the sharing of information, evidence and in extradition scenarios where multiple States have jurisdictional claims. For instance, as the extradition articles of the Geneva Conventions and AP I (Art 88 AP I) do not apply to NIACs and certain hostile acts in a NIAC which are neither war crimes nor terrorism and thus may be treated as non-extraditable ‘political offences’ (regardless of legality under domestic law). It could, however, be argued that in the absence of a more specific extradition regime, this means that any pre-existing transnational criminal law provisions regarding terrorism will not be displaced by, or clash with, IHL.<sup>64</sup>

## VI. Jurisdiction

Common law and civil law States each have different perspectives on the validity, legality and perceived wisdom of each of the jurisdictional principles in relation to the nature of the crimes in question. National cases will likely hinge on discretionary prosecutorial decisions about which approach is most likely to result in a conviction of a suspect given the opportunities and limitations present in their respective systems. The global counter-terrorism treaties require States to establish prescriptive criminal jurisdiction over the respective offences, on both mandatory and optional jurisdictional bases.<sup>65</sup>

One consideration to emerge from this study is whether prosecutorial policy is sufficiently robust to ensure that there are no safe havens for conflict-related terrorism and that positive jurisdictional conflicts can be resolved without risking a *ne bis in idem* situation where improperly applied penal law provides a means for perpetrators to escape justice in another State. As such, jurisdictional principles as it relates to terrorism cases may need to be reviewed in so far as they concern international crimes, war crimes and the application of the ‘political offence’ exclusion for certain acts of violence.

The territorial principle presents difficulties when States in which the armed conflict is occurring lack the ability or willingness to prosecute suspected perpetrators. As this may prove insufficient, where a State wishes to project its prescriptive jurisdiction extra-territorially, it must find a recognised basis in international law.<sup>66</sup> As has been called for in several international instruments, other States, in the spirit of cooperation, may make claims on the following bases:

1. *Subjective territorial jurisdiction* can be activated for crimes commenced within the State, but completed or consummated abroad. Correspondingly, *objective territorial jurisdiction* may be applicable for conduct in which any essential constituent element of the crime is consummated on State territory.

<sup>61</sup> See: Eurojust, *Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response – Third Eurojust Report* (November 2015), p.29.

<sup>62</sup> See: Council of Europe Convention on the Prevention of Terrorism (Warsaw Convention), CETS No. 196 (16 May 2005), Articles 11, 15, 18; Hague Convention 1970, Articles 7 & 8; Montreal Convention 1971, Articles 6 & 7; Protected Persons Convention 1973, Articles 6 & 7; Rome Convention 1988, Articles 7 & 10; Vienna Convention 1980, Articles 9 & 10; Terrorist Bombings Convention 1997, Articles 7 & 8; Terrorist Financing Convention 1999, Articles 9 & 10; Nuclear Terrorism Convention 2005, Articles 8 & 10.

<sup>63</sup> Council of Europe Convention on the Prevention of Terrorism (Warsaw Convention), CETS No. 196 (16 May 2005), Article 17.

<sup>64</sup> See for instance, Dan E Stigall and Christopher Blakesley, ‘Non-State Armed Groups and the Role of Transnational Criminal During Armed Conflicts’ *The George Washington International Law Review* 48 (2015), pp. 38-39.

<sup>65</sup> Warsaw Convention, Article 14; also see: Article 6 Terrorist Bombings Convention 1999; Articles 4-5 Hague Convention 1970; Article 5 Hostages Convention 1979; and Article 9 Nuclear Terrorism Convention 2005.

<sup>66</sup> Ian Brownlie, *Principles of Public International Law* (8<sup>th</sup> Ed., OUP 2012), p. 458.

2. The *active nationality principle* entails jurisdiction on basis of a connection between the perpetrator and forum State, either by nationality (citizenship), or (permanent) residence. Similarly, the *passive nationality principle* provides jurisdiction for criminal acts committed by foreign nationals in foreign territories which are harmful to nationals of the forum State.
3. The *universality principle* is limited to certain States with long-arm statutes for jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crimes as a matter of international public policy. Certain crimes such as piracy, hijacking of aircraft and certain narcotics trafficking offences may be subject to universal jurisdiction. For violations of IHL, the Commentary to Additional Protocol I notes: “the principle of *mutual legal assistance* is certainly implied in the common article of the Conventions which makes grave breaches subject to *universal jurisdiction*, even though the conditions and modalities of such mutual assistance are determined by the law of the Contracting Party to whom the request is made”.<sup>67</sup> Though occasionally politically controversial in practice, universal jurisdiction, certain instruments such as the International Convention for the Suppression of Terrorist Bombing, create a regime of universal jurisdiction.

Aside from the widely-recognised means of establishing jurisdiction,<sup>68</sup> a regional treaty-based jurisdiction may also be valid.

For instance, the Council of Europe Convention on the Prevention of Terrorism (2005) Article 14 recognises jurisdiction on the basis of territory, flag, and nationality: “when the offence was directed towards or resulted in the carrying out of an offence referred to in Article 1 of this Convention, in the territory of or against a national of that Party”; “[...] against a State or government facility of that Party abroad, including diplomatic or consular premises of that Party;” “[...] committed in an attempt to compel that Party to do or abstain from doing any act;” and “[...] when the offence is committed by a stateless person who has his or her habitual residence in the territory of that Party;”. This is followed by the requirement that “each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party”.

## VII. Integrity of IHL: Ensuring Respect and Accountability

As mentioned previously, a crucial difference between IHL and the legal regime governing terrorism is that IHL is based on the premise that certain acts of violence in war – against military objectives and personnel – are not prohibited. Acts of terrorism, on the other hand, are prohibited and criminalised in all circumstances. Though some counter-terrorism instruments and norms have reinforced or complemented IHL protections for civilians, others are more problematic in that they prohibit or criminalise conduct that would not be unlawful under IHL.<sup>69</sup> As such, legitimate actions that do not violate IHL prohibitions may not be subject to criminal liability.

At the domestic level, lawful attacks under IHL may be exempt from prosecution in the absence of relevant domestic prohibitions to the contrary. Generally speaking, many serious violations of IHL are covered by national penal laws, particularly those which include offences against life, body and health, personal liberty, personal property, and/or offences constituting a public danger.<sup>70</sup> As such, certain acts resulting in death or injury to civilians, or the destruction of property during armed conflicts may breach national penal laws but be justified within the framework of an armed conflict.<sup>71</sup> Terrorism may overlap

<sup>67</sup> Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), para. 1028.

<sup>68</sup> Additionally, the *protective/security principle* provides jurisdiction over aliens for acts committed abroad which affect the security of the state, including political acts. Its applicability relating to terrorism or terrorist propaganda directed towards the forum state is controversial. Historically, this form of jurisdiction has been used for crimes relating to currency, immigration and economic offences.

<sup>69</sup> Ben Saul, *Terrorism, Counter-Terrorism and International Humanitarian Law*, (2016) p.18.

<sup>70</sup> Dieter Fleck, *Handbook of International Humanitarian Law* (2<sup>nd</sup> Ed, Oxford University Press 2013), p. 704.

<sup>71</sup> ‘International humanitarian law and the challenges of contemporary armed conflicts’, document prepared by the ICRC for the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015), p. 17.

with IHL-specific norms relating to offences against protected persons, such as the wounded, sick, inhabitants of occupied territory, civilians, such as wilful killing, mutilation, torture or inhumane treatment constitute grave breaches that must be punishable within domestic codes.<sup>72</sup>

This is particularly important in situations of non-international armed conflict, where a “terrorist” designation may act as an additional disincentive for organized armed groups to respect IHL as they are already subject to prosecution under domestic criminal law, or by foreign States with long-arm statutes enabling jurisdiction. There is no combatant immunity applicable in non-international armed conflicts, though IHL generally encourages States to grant the ‘widest possible amnesty’ at the end of the conflict for permissible hostile acts. There is the risk that if all acts of armed resistance to State forces become ‘terrorism’, regardless of how groups fight or whether they respect IHL,<sup>73</sup> then the prospects for amnesty are significantly diminished where even lawful acts of war have been qualified as acts of terrorism. If all fighting by non-state armed groups is criminalised as ‘terrorism’, the incentive to comply with IHL is undermined as there is no longer a real difference in legal consequences for proportionally attacking military objectives, indiscriminately targeting civilians, or engaging in acts of brutal violence in order to intimidate or coerce foreign governments and populations.<sup>74</sup>

Equally, however, the failure to adequately ensure accountability for grave breaches of IHL may also undermine the incentive, already limited, for organised armed groups to regulate their conduct in observance of the principle of humanity and perpetuate the notion that excessive violence and terrorism-like conduct is normal, acceptable or an otherwise legitimate strategy of warfare.<sup>75</sup>

However, aside from more notorious incidents involving more overt attempts to spread fear and terror, States have generally avoided criminalising the conduct of organised armed groups operating in non-international armed conflicts as terrorism. This approach has been taken in order to preserve the integrity of IHL so as to avoid criminalising permissible conduct under IHL as terrorism, but also to avoid conflict with other international legal obligations, such as respecting combatant immunity or respecting an amnesty agreement.<sup>76</sup>

## VIII. Conclusion

In light of the continued presence of hybrid groups combining the worst features of non-state armed groups and terrorist organisations, a practical and effective approach may need to be taken to ensure that all persons engaging in conduct prohibited under IHL and counter-terrorism law may be brought to justice. As the criminal law enforcement regime may have gaps in which suspected perpetrators may fall through, there may be a motivation for States to review the application of legal regimes pertaining to terrorism and armed conflict in order to ensure accountability and justice in all relevant circumstances.

The interaction of these regimes is complex and all feasible options should be kept open. As appropriate, acts or conduct committed in the context of an armed conflict, by individuals with a nexus to said armed conflict, should generally be reviewed in accordance with the relevant rules of IHL. However, not all acts of extreme violence conducted in a territory in which there is an armed conflict will comprise part of that

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<sup>72</sup> Article 3 Common to the Geneva Conventions of 1949: “the following acts are and shall remain prohibited at any time and in any place [..]:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” Article 4(a) of Additional Protocol II; Rule 89: violence to life – murder is prohibited; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005); also see: Dieter Fleck, *Handbook of International Humanitarian Law* (2<sup>nd</sup> Ed, Oxford University Press 2013), pp. 693-695.

<sup>73</sup> Ben Saul, *Terrorism, Counter-Terrorism and International Humanitarian Law* (2016), p.13.

<sup>74</sup> ‘International humanitarian law and the challenges of contemporary armed conflicts’, document prepared by the ICRC for the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015), p. 18.

<sup>75</sup> Ben Saul, *Terrorism, Counter-Terrorism and International Humanitarian Law* (2016), p.13.

<sup>76</sup> Kimberley Trapp, *The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions: The UK Experience* (2013), p. 12; also see: ‘International humanitarian law and the challenges of contemporary armed conflicts’, document prepared by the ICRC for the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015), p. 18.



conflict, and should therefore be prosecuted as acts of terrorism in accordance with domestic or transnational criminal law.

It is incumbent upon States to assess whether the substantive and procedural dimensions of their criminal justice system respects and maintains the integrity of each legal regime. States should therefore consider suitable means of ensuring that no enforcement gap exists and that it is possible to investigate, prosecute or extradite suspected offenders, especially returned foreign terrorist fighters, in accordance with their international obligations under both legal regimes. In this regard, IHL and counter-terrorism law can be seen to practically co-exist and neither should displace or otherwise interfere with the appropriate application of the other under the right circumstances.

In conclusion, member States may wish to further explore how to approach these complex legal issues in a holistic manner, taking into account the need to ensure that both legal regimes can be efficiently applied and persons who have committed offences under one or both of them brought to justice.